

Jur. rel.
1736

Decisions

FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

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also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
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local works on Pleading and Practice.*

VOL. XVII.

ESTOPPEL — EXTRADITION.

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EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, DOE v. ROE.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

NOTE.

MR. CROSWELL was selected to edit the subject of EVIDENCE contained in this volume on account of his having edited an edition of Greenleaf on Evidence. His reputation is regarded as a sufficient guaranty of good work, and the usual certificate of approval is omitted.

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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister	McAl.
Albany Law Journal	Alb. L. J.	McCahon	McCahon.
American Law Register ...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee	Bee.	MacArthur	MacArth.
Benedict	Ben.	Marshall	Marsh.
Bissell	Biss.	Martin	Martin (N. C.).
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Central Law Journal	Cent. L. J.	Otto	Otto.
Chase's Decisions	Chase's Dec.	Overton	Overton (Tenn.).
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Clifford	Cliff.	Peters	Pet.
Colorado Territory	Colo. T'y.	Peters' Admiralty	Pet. Adm.
Connecticut Reports	Conn.	Peters' Circuit Court	Pet. C. C.
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Crabbe	Crabbe.	Sawyer	Saw.
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Curtis	Curt.	Story	Story.
Dakota Territory	Dak. T'y.	Sumner	Sumn.
Dallas	Dal.	Taney	Taney.
Daveis	Dav.	Utah Territory	Utah T'y.
Day	Day (Conn.).	Vermont Reports	Vt.
Deady	Deady.	Wallace	Wall.
Dillon	Dill.	Wallace's Circuit Court ...	Wall. C. C.
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Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. T'y.
Law and Equity Reporter ..	Law & Eq. Rep.	Van Ness	Var Ness.
Legal Gazette Reports	Leg. Gaz. R.		

FEDERAL DECISIONS.

ESTOPPEL.*

[See PATENTS, p. 244. As to the doctrine of *Res Adjudicata*, see JUDGMENTS.]

SUMMARY—*Equitable estoppel a defense in ejectment; acquiescence in sale and improvement of land, § 1.—Silence of one entitled to subrogation, § 2.—Acts and admissions, § 3.—Bond given under an unconstitutional law, § 4.—As to boundaries, § 5.—Silence while a boundary wall is being erected, § 6.—Sworn statement in a petition for divorce, § 7.*

§ 1. Equitable estoppel may be a defense in ejectment, and one whose land is sold in pursuance of a suit in equity to subject such land to the payment of his debts, on the ground that he had conveyed it in fraud of creditors, shall not recover in ejectment against the purchaser at such sale, where he stood by and without objection permitted the purchaser to accept a deed, and make valuable improvements on the land during several years. *Kirk v. Hamilton*, §§ 8, 9.

§ 2. The purchaser of land subject to a mortgage to which he is in part entitled to subrogation, and which is on record, does not estop himself from claiming such subrogation and foreclosing the mortgage by knowingly neglecting to give notice of his rights to purchasers of the land at a sale in pursuance of a judgment against his vendor rendered subsequent to the mortgage. *Hurt v. Riffle*, § 10.

§ 3. A., an engineer, employed in the construction of a railroad, was permitted to locate stations. He bought land at a point where he proposed to locate a station, and conveyed a strip fifty feet wide on each side of the proposed railroad track to the railroad company. He laid out a plat of the town in which he marked this strip two hundred feet wide, and sold lots according to this plat. He furnished materials for the railroad company for a plat of their lands, this plat locating the track in the center of the two hundred feet strip. He admitted orally that he had given the extra one hundred feet to the railroad company. The railroad company used the extra land for buildings, etc., for many years. *Held*, that by these acts he is estopped to claim the extra one hundred feet. In such a case the statute of limitations will perfect the title of the railroad company. *Morgan v. Railroad Co.*, §§ 11-13.

§ 4. One who has given his bond under authority of an unconstitutional law is thereby estopped from questioning the validity of the law for the purpose of defeating his bond. *Daniels v. Tearney*, §§ 14-17.

§ 5. A party to a partition suit is not on that account estopped to dispute the boundary between a tract included in the suit, but in which he was not interested, and an adjoining tract which he subsequently acquires. *Walker v. Flint*, §§ 18, 19.

§ 6. One who sees the wall of a large building erected on his land without asserting his title is estopped from so doing after ten years, in Missouri. *Ibid.*

§ 7. A sworn statement or admission is not an estoppel when it has not been acted on by others, although it was necessary for the jury to find that the sworn statement was made inadvertently or by mistake before they could consider the proof at large in the cause. *Behr v. Conn. Mut. Life Ins. Co.*, §§ 20-22.

[NOTES.—See §§ 23-208.]

KIRK v. HAMILTON.

(12 Otto, 68-79. 1880.)

ERROR to the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Kirk sued Hamilton in ejectment for certain lots in Washington city. Judgment was rendered in favor of defendant, and Kirk

*Edited by THEODRIC B. WALLACE and CHARLES N. BROWN, Esqs., under the supervision of the general editor.

sued out this writ. It appears that in 1859 Moore & Co. filed a bill against Kirk and others to subject certain property to the payment of their debts, which it was alleged Kirk had fraudulently conveyed to other persons, his co-defendants in this case. The bill was taken for confessed against Kirk, and under it a sale of lot 78 was made by a trustee for \$1,480, and the report of the sale was confirmed, there being in the hands of the trustee a balance, after satisfying complainant, of \$1,008.52. A number of other creditors of Kirk filed petitions seeking the payment of their debts. As he was then a non-resident, being in the south, publication was made and the petitions taken for confessed. This was done in 1863, and on the 12th February, 1864, there was a reference to an auditor to state the trustee's accounts and distribute the funds in his hands, which was done accordingly. Without further order of court the trustee, Carrington, proceeded to sell the property in dispute, which was bought by Hamilton for \$950. The sale was confirmed and an order of reference made to the auditor to state the trustee's account, and it then appeared in his report that Kirk had returned from the south, appeared before the auditor by his counsel, and disputed some of the simple contract debts. The auditor's report was confirmed. Hamilton paid his money and received a deed from Carrington. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE HARLAN.

It appears from the first bill of exceptions that, upon the trial of the cause, the plaintiff, to maintain the issue joined, gave evidence to the jury tending to prove title in himself to the land in dispute, as well as his actual possession of the premises under that title; that he had fully discharged the indebtedness secured by the two deeds of trust executed, one to Lenox and Naylor, and the other to Clarke and Smith; that Charles Stott, on the 14th of May, 1872, reconveyed to him all that portion of the premises which, on the 22d of March, 1856, he had conveyed to Stott; that he had never made nor authorized any other conveyances than those just named. He also introduced a deed from Carrington, as the supposed trustee in the case of *Moore & Co. v. Kirk*, etc., at the same time, however, denying its validity, and avowing that it was introduced subject to his exceptions reserved, and to be thereafter presented, as to its sufficiency in law to prove title in the defendants or either of them. It was admitted by the court subject to those exceptions. The plaintiff further gave evidence to prove that defendants were in possession of the premises at the commencement of the action, and then rested.

The bill of exceptions then shows that defendants, to sustain their defense, and to prove title out of the plaintiff, offered to read in evidence the record of the equity suit of *Moore & Co. v. Kirk*, etc. Plaintiff insisted that the record of that suit was insufficient in law to maintain the issue on defendants' behalf, or to show title in them, and asked the court to inform the jury that it should not then be admitted in evidence, except subject to his exceptions as to its sufficiency in law, to be thereafter presented to the court pending the further trial of the cause. The record was so admitted. The defendants, further to maintain their defense, and to prove title in themselves, offered to introduce testimony tending to prove that, at the time of the purchase of the premises at the sale made by Carrington, trustee, in the suit of *Moore & Co. v. Kirk*, etc., the only improvement thereon was a two-story four-room brick house, and that, about the year 1868, the defendants erected an extensive building on the property, at a cost of some \$4,000; that when they began such building, and

for some time thereafter, the plaintiff Kirk resided on the adjoining premises; that during all that time he well knew of said improvements, made no objection thereto, and asserted no claim to the property, except the west three feet thereof, adjoining his ground, and which he claimed as an alley, and, even as to such portion, he subsequently informed the witness he was mistaken; and, lastly, that the plaintiff, though residing in the city of Washington ever since about the year 1865, never, to defendants' knowledge, until the commencement of this action, asserted any claim to the premises in dispute.

At that stage of the trial the plaintiff interposed and asked the court to inform the jury that the testimony thus offered, in reference to defendants' putting improvements on the premises, was inadmissible in law, and that such issue ought to be found for the plaintiff. The court ruled that the testimony was admissible, to which plaintiff excepted. The defendants then gave the said testimony in evidence to the jury, who rendered a verdict against the plaintiff upon the issue set forth by the first bill of exceptions.

The remaining bills of exceptions present, in different forms, the general question whether the sale by Carrington, as trustee, on the 19th of April, 1864, was or was not, upon the face of the record of *Moore & Co. v. Kirk, etc.*, a mere nullity. Its validity is assailed by the plaintiff on various grounds, the most important of which seem to be: 1. That as *Moore & Co.* sued in their own behalf only, and not for the benefit of themselves and other creditors, the jurisdiction and power of the court was exhausted by the first sale (of lot No. 78), which raised an amount largely in excess of the claims for which *Moore & Co.* sued. 2. That the utmost which the court, upon the pleadings, could do, was to distribute such excess among the other creditors of Kirk who should appear, in proper form, and establish their claims. 3. That the court was entirely without jurisdiction to make a second order of sale, and did not assume to exercise any such power. 4. That the second sale by Carrington, having been made without any previous order or direction of the court, its confirmation, and the deed subsequently made to Hamilton, were absolutely null and void.

In the view we take of the case it is unnecessary to pass upon these several objections. If it be assumed that the record of the suit of *Moore & Co. v. Kirk, etc.*, was, of itself, insufficient in law to divest Kirk of title to the premises in dispute, or to invest Hamilton with title, the question still remains, whether the facts disclosed by the first bill of exceptions do not constitute a defense to the present action.

§ 8. *One who for years stands by and permits in silence another in possession to occupy land and make improvements thereon is estopped in equity from claiming such land.*

After the confirmation of the sale of April 19, 1864, before any deed had been made, and while the cause was upon reference for a statement, as well of the trustee's accounts as for distribution of the fund realized by the sales, Kirk, it seems, appeared before the auditor, by an attorney, and made objection to the allowance of the simple contract debts which had been proven against him in his absence. So far as the record discloses, no other objection to the proceedings was interposed by him. Undoubtedly he then knew, he must be conclusively presumed to have known, after he appeared before the auditor, all that had taken place in that suit during his absence from the district, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If that sale was a

nullity, the court, upon application by Kirk, after his appearance before the auditor, could have disregarded all that had been done subsequently to the first sale, discharged Hamilton's bond, returned the money he had paid, and, in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim was asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what had been done in his absence. In 1868, three years after his return to the city, and two years after Hamilton had secured a deed in pursuance of his purchase, he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. Indeed, his assertion while the improvements were being made, of claim to only three feet of ground next to the adjoining lot upon which he resided, was, in effect, a disclaimer that he had, or would assert, a claim to the remainder of the lots 7 and 9 which Hamilton had purchased at the sale in April, 1864. And his subsequent declaration that he was in error in claiming even that three feet of ground only added force to his former disclaimer of title in the premises. Hamilton was in possession under an apparent title, acquired, as we must assume from the record, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction.

§ 9. *An equitable estoppel is available in law as a defense to an action of ejectment.*

The only serious question upon this branch of the case is whether, consistently with the authorities, the defense is available to Hamilton in this action of ejectment to recover the possession of the property. We are of opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. "What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asseveration," became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in *Wendell v. Van Rensselaer*, 1 Johns. Ch., 344: "There is no principle better established, in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." Page 354.

While this doctrine originated in courts of equity, it has been applied in cases arising in courts of law. In *The King v. The Inhabitants of Butterson*, 6 Durn. & E., 554, Mr. Justice Lawrence said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land." In 2 Smith's Lead. Cas., pp. 730-740 (7th Am. ed., with notes by Hare and Wallace), the authorities are carefully examined. It is there said that there has been an increasing disposition to apply the doctrine of equitable estoppel in courts of law.

Again (pp. 733, 734): "The question presented in these and other cases,

which involve the operation of equitable estoppels on real estate, is both difficult and important. It is undoubtedly true that the title to land cannot be bound by an oral agreement, or passed by matter *in pais*, without an apparent violation of those provisions of the statute of frauds which require a writing when the realty is involved. But it is equally well settled that equity will not allow the statute to be used as a means of effecting the fraud which it was designed to prevent, and will withdraw every case not within its spirit from the rigor of its letter, if it be possible to do so without violating the general policy of the act, and giving rise to the uncertainty which it was meant to obviate. It is well established that an estate in land may be virtually transferred from one man to another without a writing, by a verbal sale accompanied by actual possession, or by the failure of the owner to give notice of his title to the purchaser under circumstances where the omission operates as a fraud; and, although the title does not pass under these circumstances, a conveyance will be decreed by a court of equity. It would, therefore, seem too late to contend that the title to real estate cannot be passed by matter *in pais*, without disregarding the statute of frauds; and the only room for dispute is as to the forum in which relief must be sought. The remedy in such cases lay originally in an application to chancery, and no redress could be had [except] in a merely legal tribunal, except under rare and exceptional circumstances. But the common law has been enlarged and enriched under the principles and maxims of equity, which are constantly applied at the present day in this country, and even in England, for the relief of grantees, the protection of mortgagors, and the benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times. The doctrine of equitable estoppel is, as its name indicates, chiefly, if not wholly, derived from courts of equity, and as these courts apply it to any species of property, there would seem no reason why its application should be restricted in courts of law. Protection against fraud is equally necessary, whatever may be the nature of the interest at stake; and there is nothing in the nature of real estate to exclude those wise and salutary principles, which are now adopted without scruple in both jurisdictions, in the case of personalty. And whatever may be the wisdom of the change, through which the law has encroached on the jurisdiction of chancery, it has now gone too far to be confined within any limits short of the whole field of jurisprudence. This view is maintained by the main current of decisions."

This question in a different form was examined in *Dickerson v. Colgrove*, 100 U. S., 578. That was an action of ejectment, and the defense, based upon equitable estoppel, was adjudged to be sufficient. We there held that the action involved both the right of possession and the right of property, and that as the facts developed showed that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, there was no reason why the latter might not, under the circumstances disclosed, rely upon the doctrine of equitable estoppel to protect their possession.

Applying these principles to the case in hand, it is clear, upon the facts recited in the first bill of exceptions, and which the jury found to have been established, that the plaintiff is estopped from disturbing the possession of the defendants. He knew, as we have seen, that the defendants claimed the property under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid transfer of his right of property. Instead of pursu-

ing that course, he, with a knowledge of all the facts, appeared before the auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by the sale of his property. He forbore to raise any question whatever as to the validity of the sale, and by his conduct indicated his purpose not to make any issue in reference to the proceedings in the equity suit. Knowing that the defendants' claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which others acted.

The evidence upon this point was properly admitted, and operated to defeat the action independently of the question whether the sale by Carrington, the trustee, and its confirmation by the court, was itself a valid, binding transfer of the title to the purchaser. What has been said renders it unnecessary to consider the questions of law presented in the remaining bills of exceptions

Judgment affirmed.

HURT v. RIFFLE.

(Circuit Court for Indiana: 11 Federal Reporter, 790-793. 1882.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—The plaintiff in this suit seeks to be subrogated to the benefit of a mortgage and have it foreclosed. George W. Riffle and George Westfall executed their joint note to Lampson Reed, for \$1,000, payable in twelve months. Westfall was Riffle's surety, and to save him harmless the latter executed the mortgage sought to be foreclosed. This mortgage was duly recorded on the 18th day of June, 1877. On the 11th day of July, 1877, Abraham Ackerland and Lewis Wyler obtained judgment in this court against Riffle for \$1,000, and on the 21st of February, 1878, Riffle sold and conveyed to Hurt, the plaintiff, for \$1,200, the real estate described in the mortgage to Westfall. Hurt paid the purchase money, except \$739, to Riffle, and the latter sum Hurt paid on the debt due to Reed by Riffle's direction. Hurt bought the lot and paid the purchase money in full, not knowing that Ackerland and Wyler and others had taken judgment against Riffle, and supposing that Westfall's mortgage was the only lien on the land. An execution was issued on Ackerland and Wyler's judgment, which, by direction of their attorneys, Herod & Winter, was levied upon two hundred and forty acres of land in White county, the land conveyed to Hurt, and certain other real estate. After the marshal had advertised all this real estate for sale, the following correspondence occurred:

“INDIANAPOLIS, April 14, 1879.

“SQUIRE L. GILKEY, Esq., Waynetown, Indiana:

“*Dear Sir*—We are the attorneys for Ackerland Wyler against George W. Riffle, and we are informed that you purchased of Riffle in-lots 2 and 3, upon which our judgment is now the first lien. We have found some land in White county belonging to Riffle, upon which there is a mortgage, which we propose to sell at Monticello on May 7th. We do not want, if it can be avoided, to bother the property which you and Mr. Hurt bought, and thought it would be proper for us to suggest to you and Mr. Hurt that you attend the sale at Monticello and buy the three hundred and twenty acres of land at a small bid, and then pay us the balance of the judgment and we will assign it to you. The

land, we understand, is valuable,—sufficient to fully save you harmless against any loss. The course indicated will pay our debt, give you the land, and fully protect your title against all other claims; otherwise we are compelled to sell the property of yourself and Mr. Hurt on May 8th. Will you do us the favor to show this letter to Mr. Hurt, as what we suggest is intended for him too. We trust that you may see this mode to be the one for you to adopt, and act accordingly, as it will be a matter of regret to us that we should be compelled to take your property that you have once paid for. Let us hear from you and Hurt before sale, if possible.

“Yours, respectfully,

HEROD & WINTER.”

“WAYNETOWN, INDIANA, May 3, 1879.

“HEROD & WINTER: In answer to your letter of the 14th of last month, I do not think I will be at the sale of Riffle's land on the 7th. We are not able to make a purchase, and, another thing, I do not wish any more incumbered property, and the way the thing now stands I believe it will be cheaper to me to let my property sell than to try and save it. I bought it in good faith, *taking* Riffle's word that there was nothing against it. We have already settled off two judgments, and there is this judgment, and that is not all; so I see but little chance for us. There are other unsatisfied claims. You will please excuse me for not writing sooner. I wrote to Riffle and have been waiting for an answer. I wished to hear from him before I wrote to you.

“Yours truly,

ABSOLOM HURT.”

Mr. Herod, of the firm of Herod & Winter, appeared at the sale of the White county land and bid it in for the execution plaintiffs for \$15, and on the day following he appeared and bid in for his clients the land conveyed to Hurt, for \$900, and his firm receipted the execution for that amount as attorneys for the judgment plaintiffs. After the sale, but before the marshal had made a written memorandum or return of it, and while Herod and the marshal were still at the place of sale, Hurt made his appearance for the first time, and told Herod that during the year for redemption he would make up his mind as to what he would do. Neither at this time nor prior thereto had Herod or his partner, or either of the execution plaintiffs, actual knowledge of the Westfall mortgage, or that Hurt had paid part of the debt due from Riffle and Westfall to Reed. On the day of the last sale, and before it occurred, Herod examined the judgment records, and found two unsatisfied judgments against Riffle, which were junior, however, to the judgment of Ackerland and Wyler. But he neglected to examine the records of the recorder's office, where he would have found the Westfall mortgage unsatisfied. It was not until four or five weeks after the sale that Hurt employed the counsel who brought this suit. Mr. Herod testified before the master that he bid in the property, at both sales, for the execution plaintiffs, on the faith of Hurt's letter to his firm. The master found, on these facts, that Hurt was estopped from asserting against Ackerland and Wyler any right he had acquired under the Westfall mortgage by paying part of the debt due to Reed; and to this finding Hurt excepted.

§ 10. *Representations which are not estoppels in pais. What are such estoppels.*

It is urged for Ackerland and Wyler that Hurt's letter prevented their counsel from examining the records of the recorder's office, where they would have found the Westfall mortgage; that the fair inference to be drawn from that letter was that Hurt had no lien on the property superior to that of the exe-

cution plaintiffs; and that the execution would not have been receipted for \$900 — the amount of the bid — if Hurt had asserted his right under the mortgage; or had mentioned the fact that there was such a mortgage before the execution was receipted. Herod & Winter were informed by Hurt's letter that he had paid off two judgments which were liens on the land, and that in addition to the judgment which they represented there were still other unsatisfied claims against the land. Other unsatisfied claims might have been mortgages as well as judgments, and yet the sale was made without any examination of the mortgage records. Hurt was authorized to assume that Herod & Winter had actual knowledge of all recorded liens against the property, which was soon to be sold under their direction, by the marshal, to satisfy the judgment in favor of Ackerland and Wyler. Hurt sustained no such relation to the execution plaintiffs, or to their counsel, as compelled him to take any notice whatever of their letter to Gilkey and himself, and there was nothing in his letter in reply which justified Herod & Winter in assuming, without examination, that the lands levied upon were free of mortgage liens. Hurt may have thought, and he no doubt did think, that he was dealing with men who were more than his equals in legal knowledge, and who were more anxious about the interests of their clients than his welfare. When Hurt replied to Herod & Winter's letter he had not employed counsel, and it is not probable that he then understood his rights under the Westfall mortgage. The facts of the case do not justify the belief that he intended or expected his letter and conduct to deceive or mislead Herod & Winter. Hurt is not estopped from asserting his rights under the Westfall mortgage, unless he made a representation or concealment in a matter of fact important to the interests of Ackerland and Wyler, upon which Herod & Winter were authorized to rely, and upon which they did actually rely, to the prejudice of their clients. No mere opinion that Hurt expressed could be relied on, and the recorded mortgage was a fact equally open to all. Finding, as they should have done, this mortgage unsatisfied, and prior to the judgment of Ackerland and Wyler, Herod & Winter would, on inquiry, have learned that Hurt had paid part of the debt due from Riffe and Westfall to Reed. It was unsafe and unreasonable, and therefore unauthorized, for the counsel to bid off the property described in the mortgage for their clients, relying upon anything that Hurt said or did, or failed to say or do. And, admitting that Mr. Herod made the bid and receipted the execution in the manner and for the reasons stated, it does not appear that Hurt's conduct induced Herod & Winter to alter their position to the injury of their clients. It is not shown that there was other property subject to the execution, or that the judgment was replevied. *Hefner v. Vandolah*, 57 Ill., 520; *Rice v. Dewey*, 54 Barb., 455; *Bayles v. Perry*, 51 Mo., 449; *Palmer v. Williams*, 24 Mich., 328; *Freeman v. Cooke*, 2 Ex., 654; 11 Allen, 349. Exceptions sustained.

MORGAN v. RAILROAD COMPANY.

(6 Otto, 716-724. 1877.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.— This was a bill by Morgan claiming land held by the company, and a cross-bill by the company insisting that Morgan had dedicated the land to public uses and was estopped *in pais* from denying it. There was a decree in favor of the company and Morgan appealed.

Opinion by MR. JUSTICE SWAYNE.

During the years 1853 and 1854, the Chicago & Mississippi Railroad Company was engaged in locating and building a railroad from Joliet to Alton, in the state of Illinois. The appellant and Spencer and Lathrop were in the service of the company as engineers. Kersey H. Fell was employed to obtain the right of way for the road. The line of the road was located by Oliver H. Lee, the chief engineer. The parties first named were permitted to locate the stations between the principal points. This was to be done in conformity to the interests of the company. Spencer says, in his testimony, "My understanding with Mr. Lee was that the railroad company should have ample grounds for the transaction of their business where we located the stations."

With the view of locating one of the stations and laying out a town, four contiguous parcels of land of forty acres each were bought from the United States, one by Morgan, Spencer and Lathrop, each severally; and the other by Kersey H. Fell, and his brother, Jesse W. Fell. At the time of the entry of the lands, it was the intention of the parties to locate the depot at the center of the four tracts. The line of the road was fixed some distance east of that point. This caused the depot to be located upon the tract belonging to Morgan.

Prior to the construction of the road, the other parties conveyed their three tracts to Morgan, under an agreement that all the parties should have joint, instead of separate, interests in the proposed town plat, and that Morgan, as trustee, should lay out the town, and sell and convey the lots. The proceeds were to be divided among the parties according to their original ownership respectively of the lands. On the 6th of August, 1853, Morgan conveyed to the railroad company fifty feet in width on each side of the center of its roadway through the several tracts before mentioned. The deed required the company, among other things, to "keep station-houses and other necessary depot buildings on said first-mentioned tract." The tract first mentioned was the one originally entered by Morgan. On the 30th of January following, he laid out the contemplated town plat. The town was called Dwight. The plat shows a strip of land marked "depot," one thousand and four feet long and two hundred feet wide, with the line of the railroad through the center. There is nothing indicating the previous conveyance of a hundred feet in width through the center to the railroad company. The premises in controversy are fifty feet in width on each side of this hundred feet.

Morgan sold a part of the town lots, and accounted for the proceeds. In 1855, partition was made of the unsold lots, without reference to the original ownership of the several tracts as entered, and Morgan conveyed accordingly to the other several parties in interest. No notice was taken of the premises in dispute. The business of the trust was thus finally closed.

In 1853 or 1854, Morris, a draftsman in the office of the company, made a map, he says, "for the purpose of showing the company's land, as required for right of way and operating purposes, through different subdivisions of United States surveys, to be a permanent record for the use of the company, showing its property along the line of the road." Morgan and Spencer furnished the materials for the work. It is affixed to his deposition, and marked Exhibit 1. Being asked whether Morgan and Spencer saw it, he answered, "I have no doubt they saw it frequently, as those gentlemen were in the habit of coming into the office where I made this map." The map represents the premises in question as they are represented on the town plat. The diagram

has the line of the railroad in the center, and is marked "depot ground." The data for the map were furnished before the iron was laid upon that part of the roadway. Spencer testified that he supposed the making of the town plat vested a sufficient title in the company. He added, "Had I not thought so, it would have been my duty as engineer of that division to have seen that the company had a proper deed." He said, further, that Morgan occupied the same relation to the company as himself, and was clothed with the same duty. When the partition was made he regarded the premises as belonging to the railroad company.

At the time the unsold lots were divided, Jesse W. Fell had the same understanding as to the premises. He says: "Looking at the interests of the parties as affected by the location of the depot, I have always supposed that good faith on our part demanded that these strips should belong to the railroad." When the partition deeds were made, he supposed that all the property not dedicated had been divided. Morgan himself was examined as a witness. Speaking of the premises, he said: "I set them apart with a view to the ultimate needs of the railroad company at this station;" and that it was his intention to convey to the company for a nominal consideration, if they faithfully performed their covenants in his deed for the hundred feet; but that he never had any thought of dedicating the property. He insisted that his interests had been largely sacrificed by the delinquencies of the company touching the covenants.

In 1856 or 1857, he said, "he had given the road the right of way, one hundred feet through the entire land, and fifty feet more on each side for a thousand feet long; and they, on their part, were to build depot buildings and crossings, and keep them up for all time to come." At one time the company had a house on the premises, used for boarding the laborers working on the road. Morgan claimed that this "was not in compliance with the terms of the grant made to the railroad company." He said that, if the company were allowed to cover the premises with Irish shanties, it would prevent the sale of a corresponding number of lots, and that he should require the house to be removed, which was accordingly done. This occurred in 1860 or 1861. In 1858 or 1859, he sold a corn-crib upon the premises, but asserted no title to the ground on which it stood. In 1867 he said to the village attorney of Dwight: "It was my intention that they" (the company) "should have those lands; and they would have had them had they behaved themselves properly, and had done as they agreed to on their part."

From 1854 to 1863 passengers and teams constantly crossed the strips, for the purpose of reaching the depot. In 1863 the Chicago & Alton Railroad Company, which had become the successor to all the rights of the Chicago & Mississippi Company, had a track or tracks on the western strip. Both strips had been and were used for various purposes connected with railroad traffic, and several structures had sprung up on them. One of them was a grain elevator, erected under a license from the railroad company. A street thirty feet in width, extending across both strips, was laid out in 1873. Before that, the depot could not have been reached from any direction without crossing private property, if the strips were such, or taking the hazards of passing along the roadway of the company for a distance of five hundred feet. The strips were therefore indispensable to the use of the depot when it was located and built.

From the time of recording the town plat up to the year 1867 no taxes were

paid on the premises by either party. Morgan claimed no rents until 1865; he received none until 1867; and he made no effort to sell any part of the property until January, 1872.

§ 11. *A party is not permitted to deny a conclusion resulting from his culpable silence or misrepresentation, upon which he has induced others to act.*

The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not unfrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken shall not be heard to speak when he ought to be silent. *The Bank of the United States v. Lee*, 13 Pet., 107.

He is not permitted to deny a state of things which, by his culpable silence or misrepresentations, he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. *Merchants' Bank v. State Bank*, 10 Wall., 604 (BANKS, §§ 101-118).

The rule has been settled in Illinois, where this case arose, in accordance with these views. In *Baker v. Pratt*, 15 Ill., 568, the court said, "a verbal statement is sufficient, where the party has made an admission which is clearly inconsistent with the evidence he proposes to give or the title or claim which he proposes to set up, and the other party has acted upon the admission, and will be injured by allowing the truth of the admission to be disproved." In the case of *Mills v. Graves*, 38 Ill., 455, it was said, "where a party stands by and sees another acting to his injury, and the owner declares that he has no claim, equity will not permit him afterwards to assert his title to the injury of the person he has thus misled." See, also, *The People v. Brown et al.*, 67 Ill., 435; *Knoebel v. Kircher*, 33 id., 308; *Smith v. Newton*, 38 id., 230; *International Bank v. Bowen*, 80 id., 541; and *Higgins v. Ferguson*, 14 id., 269.

The facts developed in the evidence clearly establish this defense. Briefly stated, they are the advantages given to the appellant and his associates in the location of the stations; the agreement that the railroad company should have ample ground in all such cases for its purposes; the designation of the premises on the town plat by the word "depot;" the fuller designation of a like diagram of the premises on the map made for the railroad company; the furnishing of the data for that map by the appellant and his associate, Spencer; the intent of Spencer and Fell that the premises should belong to the corporation, and their belief that the title had vested accordingly; the non-payment of taxes by the appellant for so long a period; his non-claim, and his repeated declarations during that time that the property belonged to the railroad company; the fiduciary relation of the appellant and his associates; and lastly, the location and building of the depot where it was placed. As is well remarked by the counsel for the appellee, it is incredible that the depot would have been put there if any doubt had been entertained as to the ownership by the company of property so vital to its beneficial use. It would also have been a gross fraud on the part of the appellant, who was then in the service of the company as an engineer, to stand by in silence and see it erected under such circumstances.

§ 12. *Where a party is estopped in pais, the statute of limitations perfects the title against him.*

Whether the estoppel here, as in cases of estoppel by deed, passed the legal title by inurement, it is not necessary to consider. In either view, it is alike fatal to the appellant's claim. The authorities upon the subject are not in harmony. *Favill v. Roberts*, 50 N. Y., 222; *Doe ex dem. McPherson v. Walters*, 16 Ala., 714; *Brown v. Wheeler*, 17 Conn., 345; *Bigelow on Estoppel*, pp. 534, 537. The bar of the statute of limitations confers a positive title. *Leffingwell v. Warren*, 2 Black, 599.

§ 13. *A dedication to public uses may take effect from any form of words indicating a purpose to dedicate.*

It is also insisted, in behalf of the appellee, that the premises in question were dedicated by the appellant to the railroad company. This question arises under the twenty-first section of chapter 25 of the Revised Statutes of Illinois of 1845. The provisions of the statute are peculiar. It declares, touching town plats, that the plat or map, when executed and recorded as required, "and every donation or grant to the public, or any individual or individuals, religious society or societies, or to any corporation or bodies politic, marked or noted on such plat or map," shall be deemed a sufficient conveyance of such parcels of land to vest a fee-simple title, and shall be considered a general warranty against the donor and his heirs to the grantee, for his benefit, "for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever." Four classes of parties are named who may be the recipients of the donation: 1. The public; 2. Any individuals; 3. Any religious societies; 4. Any corporations or bodies politic. The purposes of the grant are not required to be set forth, nor is there any limitation as to what they shall be. The power and will of the donor are unfettered. The provisions are simply a mode of conveyance which the grantor may pursue, if he chooses to do so. The language of the statute is clear and explicit. There is no room for doubt. The case is one in which the rule applies, that there shall be no construction where there is nothing to construe. *Dwarris, Statutes*, pp. 143, 144. There can be no doubt of the power of the legislature so to provide.

Was the intention of the appellant to dedicate the premises to the railroad company for its use for depot purposes, as claimed, "named, expressed or intended?" Either, as to the use, is, according to the statute, sufficient. The facts to which we have adverted in the previous parts of this opinion seem to us conclusive upon the subject. The question must be resolved in the affirmative. If this view be correct, the legal title, by virtue of the statute, passed to the corporation with the right of user as to the premises for all depot purposes, but for none other.

"No particular form of words is required to the validity of a dedication. The dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, that it was the intention of the proprietor to set apart certain grounds for the use of the public. An examination of the cases referred to on the argument will show that dedications have been established in every conceivable way by which the intention of the dedicator could be evinced." *Godfrey v. The City of Alton*, 12 Ill., 29.

"The question whether a person intends to make a dedication of ground to the public for a street or other purpose must be determined from his acts, and statements explanatory thereof, in connection with all the circumstances which

surround and throw light upon the subject, and not from what he may subsequently testify as to his real intent in relation to the matter." The City of Columbus *v.* Dahn, 36 Ind., 330.

All that is required is the assent of the owner and the use of the premises for the purposes intended by the appropriation. The law considers the owner's acts and declarations as in the nature of an estoppel *in pais* and precludes him from revoking the dedication. City of Cincinnati *v.* The Lessee of White, 6 Pet., 431 (DEDICATION, §§ 52-59); Holden *v.* Cold Spring, 24 N. Y., 474. These authorities apply alike to all the dedications authorized by the statute. The subject of dedication, in all its aspects, was fully and ably considered in Rowan's Executors *v.* Town of Portland, 8 B. Mon., 232. It is sufficient to refer to the case. Upon the grounds, both of estoppel and dedication, we hold the decree of the circuit court to be correct.

Decree affirmed.

DANIELS *v.* TEARNEY.

(12 Otto, 415-422. 1880.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is a writ of error, brought to reverse a judgment of the supreme court of appeals of the state of West Virginia. The case, as disclosed in the record, may be sufficiently stated for the purposes of this opinion as follows:

On the 18th of April, 1861, a convention of the state of Virginia passed an ordinance of secession, and on the 30th of that month a law entitled "An ordinance to provide against the sacrifice of property and to suspend proceedings in certain cases." This ordinance declared that thereafter no execution (except in favor of the commonwealth and against non-residents) should be issued, and that no sales should be made under deeds of trust or decrees without the consent of the parties interested, until otherwise provided by law; and that where executions were in the hands of the officer, whether levied or not, if the debtors should offer bond and security for the payment of the debt, interest and costs, when the operation of the ordinance should cease, the property should be restored and the bond should be returned, as in the case of a forthcoming bond, and should be a lien on the realty of the obligors. If the debtor offered no bond his property was to be appraised by three freeholders, at its value on the 6th of November, 1860, and unless the property would sell for the amount of the valuation, it should be restored to the debtor without lien.

The suit was brought in the circuit court of Jefferson county, state of West Virginia, by Tearney and Wilson, executors of Colin C. Porter. The declaration sets forth that the defendants, on the 1st day of June, 1861, made their joint and several bond, whereby they bound themselves to pay to the plaintiff the sum of \$1,597.18 when thereunto requested; and that there was a condition affixed to the bond, which was, "that whereas, on the 25th day of March, 1861, a writ of *feri facias* was issued from the clerk's office in the name of Colin C. Porter against Benjamin F. Daniels, for \$747.92, with interest from the 2d day of January, 1860, until paid, and \$31.97 costs; if, therefore, the said B. F. Daniels should pay the debt, interest and costs, when the operation of the ordinance before mentioned should cease, then the obligation to be void, otherwise to be in full force." It was averred that the operation of the ordinance had long since ceased, and yet that the defendants, though often re-

quested so to do, had not paid the said sums of money or any part thereof, whereby an action had accrued, etc.

Among other pleas, the defendants filed one *in hæc verba*: "For further plea to this action, the defendants say that the bond in the declaration mentioned was executed by Benjamin F. Daniels, a citizen of the state of Illinois, as principal, and by William B. Daniels and D. M. Daniels, as his securities, in pursuance of the requirements and conditions of a statute passed in violation of the constitution of the United States, heretofore, to wit, on the 30th of April, 1861, by the convention of the state of Virginia, and that said statute was subsidiary to and in aid of and in furtherance of the objects and policy of the ordinance of secession passed theretofore by said convention, to wit, on the — day of April, 1861, in violation of the constitution of the United States. And the defendants say that they rely on the fact that said statute and ordinance were in violation of and repugnant to the constitution of the United States for their defense and plea in this case; and that they are unconstitutional the defendants are ready to verify."

The plaintiff demurred. The court sustained the demurrer, and the defendants excepted. The parties thereupon waived a jury and submitted the case to the court, and a judgment was entered in favor of the plaintiff. The defendants removed the case to the supreme court of appeals for review. That court affirmed the judgment, and this writ of error was thereupon sued out.

§ 14. *The three cases in which a writ of error lies from this court to the supreme court of a state.*

The objection raised as to the jurisdiction of this court is untenable. In *Home Insurance Co. v. City Council of Augusta*, 93 U. S., 116 (Const., §§ 2325-27), we said: "Where a judgment or decree is brought to this court by a writ of error to a state court for review, the case, to warrant the exercise of jurisdiction on our part, must come within one of three categories:

"1. There must have been drawn in question the validity of a treaty or statute of, or authority exercised under, the United States; and the decision must have been against the claim which either was relied upon to maintain.

"2. Or there must have been drawn in question a statute of, or authority exercised under, a state, upon the ground of repugnance to the constitution, or a law or treaty, of the United States; and the decision must have been in favor of the validity of the state law or authority in question.

"3. Or a right must have been claimed under the constitution, or a treaty, or law of, or by virtue of a commission held or authority exercised under, the United States; and the decision must have been against the right so claimed. *Rev. Stat.*, 132, sec. 709; *Sevier v. Haskell*, 14 Wall., 15; *Weston v. City Council of Charleston*, 2 Pet., 449 (Const., §§ 399-407); *McGuire v. The Commonwealth*, 3 Wall., 385."

The plea is neither full nor technical, but it does aver the invalidity of the statute under which the bond was taken, because it was in violation of the constitution of the United States, and was passed "in aid and furtherance of the objects and policy of the ordinance of secession," and that the defendants "rely on the fact that said statute and ordinance were in violation of, and repugnant to, the constitution of the United States, for their defense and plea in this case." This implies clearly that the defendants claimed, in addition to what was averred, that the bond was void in every aspect, and that they had a right, by reason of the premises, to exemption from liability under it. What

is thus averred in a pleading is as effectual as if it were expressed. *Haight v. Holley*, 3 Wend. (N. Y.), 258.

It thus appears that there was drawn in question the authority of the sheriff, exercised under a law of the state, in taking the bond, and that the decision was in favor of the validity of that authority; and that there was also a right of exemption from liability, claimed under the constitution of the United States, and that the decision was against the right so claimed. These claims give us jurisdiction. Whether they are well founded remains to be considered. Jurisdiction is only "the right to hear and determine." The result of its exercise is the judgment of the court.

§ 15. *State legislation intended to prepare a state for secession is void as against the constitution of the United States. Judicial notice.*

That the ordinance of secession was void is a proposition we need not discuss. The affirmative has been settled by the arbitrament of arms and the repeated adjudications of this court. *Texas v. White*, 7 Wall., 700 (Const., §§ 140-60); *Hickman v. Jones*, 9 id., 197; *Dewing v. Perdicaries*, 96 U. S., 193. It was supplemented and complemented by the statute authorizing the bond to be taken. The latter was one of a series of acts passed by the secession convention, all looking to the conflict of arms which was foreseen to be approaching. They were intended to prepare the state for the struggle, and were means to that end. The saving in the statute as to executions in favor of the commonwealth and against non-residents was characteristic. It obviously contemplated the confiscation of the property of the latter as a war measure. We cannot doubt that the statute was invalid by reason of the treasonable motive and purpose by which its authors were animated in passing it. The provision that no executions should issue, and that no sales should be made under decrees or deeds of trust without the consent of the parties interested, "until otherwise provided by law," was clearly in conflict with the contract clause of the national constitution. *Bronson v. Kinzie*, 1 How., 311 (Const., §§ 1650-55); *McCracken v. Hayward*, 2 id., 608 (Const., §§ 1656-58); *Edwards v. Kearzey*, 96 U. S., 595 (Const., §§ 1664-71). The circumstances which surrounded the convention and controlled its action are a part of the history of the times, and we are bound to take judicial notice of them. *Brown v. Piper*, 91 U. S., 37.

§ 16. *Stay laws of states are void as impairing the obligation of contracts.*

We have already pointed out the infirmities of the statute. One of them is expressly embodied in the bond. The condition is that the obligors shall pay when the statute under which it was taken "*ceases*." That is, that payment was to be made at the time of its cessation, and not before. In the meantime the statute was to operate as a stay law, and the condition of the bond was framed accordingly. This, as we have shown, was directly repugnant to the constitutional provision which forbids the impairment of contracts by state laws. The bond, as a statutory instrument, cannot have more validity than the statute which prescribed it as the means of giving effect to the statute in the way it was intended to operate. To hold the bond valid as a statutory bond, and the statute void, would be an inversion of reason. Viewed in this light, it is void for exactly the same reasons that the statute is void. They rest on the same basis, and must stand or fall together. The creditor was not to be consulted. His assent was not required. So far as he was concerned, the sheriff could proceed *in invitum*. The option to give the bond or not was with the debtor. The presence or absence of the creditor,

and his assent or dissent, were alike immaterial. He was powerless in any event to control the result.

The cases are numerous in which it has been held that where a bond contains conditions, some of which are legal and some illegal, and they are severable and separable, the former may be enforced and the latter disregarded. *United States v. Hodson*, 10 Wall., 395 (BONDS, §§ 195-99). But this bond does not belong to that class. The condition is a unit, and indivisible. There are no separate elements into which it can be resolved. It must be considered as an entirety, and can be viewed in no other light. As a statutory bond, therefore, the instrument is clearly void. Whether it is void also as a voluntary bond is a point upon which the opinions of all the members of the court are not entirely in accord. We pass from the subject without further remark, because, irrespective of that question, there is a view decisive of the case, in regard to which we are unanimous and our minds are free from doubt.

Conceding the bond to have been wholly void in both aspects, it does not by any means follow that it could not thereafter, under any circumstances, be enforced as between the parties, or that there is such error in the judgment that it must necessarily be reversed. A corporation is liable for negligent and malicious torts, including libel, assault and battery, malicious prosecution and false imprisonment. In such cases the plea of *ultra vires* is unavailing. The corporation is estopped from setting up such a defense. *National Bank v. Graham*, 100 U. S., 699 (BANKS, NAT., §§ 290-93). The same result is produced in like manner in many instances where a corporation, having enjoyed the fruits of a contract fairly made, denies, when called to account, the existence of the corporate power to make it. *Railway Company v. McCarthy*, 96 U. S., 258 (CARRIERS, §§ 1273-76).

The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the statute of limitations, it is a conservator, and without it society could not well go on. If parties are *in pari delicto*, the law will help neither, but leaves them as it finds them. But if two persons are in *delicto*, but one less so than the other, the former may in many cases maintain an action for his benefit against the latter. *White v. Franklin Bank*, 22 Pick. (Mass.), 181.

It is not necessary here to consider the extent and limitations of the rule. They are fully examined in the authority referred to. In the case at hand the obligee must be deemed wholly innocent, because the contrary is not alleged, and it does not appear. *Quod non apparet, non est. De non apparentibus et non existentibus, eadem est ratio.* "If the contract be executed, however, that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract; for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege." 1 Story, Contr., sec. 610; *Taylor v. Weld*, 5 Mass., 108.

§ 17. *A party having for his benefit availed himself of an unconstitutional law is estopped from denying the validity of his contracts under it.*

It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with

others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. *Ferguson v. Landram*, 5 Bush (Ky.), 230. See *Ferguson v. Landram*, 1 id., 548; *Van Hook v. Whitlock*, 26 Wend. (N. Y.), 43; *Lee v. Tillotson*, 24 id., 337; *The People v. Murray*, 5 Hill (N. Y.), 468; *City of Burlington v. Gilbert*, 31 Ia., 356; *B., C. R. & M. R. R. Co. v. Stewart*, 39 id., 267.

In the case first cited, an injunction was applied for to prevent the collection of a tax authorized by an act of the legislature passed during the late civil war, to enable the people of a county to raise volunteers and thus avoid a draft for soldiers, and that object had been accomplished. In disposing of the case the court well asked: "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration and repudiate the statute?"

In *United States v. Hodson* (*supra*) this court said: "When a bond is voluntarily entered into, and the principal enjoys the benefits it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are *estopped* from availing themselves of such a defense." Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice.

Judgment affirmed.

WALKER v. FLINT.

(Circuit Court for Missouri: 3 McCrary, 507-510. 1882.)

STATEMENT OF FACTS. — Ejectment to recover a strip of land two and one-half feet by one hundred and thirty-seven feet, on which one wall of a large building had been erected. Plaintiff claimed the strip as part of a lot set apart to him in partition proceedings to which the Life Association of America was a party. It was alleged that the building in question was erected by the life association, and leased to Coan and Flint, defendants. Defendants pleaded, first, a general denial; secondly, the statute of limitations of ten years; thirdly, ten years' possession; fourthly, that Walker's lease had expired; fifthly, that the building had been erected in good faith and without knowledge of plaintiff's claim; sixthly, that the life association was not owner of the property when the partition was made and was not a party to the suit nor estopped by it. There was a demurrer to the answer.

Opinion by TREAT, J.

The main question is as to estoppel *in pais* alleged in the answer, while the petition avers, on the other hand, substantially, an estoppel by record. The petition sets out with great fullness the sources of plaintiff's title, and by anticipation negatives any question of estoppel or limitation which defendants may aver. The main ground of plaintiff's averments as to estoppel of record relates to the fact that the Life Association of America, the landlord defendant, was a party to the partition suit, while the answer of the defendants directs attention to the alleged fact that said partition suit was for many parcels of property, in one only of which that association was interested, and that was a parcel of ground in Carondelet, miles away from the *locus in quo* in this

case. The answer then avers further that said association, with full knowledge of the plaintiff, proceeded, after having acquired possession of the abutting property of plaintiff, to erect thereon an expensive building, without objection, and that now plaintiff's demand would be, if upheld, disastrous, far beyond the value of the two and a half feet of land in question. The property subsequently acquired by the association was not property involved in the partition suit, but was an abutting tract.

§ 18. *Estoppel by record and in pais.*

Is a party to a partition proceeding, who subsequently acquires adjoining property not involved in the partition suit, estopped from disputing the calls in such a proceeding for lands included therein, when he thereafter becomes the grantee of adjoining property? Thus the defendant landlord had no interest in plaintiff's lot now claimed, but became a party to the suit in partition to protect its interests in a tract miles away. After partition had, it purchased a tract far away, which adjoins what had been set apart to plaintiff. Having become the owner of said adjoining tract, he was not estopped by the record in partition, and if it be true that, after such purchase, it proceeded with full knowledge and without objection of plaintiff to erect an expensive edifice, which possibly trespasses to the extent named on plaintiff's property, is there not an estoppel *in pais*?

§ 19. *An affirmative defense cannot be set up under a general denial under the Missouri code, and the general denial differs in this respect from the general issue.*

The first defense is a general denial. It is contended that under such denial the defendants can rely on the statutes of limitation, and therefore that the two defenses pertaining to limitations are improper. The uniform ruling of this court has been that a general denial under the code is not equivalent to a general issue at common law, whereby certain affirmative or *quasi* affirmative matters can be heard. A general denial puts the plaintiff to the proof of his substantive allegations, upon which his right of recovery depends. If the defendant has an affirmative defense in the nature of an avoidance, he must plead it. In this case, in conformity with such rulings, the defense is in the first special plea one state of facts, and in the second plea another state of facts, either of which, if true, would defeat the plaintiff's alleged cause of action. Each is well pleaded, and no demurrer thereto can prevail.

The other defense is more difficult; but what has been stated above explains the views of the court as to estoppels of record and estoppels *in pais*. If the averments with respect thereto are well founded, they constitute a valid defense. In a former opinion of this court there was a *dictum* based on the then state of pleadings; but now a different showing is made, raising other and substantial issues: *First*, as to the alleged estoppel by record; and, *second*, as to estoppel *in pais*. Hence, the demurrer to the special defenses in the answer are overruled.

BEHR v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

(Circuit Court for Tennessee: 2 Flippin, 692-702. 1880.)

STATEMENT OF FACTS.—Action on a policy of life insurance by the widow of insured. The defense was that deceased came to his end by suicide, that there were false representations as to his habits in the matter of drink, and that plaintiff was estopped by her sworn petition for divorce, filed some

years before, in which she charged her husband with excessive drunkenness. There was a verdict for plaintiff and a motion for a new trial.

At the trial the court charged the jury that if they believed the facts stated in the petition for divorce to be true, then the plaintiff could not recover; but if they found there was evidence tending to show that they were not true, the question would then arise, what force and effect should be given to the petition; that as the company had not acted on the petition, nor been injured by it, the rule of estoppel did not apply; but further, that "It is a rule of public policy that if one wilfully and deliberately swears falsely, whether anybody acts on it or not, or is prejudiced or not, he cannot be heard in a court of justice to swear to the contrary when his interest demands that he shall change his oath. But if he has inadvertently or mistakenly sworn to a state of facts which he now says is not true, and he proves to your satisfaction that he is innocent of the offense of intentional false swearing, you may look to the proof at large and say how the facts really are," etc.

In addition to this, the court was asked to charge in substance that "If the statements were made *deliberately*, as if the facts were communicated to counsel with a view to be incorporated in a petition for a divorce, and the petition, after being prepared, was read over to the party by her counsel, and then adopted and sworn to, they cannot be said to have been made *inconsiderately*. If the facts were peculiarly within the personal knowledge of the party making the statements, and if she was not ignorant in regard to the truth or falsehood of the facts, then the sworn statements cannot be said to have been made by *mistake*. A mistake, to have the effect of removing the estoppel, must, at all events, be an *innocent* and *excusable* mistake — arising from imperfect knowledge or information." The court refused so to charge.

§ 20. *Right of the court to comment on the facts in charging the jury. Limitation of that right.*

Opinion by HAMMOND, J.

The errors assigned on this motion are that the idea of *estoppel* was carefully excluded from the jury; that the conclusiveness of the sworn statement was made to depend wholly upon whether or not the plaintiff had been guilty of the offense of wilful and deliberate false swearing, and the court refused to explain, as asked by the instruction, what is meant by "inconsiderately" and "by mistake" making a false statement. It seems to me that so much of the instruction as sought to explain the meaning of the words "*deliberately*," "*inadvertently*," and "*by mistake*," is asking the court to take from the jury certain questions of fact in the case, and to determine them as a matter of law. It is certainly charging the jury upon the weight of the testimony, and expressing an opinion by the court that, under the circumstances stated in the instruction, the sworn statement was made deliberately, and not inconsiderately and by mistake. The court may comment on the facts to aid the jury in reaching a just conclusion, but should be careful, in doing so, not to assume to decide the matter of fact itself. *Farmers' Bank v. Harris*, 2 Humph., 311; *Burdell v. Denig*, 92 U. S., 716; *Life Ins. Co. v. Baker*, 94 U. S., 610.

The charge refused overlooks the proof for the plaintiff, and, calling the attention of the jury to the strong features in the defendant's favor, asks the court to say to the jury that there was deliberation in making the statement, and no inadvertence or mistake. It is not competent for the court, where there is evidence tending to prove the entire issue, although it is conflicting, to give an instruction which shall take from the jury the right of weighing

the evidence and determining its force and effect. *Weightman v. Washington City*, 1 Black, 39, 49; *Greenleaf v. Birth*, 9 Pet., 292; *Crane v. Morris*, 6 Pet., 598, at p. 617; *Lucas v. Brooks*, 18 Wall., 436.

It is very difficult in some cases to determine whether an instruction is on the facts or the law of a case, and its correctness must depend on the phraseology used; but where the jury is instructed as to what their verdict shall be on the particular point, it is a direction on the effect that they shall give to the evidence. *Tracey v. Swartwout*, 10 Pet., 80. A careful reconsideration of this charge strengthens the conviction I entertained at the time it was refused, that it is a partial statement of the facts, accompanied with an expression of opinion by the court as to the effect of those particular facts upon the general fact in dispute—namely, whether Mrs. Behr made her statement under oath deliberately, and without inadvertence or mistake. The charge was therefore properly refused.

§ 21. *What is an estoppel. A sworn statement or a sworn admission, if made inconsiderately, should be relieved against, and is not technically an estoppel.*

The other errors assigned proceed upon the theory that the petition for divorce was an estoppel, and the court erred in not saying so to the jury. Undoubtedly the supreme court of Tennessee, in *Hamilton v. Zimmerman*, 5 Sneed, 40, 47, call the principle which concludes a party by his sworn statement, erroneously, I think, when applied to a case like this, an *estoppel*; and the subsequent cases, following the language of that case, continue to call it so. *Cooley v. Steele*, 2 Head, 605, 608; *Tipton v. Powell*, 2 Coldw., 19, 23; *McCoy v. Pearce*, Thomp. Cas., 145, 148; *Seay v. Ferguson*, 1 Tenn. Ch., 287; *Ament v. Brennan*, id., 431; *Nelson v. Claybrook* (Jackson, 1880), MSS., not yet reported.

But all these cases show that it is not an *estoppel*, because, with one accord, they say that, “if made inconsiderately or by mistake, the party ought certainly to be relieved from the consequences of his error.” Now, the distinguishing feature of an *estoppel* is that under no circumstances can it be averred against; it is not susceptible of explanation and often speaks against the truth, and for this reason has been regarded as odious. It was given that name “because a man’s own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.” *Bigelow, Estop.*, 44. Such a sworn admission may become an estoppel, as it may, whether sworn to or not, if parties act on it, or would be prejudiced by it; and, perhaps, in cases where no explanation can be given, and the party is caught in deliberately attempting to cross himself by swearing two contrary ways about the same fact, it may, in one sense, be called an *estoppel* to hold him to his first oath and not permit him to gain-say it. But this very case shows that it is misleading to call it so, and because it has been done we are now asked to predicate more upon the name given than is justified by the cases so much relied on, and to extend the principle settled by them far beyond what the supreme court ever intended.

§ 22. *An odious estoppel.*

It would make a most odious estoppel to forever hold a party to a falsehood, whether any one has been injured by it or not. After all, it is only a question of the force and effect of the petition for divorce as a part of the proof, and when once it is admitted that, under any circumstances, the contrary can be shown, it cannot be called an *estoppel*; and it seems to me to be giving the adverse party an unfair advantage to call it so, and likely to mislead the jury

to the detriment of one who may be innocent of false swearing. In deference to these cases, which have established a rule of evidence binding on this court, as well as all others in Tennessee, I charged the jury that the plaintiff here was bound by her oath unless she could show, to the satisfaction of the jury, that she had not wilfully made a false oath in the first instance. This is all that the cases cited mean, in my opinion, and all else that is claimed for them is based upon an inference drawn from the use of the word "estoppel." I have found none, and doubt if any cases elsewhere will support this doctrine that a man is ever bound by a false oath so that he cannot show the truth as between himself and others who are strangers, and have been neither injured nor prejudiced by the original falsehood.

The general rule elsewhere is not in accordance with the Tennessee cases. 1 Greenl. Ev., §§ 210-212. But in the charge I gave to the jury I have followed the cases strictly in all except calling the principle enunciated an estoppel. It is immaterial by what name it is called, perhaps, but more was sought to be implied from the word than the cases themselves justified, and it seemed to me necessary to discard it as misleading. In view of what was actually said to the jury on the subject, it seems to me that no error was committed of which the defendant can complain.

The fact that the jury were told that they could not look to the proof at large unless they acquitted the plaintiff of any intentional and wilful false swearing, it is argued, called for a trial as if upon an indictment for perjury, and the jury were led to believe that they would, by finding against her, substantially fasten upon her the odium of perjury or false swearing, and were thereby led to prejudice the defendant's case by giving more effect to the plaintiff's proof than they should have done, and less to that of the defendant than they would have done if they had been told that they must simply determine whether she had made the oath deliberately and with full knowledge of the facts, or under circumstances showing that she made it inadvertently or by mistake.

There is much force in this objection to the charge, and it illustrates the inconvenience of applying the analogy of estoppel to the mere process of weighing testimony. The cases cited all show that there is a preliminary question to be tried, namely, whether there was an innocent mistake made. It is to be determined whether the party shall, in obedience to public policy, be precluded from contradicting his original oath. He is not to be so precluded unless he has, deliberately and with full knowledge, taken the oath without inadvertence or mistake on his part. If he has done this he cannot contradict or offer proof of others to contradict it. It is in the nature of a penalty, and a very serious one, for false swearing. It seems to me plain that it is proper to say to the jury that, in trying this question, they must find a wilful and deliberate false swearing to justify them in inflicting it. Nothing less should work the serious consequence of closing the plaintiff's mouth, so that, although her husband had been, in fact, a drunkard for only a year, for example, she must stand by her false statement that he had been such for four years, and thereby lose a policy to which there is no defense if she could show the truth.

The charge given is a necessary result of the doctrine invoked, and the law of these cases, in my opinion, requires that this *conclusiveness* of the false oath shall not obtain unless the public policy against false swearing requires it. I sought to avoid the effect complained of in the charge, by telling the jury that after they had determined the preliminary question in favor of the plaintiff,

they would *then* look at the admission under oath as an admission of great weight, and determine the force and effect of it in behalf of the defendant. The charge is very favorable to the defendant in that respect, and I think the jury understood that after they had tried the question of wilful false swearing, they should give the petition for divorce the fullest weight it was entitled to, as an admission by her, going to prove the defendant's case. I have no doubt from the proof that the plaintiff did make a mistake in swearing that her husband had been a drunkard four years, and think it is fairly proved that he was a temperate man when he took out the policy. The proof is not so clear as to the extent of his subsequent habits, but the jury has found that they did not impair his health or produce *delirium tremens*, and I am satisfied with the finding, as also upon the issue of suicide.

It is plain, therefore, that in this case the plaintiff, in her petition for divorce, made statements which were not true, yet would defeat her recovery on this policy. It is not difficult to apply the rule of public policy, call it an *estoppel* if you will, to a case where the principle of protecting the courts against false swearing is called for by the facts developed; but, on the other hand, when the proof tends to show an unfortunate misstatement of the facts, it becomes a matter of serious concern to so direct the jury that they shall not hold the party to the misstatement without a clear case which calls for such punishment. On the whole, I am satisfied with the verdict, and overrule the motion for a new trial.

§ 23. **Equitable estoppel.**—For the application of the doctrine of equitable estoppel there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. *Brant v. Virginia Coal & Iron Co.*, 3 Otto, 326 (EST. OF DEC., §§ 1645-47).

§ 24. **By acts in court.**—A., who, under an agreement with B., has asserted himself in the acts of court to be the owner of a vessel, cannot afterward, as against B., deny the ownership of the vessel. *The Mary*, 1 Mason, 365.

§ 25. The charges in a bill in equity, if undenied by the defendant, are taken as true against him, and he cannot deny them. *United States v. Samperyac, Hemp.*, 118.

§ 26. An alien who has received as devisee of real estate the value of the property devised to him in proceedings for partition is estopped to set up the invalidity of the devise to him by reason of his alienage, in proceedings to recover the succession tax of 1864 and 1866. *Scholey v. Rew*, 23 Wall., 331.

§ 27. **Estoppel by acts from claiming title to land.**—A. mortgaged land to B., and afterwards mortgaged the same to C. B. foreclosed his mortgage, and a sale being decreed C. purchased the land, B. bidding also. B. received the purchase money. C., being a banking corporation, could not lawfully purchase real estate. And B., having other debts against A., recovered judgments against him and levied on this same lot, sold the same, and purchased it at the sale. It is held that B., as plaintiff in an action of ejectment for the land, has not estopped himself, by any of the former acts, from claiming the land. *Russell v. Topping*, 5 McL., 194 (CORP., §§ 855-61).

§ 28. The after-acquired title of a vendor, conveying without title, inures to the benefit of the vendee, by estoppel. *Corcoran v. Brown*, 3 Cr. C. C., 143.

§ 29. The doctrine of estoppel cannot be invoked in favor of one who has made improvements upon land owned by another with the knowledge of the owner and without objection from him, in cases in which the person making the improvements did so with full knowledge of his own want of title. *Steele v. Smelting Co.*, 16 Otto, 447.

§ 30. Under the Pennsylvania recording act a deed of conveyance which is not recorded within six months after its execution is null and void as against a subsequent *bona fide* purchaser for value without notice, if the deed to the latter is first recorded. A. in 1867 sold land to B., and the deed was not recorded till 1876. In 1874 C., under a judgment against B., sold B.'s interest and E. purchased at the execution sale. In 1873 F. bought the same land from A. on being told by both B. and C. that A.'s title was good, and put his deed on record. In an action against E. by F. for the land, it was held that both B. and C. would be estopped from

setting up title, and that E., the sheriff's vendee, was in no better right than they were. *M'Bane v. Wilson*,* 8 Fed. R., 734.

§ 31. The owner of land who represents to another that the land belongs to a third person is estopped to claim the land as against a mortgage executed by such third person to secure a debt due from him to the person to whom the representation was made, where, in securing such mortgage, the mortgagee has relied upon the owner's representations and extended the time of payment. *Parlin v. Stone*, 1 McC., 443 (CONV., §§ 390-92).

§ 32. The claimants under a Mexican grant are not estopped from claiming the land finally confirmed and patented to them, by the fact that on an erroneous location of their claim by the government they claimed the land thus erroneously located and disclaimed all other. *Bissell v. Henshaw*, 1 Saw., 553.

§ 33. By bond.—One who gives his bond for the release of a vessel which has been seized cannot, in defense to a decree against him on his bond, a decree of forfeiture having been rendered against the vessel, rely on any irregularities in the execution of the bond. *United States v. The Schooner Little Charles*, 1 Marsh., 380.

§ 34. In an action upon a prison-bonds bond the defendant cannot deny that there was any such judgment as that recited in the bond. *Allen v. Magruder*, 3 Cr. C. C., 6.

§ 35. The assignor of a bond, who received it for the purpose of raising money upon it, is not estopped to question its validity in an action against him on his promise to pay, made after he had assigned it. *Moncure v. Dermott*, 5 Cr. C. C., 445.

§ 36. A claimant who accepts the delivery of a vessel which had been seized, on giving bail for its appraised value, is estopped to contest the validity of the security, on condemnation of the vessel. *The Brig Struggle*, 1 Gall., 476.

§ 37. Where the bond of an Indian agent recites his appointment, the obligors in the bond, in a suit thereon against them, are estopped to deny his appointment. *Bruce v. United States*, 17 How., 437 (BONDS, §§ 579-83).

§ 38. One who is both obligor and obligee in a joint and several bond, and who assents to an assignment thereof, is estopped, in an action on the bond by the assignee, from claiming as a defense that there could have been no delivery of the bond to the obligees, and hence none by them to the assignee which would bind him, the defendant. *Bradford v. Williams*, 4 How., 576 (BONDS, §§ 19-21).

§ 39. An obligee in a bond, which declares him to be a principal debtor, cannot plead that he was in fact merely a surety and therefore released by an extension of time given to the principal debtor. *Sprigg v. The Bank of Mount Pleasant*, 10 Pet., 257 (BONDS, §§ 520-22).

§ 40. Parties who, in an instrument under seal, represent themselves as principals are estopped to assert that they executed it as sureties. *Bank of Mount Pleasant v. Sprigg*, 1 McL., 178. This is the rule in equity as well as in law. *Sprigg v. Bank of Mount Pleasant*, id., 384.

§ 41. A person who has acknowledged a fact in an instrument under seal cannot question that fact though some expressions in the instrument imply that the fact acknowledged does not exist. *Martin v. Taylor*, 1 Wash., 1.

§ 42. Whenever an act is done or a statement is made by a party, which cannot be contradicted without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what otherwise would be a mere matter of evidence. So where a bond, regular upon its face, has been delivered to the obligee without conditions, the sureties will not be heard to say that they signed it only on condition that a third person should sign it before it was delivered, where it was delivered without notice or knowledge on the part of the obligee of such condition. *Dair v. United States*, 16 Wall., 1 (BONDS, § 511).

§ 43. By deed.—A plaintiff in ejectment who offers in evidence a deed from A. to the defendant, for the purpose of showing that both he and defendant claimed through A., is not estopped to prove the deed fraudulent and void, having stated, when he produced it in evidence, his intention so to do. *Linthicum v. Remington*, 5 Cr. C. C., 546.

§ 44. The vendee is estopped to deny the vendor's title, in an action by the vendor to enforce his lien for the purchase money. The vendor's title failing, the vendee cannot purchase a better title, and, without surrendering possession of the land, resist the vendor's lien. He can only set off the value of his after-acquired title. And a purchaser from the vendee, who binds himself to pay the purchase money due the original vendor, is in the same and no better right. *Pintard v. Goodloe*, Hemp., 502.

§ 45. A railroad company gives a mortgage on its road to secure the payment of its bonds. Subsequently, and when these bonds had been negotiated, the company makes a second mortgage on the road, which is expressly made subject to the first mortgage and the bonds secured by it. It is held that all persons coming in under this second mortgage are in no position to complain of the foreclosure of the first. *Bronson v. La Crosse Railroad Co.*, 2 Wall., 283 (CONV., §§ 1460-66).

§ 46. A purchaser of land holds adversely to his vendor, and may dispute his title. *Watkins v. Holman*, 16 Pet., 52.

§ 47. A vendor in an action to recover the purchase money is not estopped to deny the recital in his deed that the consideration has been paid. *Taggart v. Stanberry*, 2 McL., 543.

§ 48. In a *habeas corpus* proceeding to release an apprentice, the master cannot deny the recital in the indenture of apprenticeship as to the age of the apprentice. *McCutchin v. Jamieson*, 1 Cr. C. C., 348.

§ 49. The parties to a deed are not estopped to examine into its true consideration. *Bank of the United States v. Lee*, 5 Cr. C. C., 319.

§ 50. In a proceeding in equity to annul a forged deed conveying land, it was held that the plaintiffs were not precluded from proving that the signature of the grantor was a forgery, and that she was not the person who acknowledged the act, because they had produced the deed in evidence. *Bunce v. Gallagher*, 5 Blatch., 481.

§ 51. A vendor cannot dispute a title he has passed to his vendee, in an action for the land against one who purchased from his vendee. *Gilmer v. Poindexter*, 10 How., 257.

§ 52. A deed which recites or avers that the grantor is seized of a fee, and purports to convey an estate of that description, forever estops the grantor and his heirs from denying that he was so seized and possessed of a fee at the time he made the conveyance, even though the deed contains no technical covenants of title. *Van Rensselaar v. Kearney*, 11 How., 297.

§ 53. The purchaser of land who gives a mortgage on the same to the vendor to secure the purchase money cannot claim as a defense to the foreclosure suit, that, his title through his vendor having failed, he has bought a better and outstanding title. An after-acquired title by the vendor, with warranty, inures by estoppel to his vendee. *Bush v. Marshall*, 6 How., 284 (CONV., §§ 673-75).

§ 54. A., the holder of a land warrant from the United States, conveys the land, already located, to B. Afterwards a patent is issued by the United States to A. in confirmation of his title. B.'s heirs being in possession are sued by the heirs of A. for the land. *Held*, that the patent granted to A. inures to the benefit of B. and his heirs by estoppel, and plaintiffs cannot recover. *Lessee of French v. Spencer*, 21 How., 228.

§ 55. The recital of a lease in a deed of release is conclusive upon parties and privies as to the existence of that lease. *Carver v. Jackson*, 4 Pet., 1.

§ 56. A contract executed for the purpose of conveying and acquiring an estate in fee, but wanting those legal formalities which are required to pass the title, cannot be relied on by the vendor as creating the relation of landlord and tenant, for the purpose of estopping the vendee from denying his title in an action of ejectment. *Hughes v. The Trustees of Clarksville*, 6 Pet., 369.

§ 57. In an action for the specific performance of a contract to convey lands, which the obligee was to purchase from the government at a public sale, it cannot be claimed in defense that the purchase of the lands at the sale was void for fraudulent bidding, under an act of congress intended to prevent fraudulent combinations among bidders and to protect *bona fide* bidders. *Fackler v. Ford*, 24 How., 322.

§ 58. Where an executor conveys lands without authority and afterwards obtains a patent therefor in his own name, the patent operates on the former conveyance by way of estoppel. *Lewis v. Baird*, 3 McL., 56.

§ 59. The grantor in a deed with covenants of warranty is estopped from asserting any ownership or interest in the lands conveyed, and cannot sue or recover for waste committed upon it. *Patrick v. Leach*, 1 McC., 250.

§ 60. The recitals in a deed can estop no one but parties or privies who are claiming under or against it, and in a controversy founded on its covenants. *Burr v. Duryea*,* 2 Fish. Pat. Cas., 275.

§ 61. A husband who has an equitable estate in lands, of which he also holds the legal title as trustee for his wife, is estopped by his deed of such lands, though it is void as to his wife, to set up his equitable title thereto. *Partee v. Thomas*, 11 Fed. R., 769.

§ 62. A person who conveyed certain premises with all the machinery situated therein is estopped as against the purchaser to claim certain machinery which he had represented as on the premises and belonging there, but which he secretly removed to prevent its passing by the deed. *Smith v. Schroeder*,* 21 Law Rep., 739.

§ 63. A person signed a writing by which he released and quitclaimed a certain tract of land, and bound himself to make a good title thereto. *Held*, that though he afterwards acquired a greater interest in the land than he had at the date of the contract, his heirs were estopped to set up any claim to the land by the covenant to make a good title. *Lamb v. Carter*, 1 Saw., 212.

§ 64. Parties claiming under a deed which recites the existence of a mortgage upon the land conveyed are estopped to deny the existence of the mortgage. *Holmes v. Ferguson*,* 1 Or., 220.

§ 65. Where the holder of an estate in tail conveys the same in fee-simple with general warranty, the issue in tail of the grantor is not estopped to deny his right to the land, nor is the grantee estopped to assert a better title against such issue. *Gardner v. Sharp*, 4 Wash., 609.

§ 66. K., owning three lots, conveyed them to W. by a conveyance in form absolute. Afterwards K. and wife conveyed the three lots to C. in trust to secure the payment of a note of K.'s, held by W., and still later executed another trust deed of the three lots to C. in the trust to secure the payment of the same indebtedness, which was paid. W. conveyed the lands to N., and K. having died, his heirs filed a bill against N. to set aside the deed from K. to W. on the ground that it was void as being a conveyance of a part of K.'s homestead without the signature of his wife, and also to set aside the deed from K. to N. *Held*, that N. was not estopped to set up the deed from K. to W. by the fact that K. had executed the trust deeds to C. at W.'s request to secure a debt owed to him by K. *Grosholz v. Newman*, 21 Wall., 481.

§ 67. No person can set up an estoppel as against his own grant. *Branson v. Wirth*, 17 Wall., 32.

§ 68. It appeared from the exemplification of a patent that it was issued to A., for the northeast quarter of a certain section, but a memorandum appeared on the face of the record, purporting to have been made some years afterward (but by whom it did not appear), stating that the patent, as actually issued, was for the southeast quarter. It appeared that A. conveyed the southeast quarter to C., describing it as the land conveyed by the patent to him. C. also deeded the southeast quarter to D., and he to E., and E. to F. It appeared that three days before A.'s patent, the southeast quarter had been patented to X. Nine years after A.'s patent, F. procured a private act of congress by which A.'s legal representatives were authorized to enter a quarter-section of land in lieu of the southeast quarter which had been patented to X. three days before A.'s patent issued, and, in pursuance of the act, F. entered another tract. Sixteen years later the northeast quarter was sold for taxes, and purchased by H. Twenty-five years still later the northeast quarter was patented to Q., who brought ejectment against H. *Held*, that if the patent to A. was issued for the northeast quarter, then H. was not estopped to show that fact. *Ibid*.

§ 69. A man cannot recover in ejectment, nor defend himself, against his own covenant or grant. He is estopped by his own act from saying that his title was defective, when his deed professes to pass a good title. Upon a similar principle, a man will not be permitted, against his own act, though not by deed, to controvert the title which he has thus acknowledged; as if one man come into possession of land, by permission of another, he thereby admits the title of that other, and, in ejectment to recover back possession, he cannot question it. *Cooper v. Galbraith*, 3 Wash., 546.

§ 70. In order to work an estoppel by deed, the parties must be *sui juris* competent to make it effectual as a contract. So, a married woman who is unable to contract, except as to her separate estate, is not estopped by her recitals in a deed of trust that the indebtedness which it secures was contracted in reference to her separate estate. *Bank of America v. Banks*, 11 Otto, 240 (DOM. REL., §§ 254-60).

§ 71. Where a grantor has received and retains the full value of land which he assumes to convey, neither he nor a subsequent grantor can question the capacity of the grantee. *Myers v. Croft*, 13 Wall., 291.

§ 72. A., the owner of an inchoate title to a tract of land, gave B. a power of attorney to sell and convey such interest as he had in and to the lands, but no other or better title. A. afterwards acquired the full title, and B., acting under the power of attorney, quitclaimed the land to C. for a full consideration, which A. received and retained. *Held*, that after six years of acquiescence A. was estopped to question B.'s power to transfer the complete title. *Smith v. Sheeley*, 12 Wall., 358 (AGENCY, §§ 481-83).

§ 73. A widow executing a deed of release is presumed to have executed it for the purpose of conveying all her interest, and is estopped to assert that it was only executed pursuant to a power, and that it did not convey her dower rights. *Dundas v. Hitchcock*, 12 How., 256.

§ 74. A party is always estopped by his grant, because the grant is an extinguishment of the grantor's rights and a contract not to assert them. *Fletcher v. Peck*, 6 Cr., 87 (CONST., §§ 1805-12).

§ 75. A covenant of general warranty in a deed binding the grantor and his heirs forever, and warranting the land to the church wardens of a certain church and their successors forever, will operate by way of estoppel to confirm to the church and its privies the perpetual and beneficial estate in the land. *Terrett v. Taylor*, 9 Cr., 43.

§ 76. Where A. sold land to B., but executed no conveyance, and B. afterwards conveyed it to C., the latter is not estopped to question the validity of A.'s title in an action by A.'s heirs to recover the land. *Blight v. Rochester*, 7 Wheat., 535.

§ 77. A stockholder in a trading corporation, who was present at a meeting of stockholders of the corporation, at which they executed a mortgage to one of their stockholders for a debt due him, and who did not dissent, is estopped to insist upon the act of executing the mortgage as an act of insolvency. *In re Massachusetts Brick Co.*,* 5 N. B. R., 408.

§ 78. A stockholder in a corporation who, with full knowledge of the proceedings under which the corporation is decreed bankrupt, remains silent for nearly a year after the bankruptcy, will not be heard thereafter on his motion to vacate the order of bankruptcy. *In re Baltimore County Dairy Association*,* 11 N. B. R., 253.

§ 79. In an action by a corporation against a subscriber to recover unpaid stock, he will not be heard to deny that a sufficient number of shares had been subscribed as required by the charter, he having been one of the commissioners to receive subscriptions, and having acted as one of the directors. *Rockville & Washington Turnpike Road v. Van Ness*, 2 Cr. C. C., 449.

§ 80. Stock of a corporation issued in excess of the limit prescribed by its charter is void, and the holder thereof is not estopped to assert the invalidity of the stock in a suit by creditors of the corporation, though he voted by proxy at the meeting at which the overissue was voted, and held such stock thus issued, and though the corporation and its agents have asserted that its capital stock was equal to both issues. *Scovill v. Thayer*, 15 Otto, 143 (CORP., §§ 158-66).

§ 81. A stockholder of a corporation who has continued to hold his stock after an increase of its capital stock, and has participated in elections and has received dividends on his stock, is estopped to question the regularity of the increase, when sued by the assignee of the corporation, after its insolvency, to recover an assessment made upon his stock. *Payson v. Withers*, 5 Biss., 269 (CORP., §§ 215-19).

§ 82. In an action by the receiver of a national bank against a stockholder to recover the amount of his subscription, the latter is estopped to deny the existence of the corporation. *Casey v. Galli*, 4 Otto, 673 (BANKS, NAT., §§ 75-81).

§ 83. A stockholder of a corporation, whose subscription was induced by fraudulent representations of the agent of the corporation, is estopped by a delay of two years, during which time the corporation becomes insolvent, from disputing the validity of the note given by him to the corporation in payment for his stock. *Farrar v. Walker*, 3 Dill., 506.

§ 84. Corporate securities.—A city which issues bonds in payment of its subscription to the stock of a railroad company, formed by the consolidation of two other companies, cannot question the validity of the consolidation in defense of an action on the bonds. *Lewis v. City of Clarendon*,* 7 Cent. L. J., 287.

§ 85. Plaintiff, as a *bona fide* holder of bonds issued by B., a railroad company, sues A., a second railroad company, to recover interest on his bonds, the interest having been secured by a lease of B.'s road to A. It is held that A. cannot defend on the ground that the lease was void as never having been ratified by a vote of its stockholders as required by law, since in pursuance of the agreement of lease it had operated the leased road and made several payments of interest on the coupons, with full knowledge of the stockholders and without their objection. *Eakin v. St. Louis, Kansas City & Northern R. Co.*,* 3 Cent. L. J., 655.

§ 86. The bonds of an independent school district in Iowa recited: "This bond is issued by the board of school directors by authority of an election of the voters of said school district held," etc., "in conformity with the provisions of chapter 98," etc. *Held*, that this recital did not estop the district from showing that the indebtedness for which the bonds were issued exceeded the limit imposed by the constitution upon municipal indebtedness. *School District v. Stone*, 16 Otto, 183 (BONDS, §§ 1431-32).

§ 87. Where the people of a county, at an election held according to law, authorize their corporate or legal representatives to treat certain outstanding obligations as "properly authorized by law," for the purpose of negotiating a settlement with the holders thereof, the county is estopped, after the contemplated settlement has been made, to dispute the validity of the obligations. *County of Jasper v. Ballou*, 13 Otto, 745 (BONDS, §§ 1270-71).

§ 88. It seems that a recital in municipal bonds that the limit of municipal indebtedness has not been reached will estop the corporation from asserting, as against a *bona fide* holder, that the bonds are void because exceeding the limit of municipal indebtedness. *Buchanan v. Litchfield*, 12 Otto, 278 (BONDS, §§ 1232-36).

§ 89. A county subscribed for certain stock of a railroad company and agreed to issue its bonds therefor, provided the road should be completed by a certain date. It appearing that the road would not be completed in time, the county extended the time, and before the expiration of the extended time the proper county officers declared themselves satisfied that the road was completed according to the agreement, and the bonds were delivered. *Held*, that this was a waiver, and estopped the county from setting up the failure to complete the road according to the contract. *County of Randolph v. Post*, 3 Otto, 502 (BONDS, §§ 915-17).

§ 90. The act of the county commissioners of Johnson county, Kansas, in issuing bonds of the county in payment of its subscription to the stock of the St. Louis, Lawrence & Denver

Railroad, was the act of the county, and it is estopped to set up the invalidity of the bonds thus issued. *Commissioners of Johnson County v. January*, 4 Otto, 202 (BONDS, §§ 1361-62).

§ 91. *Held*, that a county was estopped to dispute the validity of bonds issued by the presiding justice of the county court and the clerk, because the order of the county court under which they acted authorized the issue of bonds which should bind the county. *County of Cass v. Shores*, 5 Otto, 375 (BONDS, § 1446).

§ 92. After a town had voted to issue its bonds, the bonds were lithographed and dated June 1, and the signatures of the officers at that time were lithographed and printed on the coupons. Before the bonds were in fact signed the town clerk whose name was so printed on the coupons resigned and a successor was appointed. He signed them July 13, and they were signed by the chairman of the town board and were by him delivered. *Held*, that as against a *bona fide* holder for value without notice, the town was estopped to prove that the bonds were in fact signed after the clerk whose name was signed thereto had resigned. *Town of Weyauwega v. Ayling*, 9 Otto, 112 (BONDS, § 1374).

§ 93. A town which had issued its bonds under authority of what purported to be a state statute is not estopped to set up as a defense, in an action on the bonds, that the statute under which the bonds were issued is not in fact a law, notwithstanding the fact that it is printed in the volume of laws, and the bonds are in the hands of an innocent holder for value. *Town of South Ottawa v. Perkins*, 4 Otto, 260 (BONDS, §§ 1353-60).

§ 94. The doctrine that a municipal corporation is bound by recitals in bonds issued by it applies also to recitals in ordinances under which such bonds are issued. *Gause v. City of Clarksville*, 1 McC., 78 (BONDS, §§ 1264-68).

§ 95. A board of education which under the laws of Missouri had issued bonds to build a school-house is estopped to question the validity of its incorporation in an action on the bonds issued by it. *Bonham v. Board of Education*, 4 Dill., 156.

§ 96. A county which has issued its bonds in aid of a railway company is estopped, as against an innocent holder, to deny the incorporation of the railway company. *Darlington v. La Clede Co.*, 4 Dill., 200.

§ 97. A municipal corporation is estopped to deny recitals in its bonds of compliance by it with precedent statutory conditions. *Ibid.*

§ 98. A town, which has acted as a corporation, and voted and issued bonds, is estopped, as against a *bona fide* holder of its bonds, to deny the validity of its incorporation. *Aller v. Town of Cameron*, 3 Dill., 198.

§ 99. A corporation, in order to borrow money, executes a number of bonds and gives a mortgage on its real estate to secure their payment. In a suit in equity, by the holder of one of the bonds, to compel the trustee in the mortgage to foreclose the same for non-payment of his bond, it is held that the corporation cannot maintain the invalidity of the bonds upon the ground that the lenders of the money were also directors in the corporation, it being shown that the stockholders had sanctioned the contract. *Hotel Co. v. Wade*, 7 Otto, 13 (CONV., §§ 1440-46).

§ 100. The recital in a bond that it was issued by the board of commissioners of Miami county by order or resolution, pursuant to the statute authorizing the county to borrow money, passed at a regular meeting of the board, to be used by the Peru & Indianapolis Railroad, payable to the company or bearer, for a loan to the county, binds the county by estoppel and precludes it from denying this recital to defeat the bond. *Moran v. The Commissioners of Miami County*, 2 Black, 722 (BONDS, §§ 1439-42).

§ 101. A county which has executed bonds to a railroad corporation cannot, on being sued on the bonds, question the capacity of the corporation to contract. A recital in the bonds showing that all the conditions precedent to their lawful issue had been fulfilled is also binding on the county, and no defense can be based on the non-compliance with these conditions at the trial, when the bonds are in the hands of *bona fide* holders for value. *Commissioners v. Bolles*, 4 Otto, 104 (BONDS, §§ 1435-38). But no estoppel can stand in the way of inquiring into the validity or existence of the law authorizing the issue of such bonds. *Town of South Ottawa v. Perkins*, 4 Otto, 260 (BONDS, §§ 1353-60).

§ 102. The truthfulness of a recital in a municipal bond, showing that the proceedings necessary to its issue were in conformity with the requirements of the law, cannot be questioned by the city to defeat an action on the bond by *bona fide* holders for value. *San Antonio v. Mehaffy*, 6 Otto, 312.

§ 103. A county agreeing to issue bonds for subscription to stock in a railroad company upon condition that the road should be completed within a certain time, by extending this time to the company, and within the extended time declaring the road completed, and delivering the bonds, estops itself from raising the objection that the road was not completed within the agreed time, in an action on the bonds. *County of Randolph v. Post*, 3 Otto, 502 (BONDS, §§ 915-17).

§ 104. A town, which issues its bonds for subscription to stock of a railroad company, under authority of statute allowing the common council to issue such bonds upon petition of three-fourths of the legal voters of the town, cannot set up in defense to an action on the bonds, by innocent holders for value, that the petition was not in fact signed by three-fourths of the legal voters. The action of the common council, determining that sufficient voters had signed, and issuing the bonds, is conclusive of the rights of the town. *Bissell v. The City of Jeffersonville*, 24 How., 287 (BONDS, §§ 1449, 1450).

§ 105. Granting that a municipal corporation has power to issue its bonds in aid of a railroad company, it is estopped to set up irregularities in the execution of such power, when the bonds are in the hands of *bona fide* holders, even though the bonds contain no recitals of conformity to law. (Dissent, WAITE, C. J., and FIELD, GRIER and MILLER, JJ.) *Rogers v. Burlington*, 3 Wall., 654 (BONDS, §§ 837-41).

§ 106. A railroad company mortgages its road to secure payment of its bonds. The mortgage is foreclosed, the road sold, and the sale confirmed. The holders of the bonds, having purchased the road at this sale, formed a new company and surrendered their bonds for a corresponding amount of stock in the new company. Held that, by such action, certain of the bondholders, being dissatisfied, were estopped from having the order of confirmation of the sale reviewed. *Crawshay v. Soutter*, 6 Wall., 739 (CONV., § 1642).

§ 107. In an action by *bona fide* holders for value of county bonds, which import on their face a compliance with the law under which they were issued, the county is estopped to say that the bonds were not issued in accordance with the law. *Mercer County v. Hackett*, 1 Wall., 83 (BONDS, §§ 1409-12).

§ 108. The recital in municipal bonds, which have reached the hands of *bona fide* holders, that they were issued by virtue of a certain ordinance of the city, concludes the city as to all irregularities that existed in complying with the law under authority of which the bonds were issued. *Van Horstrup v. Madison City*, 1 Wall., 291 (BONDS, §§ 1196-97).

§ 109. A corporation assuming to act as a Tennessee corporation, and keeping its headquarters and principal offices there, and reciting its organization and charter under the laws of that state, is estopped to deny that it is organized under the laws of that state, as well when sued in the federal courts as a citizen of that state as when its power to contract comes in question. *Blackburn v. Selma, Marion & Memphis R. Co.*, 2 Flip., 525 (CORP., §§ 1179-86).

§ 110. Although the general doctrine is that a corporation is not estopped to set up that an incompleted contract is *ultra vires*, yet a corporation will not be permitted to rescind a partially executed contract by taking possession of property it has parted with while still retaining the possession of the consideration. *American Union Telegraph Co. v. Union Pacific R'y Co.*, 1 McC., 188 (CORP., §§ 875-81).

§ 111. Although a bank organized in a territory is not authorized to transact business until the act constituting it has been approved by congress, yet a person who has conveyed land to such a bank, and who has received and retained the consideration, cannot object that the bank was not competent to do business because the act constituting it had not been confirmed by congress, where no proceedings had been instituted at the instance of the government. *Smith v. Sheeley*, 12 Wall., 358 (AGENCY, §§ 481-83).

§ 112. A person who has entered into a contract with a corporation which by law was incompetent to contract is not estopped to set up such incompetency as a defense to an action on such contract, for to permit an estoppel in such a case would enable the corporation to do what by law it was forbidden to do. *In re Comstock*, 3 Saw., 218 (CORP., §§ 1150-54).

§ 113. The law of estoppel applies as well to corporations as to individuals, and an admission or recital by a corporation, which has been acted upon by another, is conclusive against the party making it in all cases between it and the person whose conduct has been influenced. *Toppan v. Cleveland, Columbus & Cincinnati R. Co.*, 1 Flip., 74 (CONTRACTS, §§ 242-48).

§ 114. A corporation which has indorsed a note made for its accommodation, which is afterwards discounted at the request of some one assuming to represent the corporation, who receives therefor either money or the obligations of the corporation, which are delivered to the corporation and retained by it, is estopped to deny that the note was negotiated without authority. *Waynesville National Bank v. Irons*, 8 Fed. R., 1 (BILLS AND NOTES, §§ 1532-38).

§ 115. It seems that a corporation, after entering a transferee of its stock upon its books as a stockholder, is estopped from setting up that no such formal transfer of the stock had been made upon the books of the company as was required by its by-laws. *Upton v. Burnham*, 3 Biss., 431 (CORP., §§ 491-95).

§ 116. Though the charter of a corporation provides that it shall make no loans except upon certain securities, still a borrower upon other security, and his guarantor, are estopped to set up the want of power in the corporation to make the loan, when sued to recover the amount loaned. *Mutual Life Insurance Co. v. Wilcox*, 8 Biss., 203 (CORP., §§ 873-74).

§ 117. A corporation, by borrowing money and using it for its own purposes, is estopped from

denying its power to borrow in an action to recover the loan. *Union Mining Co. v. Rocky Mt. Nat. B'k*,* 2 Colo. T'y, 248.

§ 118. One who subscribes to the increased stock of a corporation and receives a certificate therefor cannot set up the irregularity or illegality of the increase of stock, in a suit to recover his subscription. *Chubb v. Upton*, 5 Otto, 665.

§ 119. **Municipal corporations.**—In an action for damages against a city for injuries resulting from negligence in the care of a public street, the city cannot maintain in defense that the street in question is not a legally established public street, its authorities having regulated it as a public street for a number of years. *Mayor v. Sheffield*, 4 Wall., 189.

§ 120. A county executed a contract, by which it agreed to convey to A. certain lands, of which it was the owner. It was agreed that the deed should be deposited in escrow with B. until the performance of certain conditions by A., and that the land should not be taxed till the conveyance was made. The deed was surreptitiously placed on record before the performance of the conditions, and the county brought suit to set aside the contract and deed. By consent of the parties, A. having made certain payments, a decree was entered in 1872, which, by its terms, barred and estopped the county from asserting any title to the lands. For two years previous to the decree the county had claimed to own the lands and had not assessed them for taxes. *Held*, that by the claim and the decree the county was estopped to assess and collect the taxes for those years on the land in question. *County of Calhoun v. American Emigrant Co.*, 3 Otto, 124 (CONV., §§ 43-46).

§ 121. **Banks.**—Where the vice-president of a bank, who is also one of its directors, with the knowledge and consent of the president and cashier, guaranties notes in behalf of the bank, of which the bank receives the proceeds, the bank is estopped to deny the authority of the vice-president to make such guaranty. *People's Bank v. National Bank*, 11 Otto, 181 (BANKS, NAT., §§ 151-52).

§ 122. It seems that, where a check is certified to be "good" by the cashier of a bank in the ordinary course of his duties as cashier, the bank is estopped to deny that the maker has funds on deposit sufficient to pay the check. *Morse v. Massachusetts National Bank*, 1 Holmes, 209 (CONTRACTS, §§ 1780-84).

§ 123. A married woman who, in New Jersey, became the purchaser of shares of stock in a national bank is estopped, in an action by the receiver of such bank, to dispute her statutory liability as such shareholder. *Hobart v. Johnson*, 19 Blatch., 359 (CONTRACTS, § 287).

§ 124. Equity will not aid a married woman to set aside a mortgage given on her property to secure a loan made to her husband, where she induces the lender to believe that she is the borrower for her own benefit, and notwithstanding that her contract of suretyship is void. *Bein v. Heath*, 6 How., 228 (DOM. REL., §§ 98-102).

§ 125. An estoppel *in pais* cannot be more effectual than a deed, and a married woman who could not convey her interest in land cannot affect the same by an estoppel *in pais*. *Wythe v. Smith*, 4 Saw., 17.

§ 126. A married woman is not estopped to set up title to land by acts of omission on her part, as by failing to claim the land when a part of the purchase money therefor passed between third parties. *Delancy v. M'Keen*, 1 Wash., 354.

§ 127. A married woman who signs and acknowledges a mortgage in which the amount and name of the mortgagee are not inserted is not estopped, after the blanks have been filled by her husband, to question the validity of the conveyance as against her. *Drury v. Foster*, 2 Wall., 24 (CONV., §§ 383-88).

§ 128. An insurance company cannot insist upon the forfeiture of a policy for want of payment of a premium on the day it fell due, where it had revoked the agency of its agent at the place of residence of the insured, and the failure of payment was caused by failure to give notice to the insured as to where he should pay this premium. And this, notwithstanding that according to the contract of insurance, the policy was subject to forfeiture for non-payment of premiums on the day they fell due. *Insurance Co. v. Eggleston*, 6 Otto, 572.

§ 129. Where the agent of a life insurance company, without the knowledge or assent of the applicant, inserts in the application untrue statements obtained from third parties, the insurance company is estopped to set up the falsity of such statements as a defense in an action on the policy. *Insurance Co. v. Wilkinson*, 13 Wall., 222.

§ 130. The defendant is an insurance company whose agent, through an insurance broker, insures the building of the plaintiff. The company refuse to accept plaintiff's risk, but their agent does not inform the insured of such refusal. The policy afterwards comes into the hands of the company for their indorsement thereon of their permission to the insured to increase the risk by adding to his building. The company keeps the policy to destroy it, but gives the insured no notice of their intention. The building having subsequently burned, it is held in an action on the policy that these facts estop the company from insisting that the policy is not in force. *Bennet v. Maryland Fire Ins. Co.*,* 17 Alb. L. J., 363.

§ 131. **Statement under oath.**—A person who has made oath to an invoice of merchandise as a purchaser will not be allowed to claim the merchandise as a manufacturer in an action to enforce the penalty for an undervaluation. *Alfonso v. United States*, 2 Story, 421.

§ 132. **Limitations.**—A defendant in an action at law pleaded in bar a matter which the court held good and dismissed the action. Afterwards the court of last resort in the state, in another action, decided that the matter thus pleaded was not a valid defense. The defendant, in an action on the same cause of action, was held not estopped to plead the statute of limitations to the second suit, the bar of that statute having intervened between the time of dismissing the first suit and the commencement of the second. *Turner v. Edwards*, 2 Woods, 435.

§ 133. **Partnership.**—One who is so grossly negligent of his interests as to allow others to carry on a very large business for a number of years with property of which he owned two-thirds, without knowing that he was held out, by those conducting the business, as a partner, is held to be precluded from asserting that he is not a partner, as against those who, relying upon his relation as represented by the others, have extended credit to the firm. *In re Jewett*, 7 Biss., 328.

§ 134. A firm which has received the consideration on which certain property is assigned to it is estopped to question the validity of the assignment on the ground that, although signed by the firm name, the body of the assignment purported to be by one partner only. *George v. Tate*, 12 Otto, 564 (ASSIGNMENTS, §§ 13-17).

§ 135. **Bankruptcy.**—The creditors of a bankrupt, by signing a paper consenting to a transfer by the assignee in bankruptcy of his trust and the assigned property to another, and requesting this other person to accept the transfer and take possession of the property, are held to have ratified the original assignment, and are in no position to oppose the discharge of the bankrupt on the ground that the assignment was made to defraud creditors and evade the bankruptcy act. *In re Schuyler*, 3 Ben., 200.

§ 136. A trustee in bankruptcy is not estopped to show that notes made by his bankrupt in favor of another bankrupt are accommodation paper, and void for usury, by the fact of having proved the notes against the estate of the bankrupt payee. *In re Dodge*,* 17 N. B. R., 504.

§ 137. A. ordered a locomotive of B., a manufacturer. Before the locomotive was commenced, B., falsely representing that it was finished, obtained payment therefor. A locomotive corresponding to the order was afterwards built and marked with A.'s name, but B. became a bankrupt before the locomotive was delivered. *Held* that, as against A., B. was estopped to set up ownership of the locomotive, and that B.'s assignee was also estopped. *Ex parte Rockford*, *Rock Island & St. Louis R. Co.*, 1 Low., 345.

§ 138. Where a bankrupt is estopped to set up title to property in his possession, his assignee is also estopped to set up the same title. *Ibid.*

§ 139. Entries in the books of a bankrupt charging the payees of accommodation paper with the amount thereof does not estop the bankrupts or their trustee from setting up the defense of usury and that the notes were accommodation paper. *In re Dodge*,* 17 N. B. R., 504.

§ 140. **Trust.**—One who advances money to an attorney for the purchase of the subject of a client's suit, and takes the title in his own name as security for repayment of the advance, cannot set up the illegality of the purchase to defeat his trust. *McMicken v. Perin*, 18 How., 507 (CONTRACTS, §§ 578-80).

§ 141. **Pledge.**—A bank which receives and retains money which it secured by a pledge of notes belonging to it cannot, while holding the proceeds, object that the pledge was without authority; and a receiver of the bank stands in no better position than the bank itself. *Casey v. La Societ  de Credit Mobilier de Paris*, 2 Woods, 77 (BANKS, NAT., §§ 294-301).

§ 142. **Carriers.**—A railway company which for many years has transported freight over its lines for an express company is estopped from excluding the express company from carrying on its business over its line. *Dinsmore v. Louisville, Cincinnati & Lexington R'y Co.*, 2 Flip., 672 (CARRIERS, §§ 1507-10).

§ 143. A dedication of lands to public use, by mere occupants thereof who have no better title, cannot work an estoppel upon a subsequent owner. *Lownsdale v. The City of Portland*, 1 Dedy, 39.

§ 144. The owner of land who sets it apart for a public use cannot revoke the dedication after it has been enjoyed by the public for that use and individual rights have been acquired with reference to it. *City of Cincinnati v. White's Lessee*, 6 Pet., 431 (DEDICATION, §§ 52-59).

§ 145. One who accepts a pardon which recites that, "by taking part in the late rebellion," he "has made himself liable to heavy pains and penalties," is not estopped by this recital from showing that he did not take part in the rebellion, the pardon having become inoperative. *Scott v. United States*,* 8 Ct. Cl., 457.

§ 146. **States.**—The doctrine of estoppel applies to a state in a case in which it has, by its conduct, led a person to invest money on the faith of the validity of a title which it had confirmed. *State of Indiana v. Milk*, 11 Fed. R., 389.

§ 147. The doctrine of estoppel applies to a state as well as to private individuals. So, where a state has made a grant of lands, it is estopped thereby from claiming any interest therein. *People of Vermont v. Society for the Propagation of the Gospel, etc.*, 2 Paine, 545.

§ 148. The United States is not estopped by the acts or declarations of its agent which are without the scope of his authority. *Lee v. Munroe*, 7 Cr., 366.

§ 149. In an action by the United States against one of her collectors to recover unpaid balances in his hands, she is estopped from claiming that he was not her legally authorized collector, and not entitled to compensation during a period through which she continued to adopt his acts, and require of him the services and responsibilities of collector. *The United States v. Collier*, 3 Blatch., 325.

§ 150. Acquiescence, generally.—One having a claim against the government, who allows it to be prosecuted in the court of claims “for the use and benefit” of another, and employs counsel to assist in prosecuting it, is held, after settlement made by the government with the person for whose use and benefit the suit was brought, to be estopped from alleging an adverse interest in himself on the hearing of his petition amending the petition in the former suit. *Stow v. United States*,* 5 Ct. Cl., 362.

§ 151. A. is bound to government by a contract for the manufacture of brick, and enters into an agreement with B. by which B. is to perform the contract in A.’s name. An award is made by the secretary of the treasury for the payment for the work, and payment for the whole is made to A., A.’s contract, by its terms, not being assignable. It is held that B., by acquiescence in this award and accepting his share under it, is estopped from setting up his claim against the government. *Kellogg v. United States*,* 1 Ct. Cl., 310.

§ 152. The postmaster-general imposes extra service on a mail contractor in consideration of extra pay. He afterwards imposes a further and special service for which the contractor demands compensation. He is told by the postmaster-general that he would not allow his claim, that this service was included in their former agreement, and, if pressed, he would withdraw, as he had a legal right to do, the improved service for which compensation was being made. The contractor, by afterward remaining silent, is held to have elected to retain the service for which he was being paid, and is estopped, by receiving such pay, from prosecuting his claim which was denied. *Alvord v. United States*,* 8 Ct. Cl., 364.

§ 153. A mortgagor, who consents, in writing, to a sale of the land on foreclosure proceedings under the mortgage, and who permits the sale without objection, and vacates the premises and sees large improvements made thereon without objection, is estopped to question the regularity or validity of the sale. *Cromwell v. Bank of Pittsburg*, 2 Wall. Jr., 569.

§ 154. A. advertises for proposals for “the hides, tallow, horns, hoofs, etc.,” of all the cattle he shall slaughter within a certain time. B. bids and his bid is accepted. B. refuses to execute the contract sent to him for signature because it omits the “etc.” in the advertisement, claiming that the “etc.” includes, in the understanding of butchers, certain articles. A. writes, allowing that these characters include all but three of the certain articles mentioned by B. On receipt of this B. executes the contract. Nothing further having passed between them, it is held that A. is estopped from objecting to this letter as modifying the contract. *Gibbons v. United States*,* 5 Ct. Cl., 416.

§ 155. S. conveyed certain lands to C., taking a mortgage back for the full amount of the purchase money. The conveyances were recorded, but S. remained in possession. S. afterwards assigned the mortgage to A., who afterwards conveyed the premises by warranty deed to B. The premises were afterwards conveyed to others by B. and his grantees, and C., who lived near the premises, never asserted any title thereto, but drew deeds of the land for the grantees of B. and took acknowledgments thereof as notary or justice, but without disclosing his title or making any claim to the premises. *Held*, that he was estopped by his conduct to assert any title to the lands. *Baker v. Humphrey*, 11 Otto, 494 (EQUITY, §§ 191-93).

§ 156. The owner of property converted and applied by another to his use is estopped, by treating the converter as the owner of the property, from asserting title thereto as against persons dealing with the apparent owner on the faith of such apparent ownership. *North Carolina Railroad Co. v. Drew*, 3 Woods, 674.

§ 157. A., the treasurer and fiscal agent of a manufacturing company, was known to the company to be a partner in a firm who were the selling agents of the manufacturing company. *Held*, that the company could not object to the acts of its treasurer in relation to the firm because of his relation to it. *Bradley v. Richardson*, 23 Vt., 720.

§ 158. Acquiescence, for many years, in the dealings of an executor in Confederate bonds, and in the settlement of his accounts, by all parties in interest, and assurances of satisfaction by some of them, estop those interested to question the settlement or the transactions. *Etting v. Marx*, 4 Hughes, 312.

§ 159. If an owner stands by and knowingly suffers an innocent person, without giving him notice of his title, to purchase his property, and to be misled by his silence in not asserting

that title, a court of equity will treat it as a fraud upon the purchaser, and grant an injunction against the positive assertion of that title. *The Brig Sarah Ann*, 2 Sumn., 206.

§ 160. The president of the L. National Bank instructed the C. bank, the correspondent of the former bank, to charge against it the amount of a note given by him to the C. bank, in payment thereof. This was done, and the C. bank rendered an account of the transaction to the L. bank, in which the latter acquiesced. *Held*, that it and its receiver are estopped to deny the validity of the transaction. *Burton v. Burley*, 9 Biss., 253 (BANKS, NAT., § 153).

§ 161. An account rendered and not objected to within a reasonable time is deemed to have been acquiesced in. *Bradley v. Richardson*, 2 Blatch., 343.

§ 162. The owners of a boat who deliver her into the hands of workmen for the purpose of having an engine put into her may receive her back without precluding themselves from insisting that the work is not done according to contract. But by superintending the work while it progressed beyond the date on which it was to be done, and by paying instalments on the work after that date, they are deemed to have so far acquiesced in the delay of performance as not to be able to set up that delay as a substantive ground for damages. *The Isaac Newton*, Abb. Adm., 11.

§ 163. The owner of a boat puts it in possession of another, reserving the title in himself. The latter, after keeping it a long time, sells it to one who purchases in good faith, and makes considerable repairs. *Held*, that the owner is not estopped to reclaim the boat by his indolence and slothfulness in hunting it up, where there is no proof of knowledge on his part of the purchase at the time and of the subsequent repairs. *Diebolt v. Canai-boat Chester Hair*,* 4 Fed. R., 571.

§ 164. The master of a tug against which a claim existed for loss of a tow purchased the tug at a sale under proceedings instituted and prosecuted in good faith by other claimants against the tug. *Held*, that the master was not estopped to set up such title in a proceeding against the tug in behalf of the owners of the tow, by reason of his having failed to notify the owners of the tow of the previous proceeding. *The Tug E. W. Gorgas*, 10 Ben., 460.

§ 165. **Bill of lading.**—The recital in the bill of lading that a cargo belongs to A. and B. does not estop A. from showing that he is the sole owner of the property, in an action against an insurance company for its loss. *The Maryland Ins. Co. v. Ruden's Adm'r*, 6 Cr., 338.

§ 166. Where the agent of a common carrier issues a bill of lading for goods never in fact received for transportation, and the consignor therein named obtains money from the consignee on faith of the bill of lading, the carrier is not estopped to deny that the goods were in fact received by him. *Pollard v. Vinton*, 15 Otto, 7 (CARRIERS, §§ 344-49).

§ 167. In an action against a common carrier by the indorsee of a bill of lading to recover the goods called for therein, the carrier is not estopped to deny that the goods were in fact received by it, and that its agent issued the bill of lading fraudulently and collusively. *Robinson v. Memphis & Charleston R'y Co.*, 9 Fed. R., 129.

§ 168. The master of a vessel who signs a bill of lading admitting that certain goods shipped on board his vessel were received "in good order and well conditioned" shall not deny this representation in an action against the consignee to recover his freight, where it is shown in defense that this representation was false, and the consignees, acting on its truth, had made large advances on the goods, and were thereby damaged to an amount equal to the freight claimed. *Bradstreet v. Heran*, 2 Blatch., 116.

§ 169. **Bill of sale.**—One who by a bill of sale, under his hand and seal, has acknowledged that he has bargained, sold and delivered a certain number of negro slaves, naming them, cannot deny the delivery in an action of trover for the slaves. *Nevett v. Berry*, 5 Cr. C. C., 299.

§ 170. **Landlord and tenant.**—The purchaser from a tenant cannot dispute the landlord's title in ejectment by one claiming under the landlord. *Lockwood v. Walker*, 3 McL., 431.

§ 171. One who recovers in ejectment against certain tenants of another, and threatens certain other of the tenants with eviction, and they attorn to him and take a lease, cannot be said to be a tenant himself under their landlord so that he cannot dispute the title of the latter. *Merryman v. Bourne*, 9 Wall., 592.

§ 172. **Patent-rights.**—It seems that if two persons each receive a separate patent for the same invention, and afterwards receive together a joint patent for such invention, they will not be estopped by the former patents from setting up that the invention is joint. *Barrett v. Hall*, 1 Mason, 447.

§ 173. A patent, so long as it remains unrepealed, is an estoppel upon the patentee from setting up any rights under a subsequent patent for the same invention. *Odiorne v. The Amesbury Nail Factory*, 2 Mason, 28.

§ 174. One acting on the declarations of an inventor that he will not take out a patent, but that he will dedicate his invention to the public, will not, by constructing and operating the invented machine, become liable to the inventor, or any one claiming under him, for an infringement. *Pitts v. Hall*, 2 Blatch., 229.

§ 175. The assignee of a patent is estopped to set up that the patented article was of no use, in an action on the contract of assignment, where he has advertised the article as one of the most useful inventions. *Stanley v. Whipple*, 2 McL., 35.

§ 176. If an inventor assigns his invention and afterwards obtains a patent, his right to the patent inures to the benefit of his assignee by estoppel. *Herbert v. Adams*, 4 Mason, 15.

§ 177. A., the inventor of a patented article, assigns an undivided third part to B., under the agreement that they are to manufacture the article as partners. It is afterwards agreed that B. shall discontinue the making of the article, and that A. alone shall make and sell, and divide the profits with B. On B.'s continuing to make and sell the article in violation of this second contract, A. brings his bill for an account. It is held that B. is estopped to claim that a third person is the original inventor, and that A.'s patent is void, B. having made his second contract with full knowledge of this third person's claim. *Parkhurst v. Kinsman*, 1 Blatch., 488. Affirmed, *Kinsman v. Parkhurst*, 18 How., 289.

§ 178. Defendants to an action to recover damages for the use of a patented article are estopped, by having used the article, from relying upon the defense that it is useless. *Hays v. Sulsor*, 1 Bond, 279.

§ 179. A contract between G., a patentee, and The N. Company, a corporation, provided that the latter should have the right to manufacture certain articles under the patent, until such a time as G. might sell the exclusive right to manufacture or sell any or all of the articles. It provided also that G., when he wished to sell, should give the corporation the right to purchase, and if it did not within a certain time, then its right to manufacture the article or articles should be terminated on paying to it one-fourth of the proceeds of the sale. After a sale of the right to manufacture a certain article, one-fourth the proceeds of the sale was paid to the treasurer of the corporation, who entered the transaction on its books. Held, that the corporation, by its acquiescence, was estopped to question the exclusive right of the purchaser from G. *New England Car-Spring Co. v. Union India Rubber Co.*, 4 Blatch., 1.

§ 180. A person who uses a patented invention is estopped by such use to attack the validity of the invention on the ground that it is of no utility. *Vance v. Campbell*,* 1 Fish. Pat. Cas., 483.

§ 181. One who offers to take a license from the patentee of an invention upon certain terms is not thereby estopped to deny that the patentee is the original inventor. *Evans v. Eaton*, Pet. C. C., 322.

§ 182. It seems that a disclaimer of title under a patent estops the patentee from claiming damages for an infringement thereof. *Treadwell v. Bladen*, 4 Wash., 703.

§ 183. There is nothing to estop the government from showing a patent which has been granted to have been a nullity *ab initio*, owing to the non-existence of the condition precedent of novelty of the invention. *King v. United States*,* 20 Law Rep., 631.

§ 184. A patentee is not estopped by words used by him in his specifications, where he afterwards changes the specifications and omits them. *Allen v. Blunt*, 2 Woodb. & M., 121.

§ 185. **Principal and agent.**—A. is the agent of a transportation company, having written authority to receipt for freight at a certain point. He is in business on his own account also, and joins B. with him as a partner. The company, by afterwards dealing with A. & Co. as their agents, estop themselves from claiming that A. & Co. had no authority to receipt for freight, when sued for its loss. *Burritt's Survivors v. Rench*, 4 McL., 325.

§ 186. The acts of an agent of a life insurance company, who has no further power than to solicit applications, in failing to read over the questions propounded in the application to the applicant, and in filling up the blanks himself without answers from the applicant, being in excess of his authority, do not bind the company, and in a suit on the policy it is not estopped from setting up that the answers made were false. *Lee v. Guardian Life Ins. Co.*,* 2 Cent. L. J., 495.

§ 187. Where an insurance agent receives from his company a circular regulating his compensation, by acting on it for fifteen years and receiving and adjusting his compensation by it, he precludes himself from denying that he is bound by its terms. *Stagg v. Insurance Company*, 10 Wall., 589.

§ 188. The borrower of money from an agent cannot deny the authority of the agent to lend, when sued by the principal. *Union Mining Co. v. Rocky Mt. Nat. B'k*,* 2 Colo. T'y, 248.

§ 189. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, though no previous authority existed, in all respects as if the requisite power had been given in the most formal manner. *Bronson v. Chappell*, 12 Wall., 681 (AGENCY, § 210).

§ 190. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what he has done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party has acted upon a

mistaken conclusion. He is estopped to take refuge in such a defense. If loss is to be borne, the author of the error must bear it. *Ibid.*

§ 191. A principal who has received and had the benefit of advances made to him by his agent is estopped to deny that they are not according to the agreement between them in relation thereto. *Bradley v. Richardson*, 23 Vt., 720; 2 Blatch., 343.

§ 192. The holder of land as agent, tenant or partner of another, for the purpose of completing title by possession and improvement, cannot use his possession to perfect the title in himself. *Hallett v. Collins*, 10 How., 174 (EQUITY, §§ 144-48).

§ 193. Where a corporation makes and delivers a quantity of goods in pursuance of a contract entered into by a person claiming to act as its agent, the person with whom the contract was made cannot question the antecedent authority of the agent to enter into the contract. *International Co. v. United States*,* 13 Ct. Cl., 209.

§ 194. **Bills and notes.**—An estoppel depends on an actual loss of something in the particular case. So, a statement by the holder to the indorser of a note, that the note has been paid, creates no estoppel where there is no loss by, or injury to, the indorser. *Ex parte Balch*, 2 Low., 440.

§ 195. The making of notes payable to another party is not such a representation as estops the makers from showing that they were accommodation paper, even in favor of one to whom the payee represented them to be such, and who took them in good faith on the strength of such representations by the payee. *In re Dodge*,* 17 N. B. R., 504.

§ 196. **Acts and declarations.**—The declaration of an author, that he has parted with his whole interest in a copyright, estops his representatives from claiming that he transferred it for only fourteen years, especially where such declaration was made after the expiration of fourteen years after the transfer. *Cowen v. Banks*,* 24 How. Pr., 72.

§ 197. A. promised to pay B. a certain sum when A. should have legal capacity to take certain public lands. An arrangement was afterwards made by which A. released to the United States all his interest in the lands in controversy, receiving a certain sum therefor. *Held*, that A. was estopped, when sued by B. upon his agreement, to deny that he had not obtained capacity to take the lands. *Bleecker v. Bond*, 3 Wash., 529.

§ 198. Where a letter of guaranty recites a consideration of \$1, the guarantor is estopped to assert that it was without consideration. *Lawrence v. McCalmont*, 2 How., 426 (CONTRACTS, §§ 267-71).

§ 199. The recitals in a private act estop only the person applying for it. *Branson v. Wirth*, 17 Wall., 32.

§ 200. It is essential to the application of the doctrine of estoppel with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another, to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title was known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Brant v. Virginia Coal and Iron Co.*, 3 Otto, 326 (EST. OF DEC., §§ 1645-47).

§ 201. An estoppel *in pais* operates only in favor of those persons who have been misled to their injury, and only such persons can set it up. *Ketchum v. Duncan*, 6 Otto, 666 (BONDS, §§ 1735-42).

§ 202. The Union Pacific Railroad Company was estopped, by receiving the bonds from the United States which were due to it when its road was completed, to deny that its road was completed at the time when the bonds were received. *Union Pacific Railroad Company v. United States*, 9 Otto, 402 (CORP., §§ 1617-20).

§ 203. Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he is estopped, after litigation has begun, to change his ground, and put his conduct upon another and different consideration. *Railway Co. v. McCarthy*, 6 Otto, 258 (CARRIERS, §§ 1273-76).

§ 204. S., the president of the W. company, used certain of its funds in purchasing bonds of a railway company, which were used by himself and his associates in buying the railway. A new railway company was incorporated, in which S. and his associates were largely interested, who entered into possession of the railway purchased with the bonds purchased by S., and continued to manage it. The W. company entered into a settlement with S. and his associates, by which it was agreed that it should have in settlement for the funds appropriated the proceeds of bonds issued to the railway company incorporated by S. and his associates, by the state, on the faith of their ownership of the road in question. *Held*, that as against the *bona fide* holders of the bonds thus issued by the state, the W. company was estopped to set up the ownership of the road in itself. *Railroad Companies v. Schutte*, 13 Otto, 118.

§ 205. C., the owner of a farm, died, leaving E. and K., a son and daughter, as his sole heirs at law. K. and her husband conveyed the whole farm to M. by warranty deed. M., learning

of the existence of E., caused a letter to be written to him in California, inquiring whether he made any claim to the premises. E. thereupon wrote to K.: "You can tell M. for me that he need fear nothing from me. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it." This letter was communicated to M., who afterwards conveyed the premises by warranty deed to O. *Held*, that E.'s letter operated as an estoppel *in pais* against E. and his grantees of the same land, and was a valid defense to an action of ejectment by such grantees. *Dickerson v. Colgrove*, 10 Otto, 578.

§ 206. Two railway companies, A. and B., had the right under their charters to build roads between two points. They entered into an agreement by which B. agreed to purchase of A. the line between those points which A. should build, and that the contractors of the line should receive, instead of stock in A., stock in B. for their compensation. The agreement having been carried out, and the contractors having received and kept stock in B., it was held that they and their assigns were estopped to contest the validity of the agreement, or the validity of a prior mortgage by B., which, by its terms, became a lien on the line thus built, as soon as it was acquired by B. *Branch v. Jessup*, 16 Otto, 468 (CORP., §§ 1580-86).

§ 207. A person is estopped to set up fraudulent representations when, with a full knowledge of all the facts, he has continually promised to perform the agreement alleged to have been induced by such fraudulent representations. *Fitzpatrick v. Flanagan*, 16 Otto, 648.

§ 208. The charterers of a ship to N. during the late rebellion, being doubtful of obtaining a license to proceed to that place, took a license to B., expecting to continue the voyage or ship the goods from that point. *Held*, that they were not estopped by the license and clearance for B. to show that the voyage was to N. *The Schooner David E. Wolf*,* 7 Int. Rev. Rec., 194.

EVICTIION.

See CONVEYANCES; LAND

EVIDENCE.*

[In Collision and Salvage cases, see MARITIME LAW. In Prize cases, see WAR. In Patent cases, see PATENTS, p. 253. In Bankruptcy, see DEBTOR AND CREDITOR. See, also, BILLS AND NOTES, XV.]

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I. IN GENERAL. ADMISSIBILITY. COMPETENCY. MATERIALITY. RELEVANCY
SUFFICIENCY. RES GESTÆ.

SUMMARY — *Prima facie* evidence, when sufficient, § 1. — Proof of similar wrongful acts, §§ 2, 3. — Proof of bad habit, § 4. — Entries in usual course of business; death of clerk, §§ 5-7; proof of handwriting, § 7; letters of traders in proof of market value, § 8; memoranda in course of business, § 9; entries in book of deceased notary, § 10; entries in day book in regular course of business, § 11. — Execution of contract not denied under oath; proof that it was signed on Sunday, § 12. — *Res gestæ*; exclamations to prove bodily or mental feelings, § 13; declarations made soon after an act, § 14; statements by insured as to accident causing death, § 15; letters, to show to whom a consignment was made, § 16; conversations between borrower and lender, § 17; declarations, generally, §§ 18-20; previous declarations of a party to a suit, § 20; declarations of agent, § 21.

§ 1. *Prima facie* evidence of a fact is such as in judgment of law is sufficient to establish the fact, and, if not rebutted, it remains sufficient for that purpose. A verdict of the jury in opposition to such unrebutted evidence would be set aside by the court. *Kelly v. Jackson*, §§ 22-25.

§ 2. As a general rule, evidence of similar wrongful acts of a defendant is not admissible in evidence on the trial of the particular charge immediately involved in the issue. In cases of fraud, however, similar fraudulent acts are admissible if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration. *Castle v. Bullard*, §§ 26-32.

§ 3. When a case involves the intent or guilty knowledge of a party, evidence is admissible of other similar acts to the one in question, if these acts were committed about the same time with that act, in order to prove such guilty knowledge. *United States v. One Hundred and Forty-six Thousand Six Hundred and Fifty Clapboards*, §§ 33-35.

§ 4. The fact that A. has a general habit of gambling while intoxicated is not legal proof that he gave certain promissory notes for a gaming consideration, although it is proved that he was intoxicated on the day the notes were executed. *Thompson v. Bowie*, § 36.

§ 5. Entries in books of account, made by a clerk whose business it was to make the entries, are admissible evidence when it is shown that the clerk is dead or out of the jurisdiction of the court, but copies of such entries, annexed to a deposition of another clerk who did not make the entries, are inadmissible. *James v. Wharton*, § 37.

§ 6. Entries in account books, regularly made by a clerk whose duty it was to make them, are admissible in evidence, after the death of the clerk, upon proof of his handwriting. *Gale v. Norris*, §§ 38, 39.

§ 7. Entries in books of account are admissible evidence, *per se*, if the person who made the entries is proved to be dead, and his handwriting proved. *Owen v. Adams*, § 40.

§ 8. When the market value of an article in a foreign country is a question in a commercial case, letters of traders in that article, written at the time in question, and written in the ordinary course of their business, giving the prices at that time, are admissible to prove the price, though neither the writer of the letter nor the receiver are parties to the suit. *Fennerstein's Champagne*, § 41.

§ 9. Memoranda made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death are admissible evidence of the acts and matters done. *Nicholls v. Webb*, §§ 42-45.

§ 10. The entries made by a deceased notary in his record book, of a notice to indorsers, of protest of a promissory note, are admissible in evidence to prove this notice, if it is accompanied by evidence that the book was kept in the regular course of his business. *Ibid.*

§ 11. Entries in day-books, kept in the regular course of business, stating the purchases and sales of the business, are admissible to prove those facts, if the person who kept them identifies them as the books of the firm, and swears that the entries are correct. *Insurance Co. v. Weide*, §§ 46-48.

§ 12. Although the execution of a contract has not been denied by affidavit, evidence is admissible to show that it was signed on Sunday, since this does not contravene the execution, but avoids its force. *Ames v. Quimby*, §§ 49-53.

§ 13. Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence, and may be proved by one who heard them, but the expressions must relate to a *present* pain. Anything in the way of narration will be excluded. *Insurance Co. v. Mosley*, §§ 54-61.

§ 14. Declarations made very shortly after an act, and telling about it, may be so connected with the act as to be admissible as part of the *res gestæ*, although they are narrations of a past event made by one not a party to the suit, and not under oath. *Ibid.*

§ 15. Where one, who was insured, fell down stairs and injured his head so that he died, it was held, in an action on the policy, that statements of his made to his wife a few minutes after the fall, as to what had happened, and what his feelings then were, were admissible as part of the *res gestæ*. *Ibid.*

§ 16. In a commercial case, letters which tend to show to whose credit consignments of goods are made, or which are otherwise connected with material facts in the case, are admissible evidence. *Turner v. Yates*, §§ 62-68.

§ 17. When the question arises whether a loan made to the cashier of a bank was made to him personally or to the bank, evidence of conversations taking place at the time of the loan between him and the lender are admissible as part of the *res gestæ*. The conversations are admitted in such cases not so much to prove ulterior facts as to prove the conversations themselves as facts constituting part of the transaction. *Bank v. Kennedy*, §§ 69-74.

§ 18. If a declaration has importance, not as a statement of fact, but as a circumstance which is part of a material fact in a case, and not depending for its credit upon the credibility of the declarant, but upon its connection with other circumstances, it is admissible as part of the *res gestæ*. *Flint v. Norwich & N. Y. Transp. Co.*, §§ 75-82.

§ 19. If the liability of a company for an injury to a passenger on its boat, incurred during a riot on board, depends upon the question whether officers of troops who started the riot did their duty in trying to stop it, conversations between those officers in regard to the riot, made while it is in progress, though in a different part of the boat, may be admissible as part of the *res gestæ*, and proved by witnesses who overheard them. *Ibid.*

§ 20. It is not competent for a party to introduce and make evidence of his own declarations, oral or written, or those of persons under whom he claims title, unless such declarations are so connected with facts material to the issue as to form part of the *res gestæ*. A letter, whose date is the sole proof that it was written at the time of such material fact, is not so connected and is not admissible as part of the *res gestæ*. *Smith v. Shoemaker*, §§ 83-85.

§ 21. Declarations of an agent, made some time after an act occurred, and being in the nature of a narration of past events, and not tending to characterize a present act, part of the *res gestæ*, are not admissible in evidence to bind the principal. *Packet Co. v. Clough*, §§ 86-89.

[NOTES.—See §§ 90-460.]

KELLY v. JACKSON.

(6 Peters, 622-633. 1832.)

ERROR to U. S. Circuit Court, Southern District of New York.

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—Many of the questions arising in this case have been disposed of in the judgment already pronounced in the case of *Crane v. Jackson*, upon the demise of the same parties, the title and evidence being in each case substantially the same. It will be necessary, therefore, to examine into those objections only, to the ruling of the circuit court at the trial, which are presented by the bill of exceptions taken by the defendant (now plaintiff in error) and which have not been decided in the other case.

The first objection is to the refusal of the court to instruct the jury that "Roger Morris was a grantor, or stood in the character of a grantor in that (the settlement) deed." This is but a slight variation in form from the point presented in the case of *Crane v. Jackson*; and the instruction given by the court, "that the mere possession of the deed by Morris was no affirmative proof on either side of the fact of delivery," has been already fully considered.

§ 22. *The court is not bound to repeat substantially the same proposition of law in different forms to the jury. If once intelligibly and unexceptionably given, it is sufficient.*

The next objection is to the refusal of the court to instruct the jury that "the holding from the marriage settlement to the attainder cannot be said to have been under the settlement deed, until it was first ascertained that the

deed had been delivered." This instruction was certainly proper in itself to have been given, if it had not been already substantially given in the other instructions; and if the court had given this reason for the refusal, there would not have been the slightest difficulty in maintaining it; for no court is bound, at the mere instance of the party, to repeat over to the jury the same substantial proposition of law, in every variety of form which the ingenuity of counsel may suggest. It is sufficient, if it is once laid down in an intelligible and unexceptionable manner. The instruction here asked and refused was but a branch of the next preceding instruction prayed for (which covered the whole ground), and is so put by the defendant. The latter asserted that "the fact that Morris and wife were in possession of the land before the Revolution, taking the rents and profits, is not of itself any evidence for or against the validity of the deed, because they were entitled to the possession whether the deed was delivered or not." This instruction was given by the court, and the jury had been previously instructed that it was necessary to the validity of the deed that it should have passed into the hands of the trustees, or of some person for them, with the intent that it should take effect as a conveyance. Indeed, the whole controversy between the parties turned upon the question of the delivery of the settlement deed, as the tenor of every instruction asked abundantly shows; and, therefore, it was necessarily implied in every step that there could be no holding or possession under the deed, if it was never delivered. It appears to us, then, that no injustice has been done to the defendant by refusing to give the instruction prayed; since, in a more general form, it had been already given.

The next objection is to the refusal of the court to instruct the jury, first, that "in the absence of any direct evidence that the trustees, or any other person for them, ever had the settlement deed, and the possession being equivocal in its character, the fact that it came out of the hands of Morris, in 1787, is sufficient of itself to rebut any presumption of a delivery arising from the proof of the deed by William Livingston, or the proof of the handwriting and death of the subscribing witnesses;" and, secondly, "that if not sufficient of itself to destroy any presumption of a delivery, it is, at least, evidence against a delivery, to be considered and weighed by the jury." The court gave as a reason for refusing this second branch, that Morris was, "technically, neither grantor nor grantee, and therefore the mere possession of the deed by Morris was no affirmative evidence either for or against the fact of delivery." This instruction has been already disposed of. The other instruction varies from that in the case of *Crane v. Jackson*, merely in substituting the words "direct evidence" for "all proof;" and the words, "and the possession being equivocal in its character," for "and there being no proof of a holding under it." It is obnoxious to the same objection which was relied upon in that case, for it called upon the court to express an opinion upon the nature, weight and effect of the evidence before the jury, which was no part of its duty. And the whole evidence being before the jury, it was their exclusive right to decide for themselves upon its credit and cogency.

§ 23. *A general objection to evidence, admissible for any purpose, is properly overruled.*

The next objection is to the admission of an extract from the journal of the assembly of the state of New York, for the year 1787, as follows: February 24, 1787. "Mr. Hamilton, from the committee to whom was referred the petition of Johanna Morris, on behalf of herself and the other children of Roger

Morris and Mary, his wife, setting forth that the said Roger and Mary had been attainted, and their estates sold and conveyed in fee-simple; that, by a settlement made previous to their intermarriage, the real estate of the said Mary was vested in Johanna Philipse and Beverley Robinson in the fee to certain uses; among others, after the decease of the said Roger and Mary, to the use of such child or children as they should have between them, and their heirs and assigns, and praying a law to restore to them the remainder of the said estate in fee, reported, that if the facts stated in such petition are true, the ordinary course of law is competent to the relief of the petitioners, and that it is unnecessary for the legislature to interfere. Resolved that the house do concur with the committee in the said report."

It was objected, first, that the journal of the proceedings in question was not legal or competent evidence against the defendant; and, secondly, not so without producing the petition mentioned in the journal. But the objections were overruled and the evidence admitted. Now, if the evidence was admissible for any purpose, the objections were rightly overruled. It did not appear to have been offered as proof of any of the facts stated in the petition, but simply of the public legislative proceedings, on the very claim and title now set up by the children of Morris at the early period of 1787. There were two points of view in which the evidence might be important, in the actual posture of the case before the jury. In the first place, it might be important to repel the notion that the claim of the children of Morris asserted in the present suit was stale, and founded upon a dormant deed, never brought forward until a very great lapse of time after its pretended execution, a circumstance which might essentially bear upon the fact of its having ever been delivered and acted upon as a valid instrument. In the next place, it might add strength to the probate of the deed by Governor Livingston, as his attention could scarcely fail of being called to such public proceedings, occurring at so short a period as within two months before the time of that probate. If his attention was called to these proceedings, the circumstance that the title was about to become a *lis mota* would naturally produce an increased caution, and a more anxious desire to recall, with perfect accuracy, every fact essential to the probate of the deed. It has been asserted at the bar that these were the very objects for which the extract from the journal was offered; and we cannot say that, for such purposes, it was not properly admissible.

§ 24. — *upon application, the court could restrain such evidence to its proper use.*

If any improper use, as evidence, was attempted to be made of it, it might have easily been restrained to its appropriate use by an application to the court. The objections, then, to its admission being general, and it being already admissible for some purposes, the decision of the court was unexceptionable.

The next objection is that the court erred in refusing to instruct the jury that "the evidence upon the one side or the other should not be submitted to the jury as *prima facie* or presumptive evidence, either for or against a delivery; but the jury should consider and weigh the whole evidence together, and from the whole determine whether or not the deed was delivered;" and in instructing the jury upon that prayer, "that the plaintiff had given *prima facie* evidence in support of his case, and such as was conclusive, if uncontradicted; and that this must be contradicted or disproved by controlling evidence on the part of the defendant, or the plaintiff is entitled to recover." The instruction prayed for and refused is precisely the same as exists in the case of Crane

v. Jackson, and it is unnecessary to do more than to refer to the opinion there given for the reasons why this court deem the refusal entirely correct.

§ 25. *Prima facie* evidence is such as, in judgment of law, is sufficient to establish a fact. In the absence of all controlling or rebutting evidence, it becomes conclusive.

In regard to the instruction actually given, we do not perceive any solid ground upon which it can be adjudged erroneous. It was given as a response to the instruction asked by the defendant on the great hinge of the controversy, the question as to the delivery of the settlement deed. In a preceding instruction which the court had given to the jury, upon the application of the defendant himself, the probate of the deed by Governor Livingston before Judge Hobart was treated as *prima facie* evidence of a delivery. It was there stated that the probate was "only *prima facie* evidence, or evidence from which a delivery may be presumed, and may be rebutted by direct or circumstantial evidence, which raises a contrary presumption." Is it not plain, then, that if not so rebutted, the plaintiff is entitled to recover? What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law on this subject. The very point in this very aspect occurred in the case of Carver v. Jackson, 4 Pet., 1, where the court, speaking of the probate of this very deed, used the following language (p. 82): "We are of opinion that, under these circumstances, and according to the laws of New York, there was sufficient *prima facie* evidence of the due execution of the indenture, by which we mean not merely the signing and sealing, but the delivery also, to justify the court in admitting it to be read to the jury; and that, in the absence of all controlling evidence, the jury would have been bound to find that it was duly executed. We understand such to be the uniform construction of the laws of New York in all cases where the execution of any deed has been so proved, and has been subsequently recorded. The oath of a subscribing witness before the proper magistrate, and the subsequent registration, are deemed sufficient *prima facie* evidence to establish its delivery as a deed. The objection was not, indeed, seriously pressed at the argument."

We have seen no reason, upon the present argument, to be dissatisfied with the opinion thus expressed. It appears to us to be founded in principles of law, which cannot be shaken without undermining the great securities of titles to estates. The circuit court, in its instruction, did no more than express the same opinion, in language of the same substantial import. Upon the whole, upon a careful review of the case, we are of opinion that the judgment of the circuit court ought to be affirmed, with costs.

MR. JUSTICE BALDWIN dissented.

CASTLE v. BULLARD.

(23 Howard, 172-190. 1859.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.— This was a writ of error to the circuit court of the United States for the northern district of Illinois. Edward F. Bullard, a citizen of the state of New York, complained in the court below of Joseph Filkins, J. P. Phillips, Elihu Granger and Edward H. Castle in a plea of trespass on the case, alleging, at the same time, that they were partners, doing business as commission merchants at Chicago, in the state of Illinois, under the style and firm of Filkins, Phillips & Company.

According to the transcript, the declaration was filed on the 7th day of July, 1856. As amended, it contained five counts setting forth, in various forms, two distinct grounds of complaint against the defendants, which may be briefly stated as follows:

In the first place, it is alleged that the defendants, on the 8th day of November, 1855, fraudulently sold on credit, at Chicago, to one Edward H. Castle, certain goods belonging to the plaintiff, and which he had previously intrusted to them as commission merchants, for sale; and that the purchaser, at the time of the sale, was in failing circumstances and irresponsible; charging, in the same connection, that the defendants, at the time of the transaction, well knew that the purchaser was insolvent, and wholly unfit to be trusted; and that they negotiated the sale with intent to deceive and defraud the plaintiff, whereby he suffered loss to an amount equal to the value of the goods so sold and delivered.

He also alleged in other counts that the defendants, prior to the sale of the goods, and at the time when it was made, represented to him that the said Edward H. Castle was worth at least \$8,000 above all his liabilities; that he was not embarrassed in his business affairs or much indebted, and that he was a safe, cautious business man, and every way worthy of credit. Those representations, the plaintiff alleged, were false, and that the defendants well knew they were so at the time of the negotiation and when the goods were delivered; and that they were so made by the defendants with intent to deceive and defraud him in the premises, and had the effect to induce him to consent to the sale, and to deliver the goods, whereby he suffered loss, as is alleged in the other counts.

To those charges, as more formally set forth in the several counts of the declaration, the defendants jointly pleaded that they were not guilty; and on the 3d day of January, 1857, the parties went to the trial on that issue.

Testimony was introduced by the plaintiff in the opening, showing that Filkins, Phillips & Company were commission merchants at the time of this transaction, doing business at Chicago, in the state of Illinois, and that they received the goods in question, a short time prior to the sale, from one William H. Adams, of that city, to whom the goods had previously been sent by the plaintiff to be sold on commission. He also proved the sale of the goods by one of the firm of Filkins, Phillips & Company, to Edward H. Castle, on credit, substantially as alleged in the declaration, and that two of the partners and the clerk of the firm were present at the time the sale took place.

Facts and circumstances were also adduced by the plaintiff, tending strongly to show that the purchaser was largely indebted and in failing circumstances at the time of the negotiation, and that two or more of the members of the

firm must have known that he was insolvent and utterly unworthy of credit. Five per cent. was charged as commissions on the sale of the goods, amounting to the sum of \$135; and the plaintiff introduced testimony tending to show that the purchaser, as a part of the transaction, gave his promissory note to the firm, payable in forty-five days, to secure that amount.

Evidence was also introduced by the plaintiff, showing that representations as to the business circumstances and pecuniary responsibility of the purchaser were made to him, at the time of the sale, by one or more of the defendants, substantially in the manner as alleged in the declaration. And it was clearly shown that two or more of the firm well knew that those representations were false, and that the subject of them was wholly unfit to be trusted for that amount. Proof was also introduced by the plaintiff, showing that the purchaser was a relative of one of the firm, and that he had repeatedly been assisted by others in obtaining credit. And many of the circumstances were of a character to afford a ground of presumption that all of the defendants must have known the true state of his affairs, and that he was insolvent.

When the plaintiff rested his case in the opening, the counsel of the defendants moved the court to order a nonsuit as to the defendant Granger, upon the ground that the evidence offered by the plaintiff did not tend to charge him with a participation in the fraud alleged in the declaration. At that stage of the cause, there was no evidence immediately connecting him with the transaction, except what might properly arise from the fact of his being one of the partners. But the court overruled the motion for a nonsuit, and the defendants excepted. They then requested the court that the jury might be permitted to retire, and consider whether the evidence introduced was sufficient to charge this defendant; and if not, that the jury might be directed to find him not guilty; urging, as a reason for the motion, that they desired to examine him as a witness for the other defendants; but the court overruled the application, and the defendants excepted.

After these motions were overruled, evidence was introduced by the defendants and further evidence was given by the plaintiff; all of which was submitted to the jury, who returned their verdict in favor of the plaintiff. Numerous exceptions were taken by the defendants in the progress of this trial to the rulings of the court in admitting and rejecting evidence, and they also excepted to two of the instructions given by the court to the jury.

§ 26. *A nonsuit cannot be ordered against the consent of plaintiff.*

1. As the facts have been found by the jury, the questions to be determined are those that arise upon the exceptions. Of these, the first in the order of the argument at the bar is the one founded upon the refusal of the court to order a nonsuit as to the defendant Granger, as requested by the counsel at the close of the plaintiff's testimony.

Several answers may be given to this complaint, each of which is sufficient to show that the exception cannot be sustained. In the first place, circuit courts have no power to grant a peremptory nonsuit against the will of the plaintiff. It was expressly so held by this court in *Elmore v. Grymes*, 1 Pet., 471, and the same rule was also affirmed in *D'Wolf v. Rabaud*, 1 Pet., 497 (CONTRACTS, §§ 1772-75). In the case last named, the defendants at the trial, after the evidence for the plaintiff was closed, moved the court for a nonsuit; which was denied, and the defendant excepted, and sued out a writ of error; but this court held that the refusal to grant the motion constituted no ground for the reversal of the judgment, remarking, at the same time, that a nonsuit

cannot be ordered in any case without the consent and acquiescence of the plaintiff. Repeated decisions have been made to the same effect; and as long ago as 1832 it was declared, as the opinion of this court, in *Crane v. The Lessees of Morris*, 6 Pet., 609, that this point was no longer open for controversy. See, also, *Silsby v. Foote*, 14 How., 222.

§ 27. *A nonsuit as to one of several defendants at common law is irregular.*

Another answer to this complaint arises from the fact that the motion for nonsuit is inappropriate in a case like the present, where there are other defendants to whom it cannot be applied. In actions of this description, where there is more than one defendant, the charge, beyond question, as a general rule, is joint and several, and, consequently, one may be found guilty and another not guilty; but at common law there cannot regularly be a nonsuit as to one and a verdict as to others; and for that reason, whenever it appears that there is evidence in the case to charge one or more of the defendants, a nonsuit is never granted at common law, even in jurisdictions where the authority to grant the motion in a proper case is acknowledged to exist. *Revett v. Browne*, 2 M. & P., 18; *Collier on Part.* (Am. ed., 1848), sec. 809, p. 698.

But a more decisive answer to this ground of complaint arises from the fact that there was evidence in the case tending to charge this defendant which rendered it proper that the question of his guilt or innocence should be submitted to the jury. He was a member of the firm of Filkins, Phillips & Company, as appears by the bill of exceptions. All of the goods in question were deposited in their warehouse, and the jury have found that the goods were sold by the firm. Two of the partners and the clerk of the firm were present at the sale, and the commissions earned in transacting the business went to the benefit of all the partners of which the firm was composed. In view of all the circumstances as disclosed in the evidence, it would be impossible to say, as matter of law, that it was error in the court to overrule the motion, even if the authority to grant it were conceded.

§ 28. *A jury will be directed to find a separate verdict for one defendant at the close of plaintiff's case only when there is no evidence whatever against him.*

2. We come now to examine the second exception, which arises out of the refusal of the court to permit the jury to retire at the close of the plaintiff's case, and consider whether the evidence offered in the opening was sufficient to charge this defendant with a participation in the alleged fraud.

Upon this subject the general rule is, that if a defendant who is a material witness for the other defendants has been improperly joined in the suit, for the purpose of excluding his testimony, the jury will be directed to find a separate verdict in his favor; in which case, the cause being at an end with respect to him, he may be admitted as a witness for the other defendants. This course, however, can be allowed only where there is no evidence whatever against him, for the reason that then only does it appear that he was improperly joined in the suit, through the artifice and fraud of the plaintiff. If there be any evidence against him, then he is not entitled to a separate verdict, because, under such circumstances, it does not appear that he was improperly joined, and his guilt or innocence must wait the general verdict of the jury, who are the sole judges of the fact. 1 Greenl. Ev., sec. 358; *Brown v. Howard*, 14 John., 122.

Courts of justice are not quite agreed as to what stage of the trial the party thus improperly joined in the suit may insist upon a verdict in his favor —

whether at the close of the evidence offered by the plaintiff in the opening, or whether he must wait until the case is closed for the defendants. Mr. Greenleaf regards it as the settled practice, that if, at the close of the plaintiff's case, there is one defendant against whom no evidence is given, he is entitled instantly to be acquitted; and it must be admitted that the decision of the court in *Childs v. Chamberlain*, 6 C. & P., 213, favors that view of the law. But Lord Denman held, in *Sowell v. Champion*, 6 Ad. & Ell., 415, that the application to a judge in the course of a cause, to direct a verdict for one or more defendants in trespass, is addressed to his discretion, and that the discretion was to be regulated, not merely by the fact that, at the close of the plaintiff's case, no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. There is, says the learned judge, so palpable a failure of justice, where the evidence for the defense discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place until there is the strongest reason to believe that such a consequence cannot follow.

Some courts hold that the application, in all cases, is addressed to the discretion of the court. *Brotherton v. Livingston*, 3 Watts, 334; 1 Holt, 275. Other courts have held that, where there is no evidence to affect a particular defendant in actions *ex delicto* against several, a separate verdict is demandable as a matter of right, and that a refusal to grant the application is the proper subject of exceptions. *Van Dusen v. Van Slyck*, 15 Johns., 223; *Bates v. Conklin*, 10 Wend., 389. Whatever diversities of decision there may be upon this point, all agree that the application ought not to be granted, unless it appear that there is no evidence to affect the party in whose favor it is made. *Brown v. Howard*, 14 John., 122. Now, it has already appeared that there was evidence in this case affecting this defendant; and, upon that ground, we hold that the circuit court was fully warranted in refusing to grant the application.

§ 29. *In actions founded on fraud, other similar fraudulent acts are admissible in evidence to show intent.*

3. After a careful consideration of the several exceptions to the rulings of the court in admitting and rejecting evidence, we are of the opinion that none of them can be sustained. Considering the great number of the exceptions, their separate examination at this time will not be attempted, as it would extend this investigation beyond reasonable limits. One class of them arises out of objections to the admissibility of evidence offered by the plaintiff, tending to show that the defendants, or some of them, had aided the purchaser in this case in committing similar acts of fraud in the purchase of other goods, about the same time, from other persons. According to the evidence, some of those purchases were prior and others subsequent to the period of the sale of the goods in this case. All of this class of exceptions may well be considered together, as they involve the same general principles in the law of evidence.

Decided cases have established the doctrine that cases of fraud like the present are among the well-recognized exceptions to the general rule, that other wrongful acts of the defendant are not admissible in evidence on the trial of the particular charge immediately involved in the issue. Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration. Assuming the proposition as

stated to be correct, of which there can be no doubt, it necessarily follows, that no one of this class of exceptions is well taken. Some of the decided cases go farther, and hold that such evidence is admissible, as affording a ground of presumption to prove the main charge; but, whether so or not, it is clearly competent as tending to show the intent of the actor in respect to the matters immediately involved in the issue on trial. *Cary v. Hotailing*, 1 Hill, 316; *Irving v. Motley*, 7 Bing., 543; *Rowley v. Bigelow*, 12 Pick., 307. Another class of the exceptions arises out of objections made by the defendants to the admissibility of evidence introduced by the plaintiff, which, it is insisted, was irrelevant and immaterial. Some twelve exceptions are embraced in this class, and they are addressed to a large portion of the testimony introduced by the plaintiff.

In the course of the trial, the plaintiff offered evidence tending to show the pecuniary circumstances of the purchaser of these goods, his acts and conduct in respect to the goods after the purchase, and that he was largely in debt and insolvent. He also introduced evidence tending to show that two or more of the defendants had represented to other persons, about the same time, that the purchaser of the goods in question was in good standing, and that they had likewise assisted him in obtaining credit with other dealers in merchandise.

To all or nearly all of this evidence, as more fully detailed in the transcript, the defendants objected, and those objections constitute the foundation of the several exceptions included in this class. Much of the evidence was of a circumstantial character; and it is not going too far to say, that some of the circumstances adduced, if taken separately, might well have been excluded.

§ 30. *In actions for fraud a wide range of investigation is permitted in the production of evidence.*

Actions of this description, however, where fraud is of the essence of the charge, necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth. Great latitude, says Mr. Starkie, is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. 1 Stark. Ev., p. 58.

Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. Applying these principles to the several exceptions under consideration, and it is clear that no one of them can be sustained.

Other exceptions to the rulings of court were taken during the progress of the trial; but it is so obvious that they are without merit, that we think it unnecessary to give them a separate examination at the present time, and they are accordingly overruled. At the argument, it was supposed by the counsel of the original defendants that the circuit judge had allowed the plaintiff to

introduce parol proof of the contents of a writ of attachment, referred to by one of the witnesses; but, on examination of the transcript, we find that no such evidence was admitted.

§ 31. *A partnership is liable for false representations of one of the partners.*

4. Exceptions were also taken to certain portions of the charge of the court. On this branch of the case, most reliance was placed upon certain objections to the first instruction given to the jury, which is as follows: "If the goods were in the custody of the defendants, for sale on commission, and one or more of the partners made false and fraudulent representations as to the party to whom they were to be sold by the defendants, then the partnership would be liable, if, in consequence of such representations, the plaintiff consented to the sale to that party, and the sale was actually made by the firm to the party."

Some criticisms were also made in the printed argument for the defendants upon the second instruction, which, like the former, was duly excepted to; but, inasmuch as it is not essentially different in principle from the other, and as the questions presented in each depend upon the same general considerations, it will not be reproduced.

Both instructions were framed upon the theory that the defendants were not liable, unless the jury found from the evidence that the goods were actually sold by the firm; which, to say the least of it, was a theory sufficiently favorable to the defendants. Judge Story says, in his valuable work on partnerships, that torts may arise in the course of the business of the partnership, for which all the members of the firm will be liable, although the act may not in fact have been assented to by all the partners. Thus, for example, if one of the partners should commit a fraud in the course of the partnership business, all the partners may be liable therefor, although they may not all have concurred in the act. So, if one of a firm of commission merchants should sell goods consigned to the firm, fraudulently, or should sell goods so consigned in violation of instructions, all the partners would be liable. Story on Part., sec. 166; Collier on Part. (Am. ed., 1848), secs. 445 and 457; Nicoll v. Glennie, 1 Maule & Selw., 588.

In precise accordance with this view of the law, it was said, and well said, by the court, in *Olmsted v. Hotailing*, 1 Hill, 318, that it does not lie with one to claim property through the fraudulent act of another, whether partner or agent, without being affected by that act the same as if it were his own; and we think the same principle must apply in a case like the present, when a firm doing business as commission merchants have received the fruits of the fraud in the commissions earned for transacting the business. Where one assuming to be an agent had committed a fraud in a sale, it was held, in *Taylor v. Green*, 8 Car. & P., 316, that the mere adoption of the sale and the receipt of the money, by the person for whom the sale was made, rendered him liable for the fraud. Suffice it to say, without any further reference to authorities, that the theory of the instructions was sufficiently favorable to the defendants.

§ 32. *Rule as to giving instructions.*

5. Complaint is also made that the instructions excepted to were not sufficiently comprehensive; that they did not embrace all the elements which constituted the charge, as laid in the declaration. Strong doubts are entertained whether this point is properly raised by the bill of exceptions; but whether so or not, we are satisfied that the exception cannot be sustained. Instructions given by the court at the trial are entitled to a reasonable interpretation; and

if the proposition as stated is correct, they are not, as a general rule, to be regarded as the subject of error, on account of omissions not pointed out by the excepting party. Seven requests for instructions to the jury were presented by the counsel of the defendants, every one of which was given by the court, without any qualification. If the defendants had supposed that the instructions given were either indefinite or not sufficiently comprehensive, they might well have asked that further and more explicit instructions should be given; and if they had done so, and the prayer had been refused, this objection would be entitled to more weight. But another answer may be given to this objection, which is entirely conclusive against it. On recurring to the transcript, we find that the court, before the instructions excepted to were given, explained to the jury the nature and character of the charge, describing substantially the two forms in which it was presented in the several counts of the declaration; and in effect instructed them that it must be proved in the one or the other of those forms, in order to entitle the plaintiff to a verdict in his favor. Those explanations immediately preceded the instructions embraced in the exceptions, and, in fact, may be regarded as a part of the same. Beyond question, the instructions excepted to must be considered in connection with those explanations; and when so considered, it is obvious that this objection cannot be sustained.

In view of the whole case, we think the defendants have no just cause of complaint, and that there is no error in the record. The judgment of the circuit court, therefore, is affirmed, with costs.

UNITED STATES *v.* 146,650 CLAPBOARDS.

(Circuit Court for Rhode Island: 4 Clifford, 301-306. 1874.)

STATEMENT OF FACTS. — The property was seized by the collector and libeled for false invoice of value.

Verdict in the district court for claimant and writ of error from this court, assigning refusal to admit in evidence another invoice of inferior clapboards at higher valuation shipped by claimant and entered at the same time; also, that the court erroneously instructed the jury as to honest error of law or fact in making the invoice.

Opinion by CLIFFORD, J.

Goods imported into the United States, subject to *ad valorem* duty, could not be admitted to entry under the act of March 1, 1823, unless a true invoice of the same was presented to the collector at the time of the entry, except as provided in section 2 of that act; and section 4 of the act of May 28, 1830, provided that if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation or extension, or otherwise, to evade or defraud the revenue, the same shall be forfeited. 3 Stat. at L., 729; 4 Stat. at L., 410. Regulations of a similar nature, but much more minute in their character, are contained in section 1 of the act of March 3, 1863, and the same section provides that if the owner, consignee or agent shall knowingly make or attempt to make an entry thereof by means of any false invoice or false certificate of a consul, vice-consul, or commercial agent, or of any invoice which shall not contain a true statement of all the particulars required, or by means of any other false or fraudulent

document or paper, or of any other false or fraudulent practice or appliance whatsoever, said goods or their value shall be forfeited and disposed of as other forfeitures for violation of the revenue laws. 12 Stat. at L., 738.

§ 33. *In cases of fraud, evidence of other similar fraudulent acts, done about the same time, is admissible to show intent or guilty knowledge.*

Cases of fraud like the one charged in the information are among the well-recognized exceptions to the general rule, that other wrongful acts of the respondent are not admissible in evidence on the trial of the particular charge immediately involved in the issue. Legal evidence of other fraudulent acts of a similar nature, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, are admissible in cases of this description, with a view to establish the intent of the actor in respect to the matter charged against him in the information. Decided cases may be found which go further, and hold that such evidence is admissible as affording a ground of presumption to prove the agency of the respondent in the matter charged; but whether so or not, it is clearly competent to show the intent or guilty knowledge of the actor in respect to the matters immediately involved in the issue on trial. *Cary v. Hotailing*, 1 Hill, 311; *Irving v. Motley*, 7 Bing., 543; *Rowley v. Bigelow*, 12 Pick., 307; *Castle v. Bullard*, 23 How., 186 (§§ 26–32, *supra*). Intent and knowledge were distinctly put in issue by the pleadings, and in such cases it is allowable, as well in civil as in criminal cases, to introduce evidence of other acts and doings of the respondent, of a kindred character, in order to illustrate or establish his intent, knowledge or motive in the particular act directly in judgment. All experience shows that such must be the rule, as in no other way would it be practicable, in many cases, to establish the real intent or motive of the actor, especially in transactions where the single act, if taken by itself, would not be decisive either way.

Guilty knowledge is in many cases an essential ingredient of crime, and, in the trial of such cases, evidence of the commission of other kindred offenses about the same time is always admitted as tending to prove that ingredient of the charge. Many cases of fraud also require the application of the same principle, as the charge of fraud usually involves the motive and intent of the party charged, which can only be deduced from a great variety of circumstances, no one of which is absolutely decisive. Positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, as the force and effect of circumstantial facts, usually and almost necessarily, depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially if corroborated by moral coincidences, be sufficient to constitute conclusive proof. *Wood v. United States*, 16 Pet., 360. Hence, it is held, that whenever the intent or guilty knowledge of a party is material to the issue, collateral facts, tending to establish such intent or knowledge, are properly admissible in evidence. *United States v. Harvey*, 2 Paine, 200; *Bottomley v. United States*, 1 Story, 143; *Alfonso v. United States*, 2 Story, 428; *Taylor v. United States*, 3 How., 207; *Buckley v. United States*, 4 How., 259. Concede all that, and still it is contended that the evidence offered was properly rejected because the entry of the merchandise

described in the invoice offered in evidence was not made about the time the supposed fraudulent act charged in the information, and the argument is, that the evidence of other fraudulent acts is never properly admissible, even to show a criminal or fraudulent intent or guilty knowledge of the respondent, unless the acts were of a kindred nature, and were done and committed about the time of the alleged criminal or fraudulent act for which the accused or respondent is on trial. But the evidence rejected in this case was not offered to prove a prior criminal or fraudulent act, nor does the offer of proof, as disclosed in the bill of exceptions, assume that the prior entry was made to defraud the revenue or to evade the payment of the lawful duties. On the contrary, the offer of proof assumes that the prior entry was made in good faith, and that the merchandise described in the invoice was correctly valued. Plainly the evidence was not offered for any such purpose, but to show that the importer well knew that the merchandise imported was of much greater value in the markets of the country where it was produced than the price given in the invoice presented to the collector. Beyond all doubt, it was proper to show that the value as given in the invoice was less than the actual market value of the merchandise, and that the party making the entry knew that fact.

§ 34. *Great latitude is allowed in the admission of circumstantial evidence in cases of fraud.*

Direct proof of those allegations could hardly be expected, and it follows that the prosecutor might properly resort to circumstances to support the charge. Great latitude is justly allowed by the law to the reception of circumstantial evidence, whenever a resort to it becomes necessary, either from the nature of the inquiry or the failure of direct proof. Collateral facts may be proved in such a case, though, when considered separately, they are quite insufficient to establish the given hypothesis, if it appears that, by their joint operation, they tend to support the theory they are offered to sustain. Tested by that rule, it is clear that the evidence offered and rejected had some tendency to prove that the invoice value of the merchandise was less than the market value of the same, and that the importer knew that fact at the time he made the entry; and it is equally clear that, if the importer knew what the market value of the merchandise was, it is wholly immaterial when or by what means he acquired such knowledge. It was assumed by the United States that the price of such merchandise was substantially the same at the two periods, and, if such was the fact, it is difficult to see why the evidence was not admissible. They offered to prove that fact, and the ruling having been made with the understanding that, if the evidence was admitted, it would be followed up by proof to that effect, I am of the opinion that the ruling was erroneous, and that the objection to its admissibility should have been overruled. 2 Graham & W. New Tri., 665; Hilliard, New Tri., 310. Suppose it were otherwise, still I am of the opinion that the judgment must be reversed, for the reason given in the second error assigned. Much discussion of that proposition is unnecessary, as the instruction given to the jury is directly opposed to the rule adopted by the unanimous decision of the supreme court. *Barlow v. United States*, 7 Pet., 410; *Cambrioso v. Maffet*, 2 Wash., 104; *United States v. Barlow*, 2 Paine, 64.

§ 35. *Mistake of law is no defense to an information for forfeiture.*

Mistake of law in such a case is no defense to an information for a forfeiture, nor is there anything in the act of congress under which the information in

this case was drawn to take the case out of the general rule established by the authorities cited by the United States. Judgment reversed, and the case remanded for a new trial.

THOMPSON *v.* BOWIE.

(4 Wallace, 463-474. 1866.)

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—Thompson brought suit in the court below to recover on three promissory notes, purporting to be given on the 1st day of January, 1857, by Bowie to Steer, and indorsed to him. Bowie sought to avoid their payment on the ground that they were founded on a gaming consideration, and therefore void, even in the hands of an indorsee, without notice, because the statute of 9th Anne, avoiding gambling contracts, was in force in the District of Columbia, where they were executed. There was no direct evidence offered on the trial to impeach the consideration of the notes; but what is called circumstantial evidence, in contradistinction to direct evidence, was relied on to prove the defense. A brother of the defendant was called by him, and allowed to testify that whenever his brother was under the influence of liquor, he had a *propensity to gamble*; and it is contended, as he was drunk on the morning the notes were given, and as they were in the handwriting of a professional gambler and payable to the keeper of a gaming-house, the inference is fair and reasonable that they were given for money won at play.

Did the court err in admitting this evidence? If it did err in this matter, then the judgment must be reversed, for undoubtedly the jury, in the formation of their verdict, must have been greatly influenced by testimony that the general character or habit of Bowie was to gamble when intoxicated.

§ 36. *Proof of general habits of gambling during intoxication is not proof of gambling at a particular time while intoxicated.*

All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Bowie to gamble, when drunk, legally tend to prove that he *did* gamble on the day the notes were executed? The general character and habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party. 1 Greenl. Ev., § 54. Bowie was not charged with fraud, or with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth. When trying a prisoner on an indictment for a particular crime, proof that he has a general disposition to commit the crime is never permitted. 1 Phillips on Ev., p. 143; *The State v. Field*, 14 Me., 249. If a man charged with the larceny of a horse was proved—in connection with other evidence tending to show his guilt—to be drunk on the day the horse was stolen, would any court allow the gen-

eral evidence to go to the jury that, when drunk, he always stole a horse? And yet the general rules of evidence are the same in civil as in criminal cases. "There is no difference," says Abbott, Justice (*Rex v. Watson*, 2 Stark., 155; *Regina v. Murphy*, 8 Carr. & P., 306), "as to the rules of evidence between criminal and civil cases; what may be received in the one may be received in the other, and what is rejected in the one ought to be rejected in the other."

The uniform habit of a party to loan money at usurious interest was not considered by the supreme court of New York a legal foundation for a verdict establishing usury, although one usurious loan had been proved between the parties to the suit, and it was altogether probable that the case under review was of that description. *Jackson ex dem. Norris v. Smith*, 7 Cow., 719. The uniform habit of Bowie, when drunk, to gamble is not a legal foundation for this verdict, although it is highly probable that the notes in controversy were executed by him for a gaming consideration.

There are other assignments of error, which it is unnecessary to notice, as the decision of this question disposes of the case. The judgment of the court below is reversed, and mandate ordered, with instructions to award a *venire de novo*.

MR. JUSTICE GRIER dissented.

JAMES v. WHARTON.

(Circuit Court for Ohio: 3 McLean, 492, 493. 1844.)

Opinion by LEAVITT, J.

STATEMENT OF FACTS.—This was an action of *assumpsit*, brought by the plaintiff as an assignee under the bankrupt law. On the trial a book of accounts was produced, and the plaintiff proposed to authenticate it as evidence to the jury, by proof that the entries which it contained were in the handwriting of a clerk, now a resident of another state. This evidence was objected to, as secondary in its character, and, therefore, inadmissible, unless the death of the clerk was first proved.

§ 37. *When a clerk who made entries in a book of accounts is dead or beyond the jurisdiction of the court, the entries themselves are admissible evidence, but not copies.*

The doctrine is now well settled, that a book of accounts may be substantiated by proof of the handwriting of the clerk who made the original entries, if he is dead, or without the jurisdiction of the court. The case of *Cram v. Spear*, 8 Ohio, 494, is an authority in point. And recent elementary writers on the law of evidence sustain the position that the fact of the death of the clerk is not material to the admissibility of this kind of evidence. *Greenl. Ev.*, 143. This writer remarks that "the value of the entry as evidence, lies in this, that it was contemporaneous with the principal fact done, forming a link in the chain of events and being part of the *res gestæ*." *Id.*, 144. But this principle does not apply to the book of accounts now offered in evidence. This is not a book of original entries, but a mere transcript from that book, made by a clerk who did not make those entries. The ground on which alone proof of the handwriting of the clerk gives validity to the book of accounts is, that it is the book of original entries; that the clerk is supposed to be cognizant of the transactions which it records; and that the entries made by him were made at or near the time they purport to have been made; and are,

therefore, a part of the *res gestæ*. As a mere copy, made by a clerk who did not keep the original book, proof of his handwriting in no way conduces to establish the authenticity of the book offered in evidence; and it is, therefore, excluded from the consideration of the jury.

GALE v. NORRIS.

(Circuit Court for Illinois: 2 McLean, 469-472. 1841.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is a motion for a new trial, and it turns upon exceptions taken to a deposition at the last term, which was then, on the trial of this case, admitted in evidence. The motion was continued from that term. The deposition was introduced to prove a book account of the plaintiff, who resides at New Orleans, where the transactions which led to this suit were had, and where the books of the plaintiff now are.

The witness states that he was clerk in the commission house of the plaintiff at New Orleans; that he has examined the accounts on the book, and the items copied by him, and particularly designated, are correct. They are items advanced by the plaintiff to fit out a vessel, etc., and of which he had personal knowledge. There are some other items charged in gross, to wit: one for \$361, and others, amounting to \$700, which were entered by the book-keeper, who is now deceased. Of these items the witness has no personal knowledge. They are such articles as are usually furnished on similar occasions, and they are set down at the customary prices; but the witness knows nothing of their delivery. This deposition was permitted to be read as evidence at the last term, and the question now is, whether it should have been admitted.

§ 38. *Entries in account books, regularly made by a clerk who is deceased, are admissible evidence upon proof of his handwriting.*

Books of accounts are not evidence at common law. But books are received as evidence under peculiar circumstances; as, where the entries have been regularly made by a clerk who is deceased. In many of the states this subject is regulated by statute, and in others, there have been certain rules established as to the admission of books in evidence, not entirely in accordance with the established law of evidence. The leading case on this subject is Lord Torrington's, reported in 1 Salk., 285. In that case it was held that, in an action of *assumpsit*, where the usual course of the plaintiff's dealings, who was a brewer, appeared to be that his drayman should come every night to the clerk of the brewhouse and give him an account of the beer delivered out by them, which he set down in a book kept for the purpose, and the drayman signed it. The drayman died; his entries, signed by him, were held to be good evidence, on proof of his handwriting.

If the person who made the entry was employed as shopman or clerk to deliver goods, etc., and he is since dead, an entry made by him will be evidence, under certain restrictions. *Cooper v. Marsden*, 1 Esp. N. P., 6, 2. The entries in a book are rejected, on the ground that they are mere hearsay, and can only be made evidence by some extrinsic circumstance. Some of the English authorities considered the evidence admissible, in Lord Torrington's case, on the ground that the entry was made against the interest of the party making it. However this may have been viewed in certain cases, it is not the light in which the principle of that case has been generally considered.

The rules of evidence were formed and modified to meet the exigencies of

human transactions, and to conduct the mind to truth; that they should be matured and expanded so as to meet the complicated and growing relations of society was to be desired and expected. But these rules are not to be lightly departed from. Where they fail to meet the endless variety of facts in cases which arise, they afford principles susceptible of expansion, so as to apply to the leading facts in every controversy.

Mere entries in a book of accounts are not evidence, whether made by the party himself or his clerk. But where entries were made by a party against himself, they were held to be evidence in case of his death. This was upon the ground that he could have had no motive to make a false entry. And this principle was eventually applied to a clerk, where his entries were regularly made, and the books upon their face were fair. In the case of *Nicholls v. Webb*, 8 Wheat., 326 (§§ 42-45, *infra*), the court say: "We think it a safe principle that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is, of course, liable to be impugned by other evidence, and to be encountered by any presumptions or facts which diminish its credibility or certainty." And it is now fully settled that the entries of his deceased clerk, in the books of a merchant, are evidence in his behalf, the handwriting being proved. *Clark v. Magruder*, 2 Har. & J., 77; *Welsh v. Barrett*, 15 Mass., 386; *Brown v. Brown*, 2 Wash., 151; *Union Bank v. Knapp*, 3 Pick., 96; *Patton v. Craig*, 7 Serg. & R., 126; *Hood v. Reeve*, 3 Carr. & P., 532; *Halliday v. Martinet*, 20 John., 160; *Wilbur v. Selden*, 6 Cow., 162.

§ 39. — *but the original books must be produced, not copies.*

Had the books of the plaintiff been before the court, the entries in the handwriting of the deceased clerk would have been evidence, his handwriting being proved. But the paper attached to the deposition contained a copy from the books. So far as the deponent could swear to the items delivered, this copy was a part of the deposition; but it was no evidence of the articles charged, of which the deponent had no knowledge. This paper, in regard to these articles, was incompetent evidence on two grounds: First, it was a mere copy from the books; and, in the second place, some of the entries are in gross, not specifying the items. A new trial must, therefore, be granted. As the books of the plaintiff are at New Orleans, some inconvenience may arise from this decision. If his books are so connected that he cannot, without injury, bring them to this court, it might perhaps be deemed proper by the court to appoint a commissioner to examine the books, and take testimony respecting them. This, however, is a mere suggestion, and not a settled rule of practice.

OWEN *v.* ADAMS.

(Circuit Court for Virginia: 1 Marshall, 72-76. 1803.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— In this case the plaintiff, who is a London merchant, offered in evidence an account taken from his books, which commenced in the year 1784, connected with a receipt signed "*Hunt and Adams*," for a box delivered in January, 1785, and a letter from the same individuals, dated in June, 1790, mentioning a remittance then made in snuff, and acknowledging a further balance to remain due in terms which imply that balance to have been by no means inconsiderable. The books from which the account was taken are

proved to have been kept by a clerk who is since dead; and the account is proved to be an exact copy from those books. Another witness swears that he has compared the account with the original entries, and that it corresponds with them, but he does not depose to the handwriting in which those original entries are made.

The plaintiff contends that, under these circumstances, the account may be submitted to the consideration of the jury. This question depends entirely on the law of evidence, and as no legislative provision has been made for the case, it is supposed to be governed by the rules of the common law.

§ 40. *Books of account are inadmissible in evidence unless they are originals and it is proved that the clerk who made the entries relied on is dead and his handwriting proved.*

The common law on this subject is believed to have been laid down with perfect accuracy by Mr. Blackstone, in his Commentaries, vol. iii, p. 368. "So, too," says that author, "books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory, and if such servant, who was accustomed to make those entries, be dead, and his hand be proved, the book may be given in evidence."

This apparently relates to original entries, not only because the principle, that the best legal evidence which the nature of the thing affords must be produced, is directly recognized by Blackstone, while speaking on the same subject, but because the expression, that "the servant who made the entries might refer to the book to refresh his memory," plainly designates such a servant as could have proved the delivery of the goods. The counsel for the plaintiff has not controverted this principle of law, but has contended that the clerk who is dead, in this case, was the person by whom the original entries were made. Privately, I am inclined to believe the fact to have been so, but I do not feel myself at liberty to deliver that opinion in this place. Exact uniformity of decision ought to be observed; and when principles are departed from, those substituted in their place ought to be so strongly marked as not afterwards to be misunderstood. In this case, the term "*books*" is used; and if that term might be understood to mean all the books, or the original books of entry in this case, it ought so to be understood in every case, and then the rule would be completely changed.

Neither do I think the form of the entries evidence that the original books were kept by the clerk who is dead. This essential fact, on which the admissibility of the account depends, ought to be plainly stated by the party who would avail himself of that account. Neither do I think the collateral testimony which has been offered can help the case. That testimony shows the existence of a debt, but not its amount. The plaintiff can only be admitted to establish its amount by legal evidence; and to make his books legal evidence, he ought to prove that the clerk who made the original entries is dead. It would be as dangerous to admit a plaintiff to establish the amount of a debt by his books, as to prove the existence of the debt by the same evidence. I therefore felt no doubt, when this case was first mentioned, in determining the testimony to be inadmissible, if it was a case of the first impression in this court, and if I could draw it out of the case of *Lewis, Executor of Thruston, v. Norton*.

A case was referred to as having established the admissibility of such testimony; but on a reference to the record it appeared that the books from which

the copy had been taken were the original books, or the books in which the original entries had been made, and the clerk who kept them was dead. The terms used were considered as synonymous with shop or day-books; and that decision will be adhered to.

I had much more difficulty in getting over the case of *Lewis v. Norton*, and was at first disposed, under the authority of that case, to permit the present verdict to stand, although directly against my own opinion. But, upon reflection, I think myself obliged to change that opinion, and to set aside this verdict. I feel no doubt concerning the law of the case. I have no doubt but that the amount of the debt can only be established by testimony which is in itself legal; and that such collateral testimony as will make an account, otherwise inadmissible, legal testimony, must apply to the account itself, and not merely to general transactions, which have no tendency to verify the particular account produced, but would equally support a claim for £100 or £1,000.

I think it of most dangerous tendency to admit such evidence; and, as there is a difference between decisions which merely respect the rules of evidence and those which affect rights, and also between a single decision subject to revision, and a series of decisions, which may be considered as fixing the law of the land, and as it is, in my opinion, of much importance that exact uniformity should be observed in decisions on that testimony which will be required by the court, in order to support a claim on account, which is but to be obtained by an inflexible observance of the rules established by law, and not by deviating occasionally from them on circumstances perpetually varying in slight, unimportant degrees, I think it right to adhere to the safe and well understood rules of the common law, and shall therefore direct a new trial in this case.

FENNERSTEIN'S CHAMPAGNE.

(3 Wallace, 145-149. 1865.)

ERROR to U. S. District Court, Northern District of California.

STATEMENT OF FACTS.—A quantity of champagne wine entered in the port of San Francisco was seized for wilful and fraudulent undervaluation in the invoices. The United States gave as evidence conducing to show the value of wines where produced, letters from other wine merchants in France to persons neither parties nor privies to the suit, notably one from Eugene Cliquot to Amos Hill. The letters were admitted and the government had judgment, from which a writ of error was prosecuted to this court.

Opinion by MR. JUSTICE SWAYNE.

The only point of the several objections taken to the admission of the letters necessary to be considered is, that they were *res inter alios acta*, and hence incompetent. The others are disposed of by what was said in the preceding case [3 Wall., 114].

In *Taylor v. United States*, 3 How., 210, foreign invoices relating to goods other than those of the claimant, and received by other merchants, were admitted to rebut the evidence given by the claimant of a general usage to allow a deduction of five per cent. for measurement—those invoices showing no such allowance,—and a foreign letter attached to one of the invoices, though objected to, was also received. This court approved the ruling of the court below. In the case of *Cliquot's Champagne*, just decided, we held that the answer of a dealer, and a price-current, relative to the prices of his wines, given by him to a witness, were competent evidence.

In *Doe d. Patteshall v. Turford*, 3 Barn. & Ad., 890, it was held by the king's bench that the entry by an attorney of the service on a tenant of a notice to quit, made in the ordinary course of his business, was admissible. In *Stapylton v. Clough*, 22 Eng. L. & Eq., 276, a like entry made by an attorney's clerk, contemporaneously with the service, was held to be admissible for the same reasons; but the after parol declaration of the clerk, offered to contradict the entry, was rejected. In this case Lord Campbell said: "I entirely approve of the decision in *Doe d. Patteshall v. Turford* and the cases decided upon the same principle. They lead to the admission of sincere evidence, and aid in the investigation of truth."

In *Carroll v. Tyler*, 2 Harr. & G., 56, in *Sherman v. Crosby*, 11 Johns., 70, and in *Shearman v. Akins*, 4 Pick., 283,—cases in Maryland, New York, and Massachusetts,—the receipts of third persons for money paid to them by one of the parties to the suit were received in evidence without the presence of the persons by whom the receipts were given. In *Holladay v. Littlepage*, 2 Mumf., 316, in the supreme court of appeals in Virginia, the parol declaration by a third person of such payment was admitted. In *Alston v. Taylor*, 1 Hayw., 395, note, in North Carolina, a receipt given by an attorney of another state for certain claims placed in his hands for collection was held to be admissible, to show the time at which he received the claims. In *Prather v. Johnson*, 3 Harris & J., 487, the court of appeals of Maryland said: "If A., as surety of B., pays a debt due to C., on proof of the payment, A. could recover of B. He could recover on C.'s *saying* he had paid, and of course if C. *wrote* that A. had paid, surely it is evidence whether the writing is *in a book* or *a letter*."

§ 41. *Letters written by third persons to third persons about their own business are competent evidence to show the value of merchandise in a foreign country.*

We think the letters in question in this case were properly admitted. In reaching this conclusion we do not go beyond the verge of the authorities to which we have referred. In some of those cases the person asserted to be necessary as a witness was dead. But that can make no difference in the result. 1 Greenl. Ev., § 120; *Holladay v. Littlepage*, 2 Mumf., 321. The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business. In most cases he must make the entry contemporaneously with the occurrence to which it relates. *Stapylton v. Clough*, 22 Eng. L. & E., 276. In all he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath. The rule is as firmly fixed as the more general rule to which it is an exception. Modern legislation has largely and wisely liberalized the law of evidence. We feel no disposition to contract the just operation of the rule here under consideration.

Judgment affirmed.

JUSTICES WAYNE, CLIFFORD and DAVIS dissented on the admissibility of the letters.

NICHOLLS v. WEBB.

(8 Wheaton, 326-337. 1823.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the district court of Louisiana. The suit was brought by Mr. Webb, as indorsee, against Mr. Nicholls, as indorser of a promissory note, dated the 15th of January, 1819, and made by Thomas H. Fletcher, for the sum of \$4,880, payable to Nicholls or order, at the Nashville Bank, and indorsed by Nicholls, by his agent, to the plaintiff. The note became due on the 18th of July, which being Sunday, the note, of course, was payable on the preceding Saturday. The cause came on for trial upon petition and answer, according to the usual course of proceedings in Louisiana, the answer setting up, among other things, a denial of due demand and notice of non-payment; and upon the trial, the jury returned a verdict for the plaintiff. The court thereupon ascertained the sum due, and entered judgment for the plaintiff, according to what is understood to be the usual practice of that state. Several questions have been argued at the bar, which may be at once laid out of the case, since they do not arise upon the record; and we may, therefore, proceed to examine that alone upon which any judgment was pronounced in the court below.

§ 42. *Entry made by a notary, since deceased, admissible in evidence to prove facts contained, it being shown that he kept a record of his notarial acts.*

From the issue in the cause, the burden of proof of due demand of payment, and due notice of the non-payment to Nicholls, rested on the plaintiff. It appears that the demand was made, and notice given, at the request of the plaintiff, by one Washington Perkins, a notary public, who died before the trial. The original protest was annexed to the plaintiff's petition, and contained the usual language in this instrument, stating a demand and refusal of payment at the Nashville Bank, on the 17th of July, the 18th being Sunday, and that he, the notary, "duly notified the indorsers of the non-payment." Among other evidence to support the plaintiff's case, he offered this protest, together with the deposition of Sophia Perkins, the daughter of the notary. She stated, in her deposition, that her father kept a regular record of his notarial acts, and uniformly entered, in a book kept by himself, or caused the deponent to do it, exact copies of the notes, bills, etc.; and in the margin opposite to the copy of the protest made memorandums after notification to indorsers, if any, of the fact of such notification and the manner; and that his notarial records had been, ever since his death, in the house where she lived. And to her deposition, she annexed, and verified as true, a copy of the protest in this case. The copy of the protest states the demand, most probably by mistake, to have been made on the 19th, instead of the 17th of July, 1819, and contains a memorandum on the margin: "Indorser duly notified in writing 19th of July, 1819, the last day of grace being Sunday, the 18th. Washington Perkins." In other respects the protest is the same in form as that annexed to the petition. To the introduction of this deposition, as well as of the protest, as evidence, the defendant, Nicholls, objected, and his objection was overruled by the court, and the papers were laid before the jury. A bill of exceptions was taken to the decision of the court in so admitting this evidence; and the sole question now before us is, whether that decision was right. What that evidence might legally conduce to prove, or what its effect might be, if properly admitted, is not now a question before us. It was

left to the jury to draw such inferences of fact as they might justly draw from it; and whether they were right or wrong in their inferences, we cannot now inquire.

It does not appear that, by the laws of Tennessee, a demand of the payment of promissory notes is required to be made by a notary public, or a protest made for non-payment, or notice given by a notary to the indorsers. And by the general commercial law, it is perfectly clear that the intervention of a notary is unnecessary in these cases. The notarial protest is not, therefore, evidence of itself, in chief, of the fact of demand, as it would be in cases of foreign bills of exchange; and in strictness of law, it is not an official act. But, we all know that, in point of fact, notaries are very commonly employed in this business; and in some of the states it is a general usage so to protest all dishonored notes, which are lodged in or have been discounted by the bank. The practice has, doubtless, grown up from a sense of its convenience, and the just confidence placed in men who, from their habits and character, are likely to perform these important duties with punctuality and accuracy. We may, therefore, safely take it to be true in this case, that the protesting of notes, if not strictly the duty of the notary, was in conformity to general practice, and was an employment in which he was usually engaged. If he had been alive at the trial, there is no question that the protest could not have been given in evidence except with his deposition, or personal examination, to support it. His death gives rise to the question, whether it is not, connected with other evidence, and particularly with that of his daughter, admissible secondary evidence for the purpose of conducing to prove due demand and notice.

§ 43. *Rules of evidence must admit of modification from time to time, to adapt them to the condition and business of men.*

The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights. Courts of law are, therefore, extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles. Still, however, it is obvious, that as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest injustice; and Lord Ellenborough has very justly observed, that they must expand according to the exigencies of society. *Pritt v. Fairclough*, 3 Camp., 305. The present case affords a striking proof of the correctness of this remark. Much of the business of the commercial world is done through the medium of bills of exchange and promissory notes. The rules of law require that due notice and demand should be proved, to charge the indorser. What would be the consequence, if, in no instance, secondary evidence could be admitted, of a nature like the present? It would materially impair the negotiability and circulation of these important facilities to commerce, since few persons would be disposed to risk so much property upon the chance of a single life; and the attempt to multiply witnesses would be attended with serious inconveniences and expenses.

§ 44. *As to admissibility in evidence of protests of foreign bills of exchange.*

There is no doubt that, upon the principles of law, protests of foreign bills of exchange are admissible evidence of a demand upon the drawee; and upon what foundation does this doctrine rest, but upon the usage of merchants and the universal convenience of mankind? There is not even the plea of absolute necessity to justify its introduction, since it is equally evidence, whether the

notary be living or dead. The law, indeed, places a confidence in public officers; but it is here extended to foreign officers acting as the agents and instruments of private parties.

The general objection to evidence of the character of that now before the court is, that it is in the nature of hearsay, and that the party is deprived of the benefit of cross-examination. That principle also applies to the case of foreign protests. But the answer is, that it is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination on oath; and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts where ordinary prudence cannot guard us against the effects of human mortality. Vast sums of money depend upon the evidence of notaries and messengers of banks; and if their memorandums, in the ordinary discharge of their duty and employment, are not admissible in evidence after their death, the mischiefs must be very extensive.

But how stand the authorities upon this subject? Do they as inflexibly lay down the general rule as the objection seems to imply? The written declarations of deceased persons, and entries in their books, have been for a long time admitted as evidence, upon the general ground that they were made against the interest of the parties. Of this nature are the entries made by receivers of money charging themselves, rentals of parties, and bills of lading signed by masters of vessels. More than a century ago, it was decided that the entries in the books of a tradesman, made by a deceased shopman, were admissible as evidence of the delivery of the goods and of other matters there stated within his own knowledge. *Price v. Lord Torrington*, 1 Salk., 285; S. C., 3 Ld. Raym., 873. So, in an action on a tailor's bill, a shop-book was allowed as evidence, it being proved that the servant who wrote the book was dead, and that this was his hand and he was accustomed to make the entries. *Pittman v. Maddox*, 2 Salk., 690. In the case of *Higham v. Ridgeway*, 10 East, 109, it was held that the entry of a midwife in his books, in the ordinary course of his business, of the birth of a child, accompanied by another entry in his ledger of the charge for the service, and a memorandum of payment at a subsequent date, was admissible evidence of the time of the birth. It is true that Lord Ellenborough, in giving his own opinion, laid stress upon the circumstance that the entry admitting payment was to the prejudice of the party, and, therefore, like the case of a receiver. But this seems very artificial reasoning, and could not apply to the original entry in the day-book, which was made before payment; and even in the ledger the payment was alleged to have been made six months after the service. So that, in truth, at the time of the entry, it was not against the party's interest. And Mr. Justice Le Blanc, in the same case, after observing that he did not mean to give any opinion as to the mere declarations or entries of a midwife who is dead, respecting the time of a person's birth, being made in a matter peculiarly within the knowledge of such a person, as it was not necessary then to determine that question, significantly said: "I would not be bound at present to say that they are not evidence." In the recent case of *Hagedorn v. Reid*, 3 Camp., 379, in a suit on a policy of insurance where a license was necessary, the original not being found, it was proved that it was the invariable practice of the plaintiff's office (he being a policy broker), that the clerk who copies any license, sends it off by post, and makes a memorandum on the copy of his having done so; and a copy of the license in question was produced from the

plaintiff's letter-book, in the handwriting of a deceased clerk, with a memorandum on it, stating that the original was sent to Doorman; and a witness acquainted with the plaintiff's mode of transacting business, swore that he had no doubt the original was sent according to the statement in the memorandum. Lord Ellenborough held this to be sufficient evidence of the license. And in *Pritt v. Fairclough*, 3 Camp., 305, the same learned judge held that the entry of a copy of a letter in the letter-book of a party, made by a deceased clerk, and sent to the other party, was admissible in evidence, the letter-book being punctually kept, to prove the contents of the letter so sent. And he observed on that occasion that, if it were not so, there would be no way in which the most careful merchant could prove the contents of a letter after the death of his entering clerk. The case of *Welsh v. Barrett*, which has been cited at the bar, from the Massachusetts Reports (15 Mass., 381), is still more directly in point. It was there held that the memorandums of a messenger of a bank, made in the usual course of his employment, of demands on promisors, and notices to indorsers, in respect to notes left for collection in the bank, were, after his decease, admissible evidence to establish such demands and notices. And the learned chief justice of the court, on that occasion, went into an examination of the grounds of the doctrine, and put the very case of a notarial demand and protest of notes, which had been suggested at the bar as a more correct course, as not distinguishable in principle, and liable to the same objections as the evidence then before the court. We are entirely satisfied with that decision, and think it is founded in good sense and public convenience.

§ 45. *Memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death are admissible evidence of the acts and matters done.*

We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death are admissible evidence of the acts and matters so done. It is of course liable to be impugned by other evidence; and to be encountered by any presumptions or facts which diminish its credibility or certainty. *A fortiori*, we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer, and is clothed with public authority and confidence.

It is, therefore, the opinion of the court, that the evidence excepted to in this case was rightly admitted. The variance between the copy and the original protest, as to the time of the demand, might have been explained to the satisfaction of the jury at the trial; but it forms no ground upon which this court is called upon to express any opinion. Judgment affirmed, with costs.

INSURANCE COMPANY v. WEIDE.

(9 Wallace, 677-681. 1869.)

ERROR to U. S. Circuit Court, District of Minnesota.

STATEMENT OF FACTS.—This was an action on a policy of insurance, begun in a state court of Minnesota, and removed to the federal court. No new declaration was filed in the federal court, and a motion to dismiss on that ground was denied.

On the trial both the plaintiffs testified as to the value of the goods destroyed, and also produced in evidence two day-books and a ledger, and a

memorandum taken from the fly-leaf of the ledger, which, one of the witnesses stated, was made up by him from inventories for several years before the fire. One witness testified that the books were kept by him and his partner, that the day-book contained original entries, and that the books were correct. The evidence was admitted.

§ 46. *As to filing new declarations on removal of causes to federal courts.*

Opinion by MR. JUSTICE NELSON.

As to the first question raised. If there were any irregularity in not filing a new complaint or declaration, it was too late, after the defendant had taken issue upon the complaint, to take advantage of it. The question, however, whether a new complaint or declaration should have been filed on a removal of the cause from a state court is one of practice, and not the subject for which error will lie.

§ 47. *Entries in day-books and ledgers, testified to as correct by the persons who made them, are admissible in evidence; but they are not admissible per se, without such accompanying testimony.*

As to the second question — the admissibility of the evidence received by the court. There can be no doubt but the day-books and ledger, the entries in which were testified to be correct by the persons who made them, were properly admitted. They would not have been evidence *per se*, but with the testimony accompanying them all objections were removed. *White v. Ambler*, 4 Seld., 170.

§ 48. *A memorandum, made and identified by a witness, taken from inventories present at the time it was made, is admissible as secondary evidence, if such inventories are proven to have been destroyed by fire.*

So, in respect to the memorandum on the fly-leaf of the ledger. It was made by one of the witnesses, taken from inventories present at the time it was made, but which had been subsequently destroyed by the fire. Those inventories, if they had been in existence, would have been the best evidence, and, unless their loss was accounted for, must have been produced. But being lost, parol evidence of their contents was admissible as secondary evidence, and so was the memorandum taken from them for the like reason. As we understand the evidence in the case, the correctness of the entry was testified to. The witness was cross-examined, among other things, as to the correctness of it. The testimony is not given, but, if the evidence of the witness had not been satisfactory, it should have been placed upon the record.

In *Merrill v. The Ithaca & Owego R. Co.*, 16 Wend., 586, it was held that when original entries are produced, and the person who made them, and knew them at the time to be true, testified that he made the entries, and that he believed them to be true, although at the time of testifying he had no recollection of the facts set forth in the entries, such evidence is admissible as *prima facie* evidence for the jury. In this case, Mr. Justice Cowan, who delivered the opinion of the court, examined most of the authorities, English and American, on the subject. The same doctrine is also sustained by the case of *Guy v. Mead*, 22 N. Y., 465-6.

The learned counsel for the plaintiff in error is mistaken in supposing that the witness Joseph Weide did not testify to the correctness of the facts stated in the memorandum. As already stated, this very point was made the subject of cross-examination, and, if the witness failed to testify to it, the fact should have been set forth in the record, as it was most material for the defendant. The witness had stated on his examination-in-chief, that he made the abstract

in July, 1866, from the inventories for several years previous to the fire. Nothing else being shown, the inference is that it was correctly made; hence the cross-examination on this point to show the contrary. We think that the memorandum was properly admitted, and that the judgment should be affirmed.

AMES *v.* QUIMBY.

(16 Otto, 342-349. 1882.)

ERROR to U. S. Circuit Court, Western District of Michigan.

Opinion by MR. JUSTICE BLATCHFORD.

STATEMENT OF FACTS.—The defendant in error brought this suit against the plaintiffs in error in July, 1872, in a court of the state of Michigan. It was removed into the circuit court for the western district of Michigan in August, 1872, before the declaration was filed. The action is *assumpsit*. The declaration claims \$25,000 for goods sold and delivered, and a like amount for money had and received, and \$15,000 for interest. The plea was *non assumpsit*, with a notice of set-off to the amount of \$25,000, and a notice that the goods alleged to have been furnished by the plaintiff were furnished under a special contract that they were to be of first-class quality, and that they were not. A further notice under the plea alleged that the goods furnished were furnished under three several contracts, made January 2, 1865, January 27, 1866, and December 25, 1866, for the furnishing by the plaintiff to the defendants of shovel-handles, and that the plaintiff did not fulfill the contracts as to the quality of the handles. In April, 1875, the suit was tried by the court without a jury. On the findings of the court a judgment was rendered for the plaintiff for \$7,825.62. The defendants brought the case to this court by a writ of error, and the judgment was reversed, and the cause was remanded to the circuit court with directions to award a new trial. The decision of this court is reported in 96 U. S., 324. The only question there presented and determined was as to the proper construction of a written contract made between the parties, January 2, 1865, in a particular not now important. The construction put by the court below upon that contract was held to have been erroneous. The case was tried a second time before a jury in April, 1879. The jury found a verdict for the plaintiff for \$12,816.53, and a judgment thereon was rendered against the defendants. To review and reverse this judgment the present writ of error has been brought.

The plaintiff, to maintain the issues on his part, read in evidence a stipulation signed by the respective attorneys, whereby the defendants admitted the sale and delivery of shovel-handles shipped to the defendants' firm and received by it at North Easton, Massachusetts, at the dates and in the quantities therein set forth, being, in 1865, fifteen thousand six hundred and seven dozen, in six items, in May and July; in 1866, ten thousand one hundred and eighty-eight dozen, in thirteen items, in June, July, August and September; and two thousand eight hundred and fifty-two dozen, in three items, in November and December, up to the 20th; in 1867, thirty-three thousand eight hundred and fourteen dozen, in thirty-seven items, in every month but January, November and December; and, in 1868, eleven thousand one hundred and thirteen dozen, in eleven items, in April, May, July, September and October. The stipulation stated that the dates given were the dates of the shipment by rail from Michigan and Canada; that the dates of the receipt by the defendants at North

Easton were fifteen days later than the several dates of shipment; and that the plaintiff admitted payments on account of said handles, at the dates and in the sums specified thereafter in the stipulation, the payments amounting to \$83,153.48. The stipulation concluded with this clause: "The question of the quality of the handles delivered as aforesaid, and all other questions of fact not stipulated, are left open to the jury and for other and further evidence." The plaintiff was then examined as a witness on his own behalf. On his cross-examination he testified that there was a contract, signed by the parties for 1865 for handles. The contract being shown to him, he "identified" it, as the bill of exceptions states, and it was read in evidence by the defendants. It bore the date of January 2, 1865. The plaintiff rested his case, and the defendants introduced testimony and rested their defense. One of the defendants testified that he made the contract of 1865, and it was made in the evening, and he stated who were present. Then the plaintiff, being recalled, testified, without objection, that the contract dated January 2, 1865, was not signed on that day — on the evening of that day. He was then asked: "When was that contract signed?" The defendants objected to the question on the ground that "it was irrelevant and immaterial, and there had been no previous denial by affidavit or otherwise of the execution of the contract, and it was incompetent." The plaintiff replied that the fact of the execution of the contract was not denied, "but he proposes to show the time of the execution of the contract was on Sunday, which avoids the contract." The court overruled the objection, and the defendants excepted. The witness then answered that the contract was signed and delivered on Sunday, January 1, 1865, stating the hour and the place, and giving particulars as to who were present and what was done. The defendants then gave testimony by three witnesses to contradict the plaintiff. The defendants now contend that the court erred in permitting the plaintiff to testify that the contract was executed on Sunday, in view of the then situation of the case and what had transpired on the trial; that he had given evidence as to its execution and allowed it to be put in evidence without suggesting any infirmity in it; and that the defendants would necessarily be surprised by such testimony. The defendants also claim that, under a rule of court governing the pleadings and practice in Michigan, where a defendant insists on a claim by way of set-off, founded on a written instrument, he cannot "be put to the proof of the execution of the instrument or the handwriting" of the opposite party, unless an affidavit is filed "denying the same;" that the failure of the plaintiff to file such affidavit was an admission of the execution of the instrument in manner and form as set up, and as being of the date of January 2; and that the testimony went to show that the contract set up was not executed.

§ 49. *What may be given in evidence with reference to the execution of a written instrument without filing an affidavit "denying the same."*

The only ground alleged at the trial for the incompetency of the evidence was that the execution of the contract had not been denied by affidavit. Assuming that the rule of court referred to can be taken notice of by this court, it not being set forth in the record, and there being no statement in the record that the affidavit referred to was required by any rule of court, and assuming that it is to be inferred that there was not any such affidavit, it not being set forth in the bill of exceptions that there was not, we are of opinion that the rule cited refers only to proof of the genuineness of a seal or of handwriting, and does not refer to any matter which goes to show the invalidity otherwise

of an instrument. Such a provision in a rule of court or in a statute is not uncommon, and, whenever it is expressed in language such as that now presented, it has never, that we are aware, received any other construction. In the case of *Pegg v. Bidleman*, 5 Mich., 26, Pegg and another were sued on a note signed "S. Pegg & Co." They appeared and pleaded the general issue, but did not deny on oath the execution of the note. Judgment was given against them without proof that they "composed the firm of S. Pegg & Co. and executed the note." It was held that, as the defendants had appeared, and the declaration was against them as individuals, and did not allege they were partners, the question was simply whether they executed the note by the name subscribed to it; and that they must be taken to have admitted that the note was executed by the parties declared against. The decision was that the admission covered the fact that the signature was that of the parties sued. If the parties be sued as partners, the admission that the signature is their signature as partners necessarily admits that they were partners. This was the principle applied in *Thomas v. Clark*, 2 McLean, 194, and *Pratt v. Willard*, 6 id., 27. In *Curran v. Rogers*, 35 Mich., 221, a written contract was signed in the name of a firm, the two partners in which were sued on the contract. The general issue was pleaded without any affidavit. One of the firm sought to prove that the other, who had signed the firm name, had no authority to do so. It was held that, as the declaration set out the contract *verbatim*, and alleged it to have been jointly executed, its execution was admitted as to both defendants. There is nothing in these decisions which goes to show that the plaintiff, notwithstanding anything in the language of the rule of court invoked, could not prove that the contract was in fact signed at a date different from that appearing on its face. The evidence did not go to show that it was not dated January 2 when it was signed, but went to show that, though dated January 2, it was signed on January 1. It admitted the execution of the contract, but tended to avoid it by proving a fact in regard to it which did not appear on its face, and which went to the merits. This was competent evidence, and was not irrelevant or immaterial. All questions as to surprise, or as to reopening the case, or as to the order of proof, were matters of discretion, not reviewable here.

Another written contract was shown to the plaintiff, and "identified by him," and put in evidence by the defendants, dated December 25, 1866. It provided for advances by the defendants to the plaintiff, and for their acceptance of his drafts, and for his payment to them of "two and a half per cent. commission for accepting his drafts." On the language of the contract so put in evidence a question was raised as to whether the commission was to be paid on all drafts accepted, or only on those which were in excess of shipments of handles. On his redirect examination, when first called, the plaintiff stated, without objection, that he had had a duplicate of the contract which was destroyed by fire; that the copy so introduced was not an exact copy of the one he had, in its reference to the two and a half per cent. commission; that the one he had was made by one of the defendants; that drafts for handles shipped he was to pay no commissions on; and that those for advances before shipments he was to pay commissions on. He was then asked: "What change was made in the duplicate which you had?" This question was objected to by the defendants on the ground that it was incompetent and irrelevant, "and, there having been no denial of the execution of this contract as pleaded and given notice of by the defendants, it is incompetent to vary it by parol." The ob-

jection was overruled, and the defendants excepted. The witness answered that the word "advanced" was inserted after the word "drafts," so as to read, "two and one-half per cent. commission for accepting his drafts advanced." The defendants contend that the evidence went to a denial of the execution of the contract, and was, therefore, incompetent under the rule of court before referred to. The remarks before made apply to this point also. The evidence went to show what the actual written contract between the parties was. It did not go to show that the defendants' copy was not actually signed by the parties. The one copy was as competent evidence of the real contract as the other was. What the plaintiff had testified to in regard to the contents of his original of the contract was admitted without objection and permitted to stand, and no motion was made to strike it out. The evidence sought by the question objected to only went to explain the previous evidence.

§ 50. *Evidence admissible of good quality of goods furnished to others than the defendant.*

A question having arisen as to the quality of the handles furnished to the defendants by the plaintiff in 1867 and 1868, a witness for the plaintiff was asked as to the quality of the handles furnished by the plaintiff to the Old Colony Company in 1867 and 1868. The defendants objected to the question on the ground that it was irrelevant and incompetent, and not admissible to show the quality of the handles furnished to the defendants. The plaintiff's counsel then stated that he proposed to show, in connection with the offered testimony, that the handles were of the same general quality as those furnished to the defendants. Thereupon the objection was overruled and the defendants excepted, and the witness answered that the quality of the handles sent to the Old Colony Company in 1867 and 1868 was good. Evidence had been given for the defendants that the quality of the handles furnished by the plaintiff to the defendants in 1867 and 1868 was inferior to the quality of those he had furnished in previous years. The plaintiff subsequently gave evidence tending to show that the handles furnished by him to the defendants in 1867 and 1868 and the handles furnished by him to the Old Colony Company in 1867 and 1868 were of the same kind and quality. After this evidence was given there was no motion to strike out the evidence so objected to, or to rule upon its admissibility. The evidence objected to was admissible.

§ 51. *Where a refusal to give a particular instruction worked no injury to a party, it is no ground for reversing the judgment.*

Alleged errors in the charge to the jury, and in refusals to charge as requested, are urged by the defendants. As to the request to charge respecting the right of the defendants, under the contract of January 27, 1866, to charge the plaintiff back with the full value of such handles as broke in the process of bending, it is sufficient to say that the record discloses that there was a settlement between the parties respecting the one hundred and seventy-two dozen handles charged back in 1866 under that contract, and that there was really no question for the jury as to those handles. If the charge given and the refusal to charge as requested had the effect to withdraw from the jury the consideration of the one hundred and seventy-two dozen, it only effected the result required by the settlement, and worked no injury to the defendants.

§ 52. *A rule as to mistake.*

In regard to the refusal to charge that the plaintiff could recover \$1.37½ per dozen for only such handles delivered between October 8, 1866, and April 20, 1867, as he had carried out at that price in his bill of particulars, and to charge

to the contrary, it is sufficient to say that the bill of particulars is not in the record, and there is no statement in the bill of exceptions as to its contents; and that when, in the course of the evidence, the claim was made by the plaintiff for \$1.37½ per dozen for the handles delivered between those dates, the defendants objected that there were three items in April, 1867, carried out in the bill of particulars at \$1.25 per dozen, and the plaintiff then and there claimed that the bill of particulars contained a mistake in that respect. The charge of the court was, that while the plaintiff could not recover for any more handles than his bill of particulars set forth, he was not bound by a mistake in carrying out the rate or price, but could show what he was actually to have. We see no error in this, under the circumstances.

The request made to charge as to the operations of 1868 was granted, and the instruction given is not open to the objection that the price for 1868 was fixed by the court and was not left to the jury to determine.

§ 53. *After a new trial has been had under a mandate of the supreme court, no antecedent errors can be considered upon the subsequent hearing.*

Although this court reversed the first judgment, and remanded the cause for a new trial, and a new trial has been had, with a new judgment, the plaintiffs in error now urge, without having raised the point before, that this court, instead of having awarded a new trial, should have rendered a judgment for the defendants below on the findings made by the circuit court at the first trial, and that it should now do so. The question is not open for this court to review on this writ of error the judgment it rendered on the former writ of error. That judgment has been carried into effect, and the parties who procured it have enjoyed the benefit of it in the new trial they have had.

Judgment affirmed.

INSURANCE COMPANY v. MOSLEY.

(8 Wallace, 397-420. 1869.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the northern district of Illinois. The action was upon a policy of insurance. It insured Arthur H. Mosley against loss of life, or personal injury by any accident within the meaning of the instrument, and was issued to Mrs. Arthur H. Mosley, the wife of the assured, for her benefit. The declaration was in *assumpsit*. The defendant pleaded the general issue, and the cause was tried by a jury. The plaintiff recovered. During the trial a bill of exceptions was taken by the plaintiff in error, by which it appears that the contest between the parties was upon the question of fact, whether Arthur H. Mosley, the assured, died from the effects of an accidental fall down stairs in the night or from natural causes.

The defendant in error was called as a witness in her own behalf, and testified "that the assured left his bed Wednesday night, the 18th of July, 1866, between 12 and 1 o'clock; that when he came back, he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling down stairs; . . . she noticed that his voice trembled; he complained of his head and appeared to be faint and in great pain."

To the admission of all that part of the testimony which relates to the dec-

larations of the assured, about his falling down stairs and the injuries he received by the fall, the counsel of the defendants objected. The court overruled the objection and the defendants excepted.

William H. Mosley, son of the assured, testified, in behalf of the plaintiff, "that he slept in the lower part of the building occupied by his father; that about 12 o'clock of the night before mentioned, he saw his father lying with his head on the counter, and asked him what was the matter; he replied that he had fallen down the back stairs and hurt himself very badly." The defendants objected to both the question and answer. An exception to their admission followed. The same witness testified further, "that on the day after the fall his father said he felt very badly, and that if he attempted to walk across the room his head became dizzy; on the following day he said he was a little worse, if anything." The admission of this testimony also was excepted to by the defendants.

§ 54. *The declarations of a person as to his mental or bodily feelings are competent evidence, but must be confined to present suffering or feeling.*

This statement presents the questions which we are called upon to consider. They are, whether the court erred in admitting the declarations of the assured as to his bodily injuries and pains, and whether it was error to admit such declarations to prove that he had fallen down the stairs. It is to be remarked that the declarations of the former class all related to *present* existing facts at the time they were made. Those of the latter class were made immediately or very soon after the fall: the declarations to his son, before he returned to his bed-room; those to his wife, upon his reaching there.

Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as *verbal acts*, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury.

In actions for the breach of a promise to marry, such evidence is always received to show the affection of the plaintiff for the defendant while the engagement subsisted, and the state of her feelings after it was broken off; and, in actions for criminal conversation, to show the terms upon which the plaintiff and his wife lived together before the cause of action arose. Upon the same ground, the declarations of the party himself are received to prove his condition, ills, pains and symptoms, whether arising from sickness, or an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. But to whomsoever made, they are competent evidence. Upon these points, the leading writers upon the law of evidence, both in this country and in England, are in accord. 1 Greenl. Ev., § 102; 1 Phillips, Ev. (last ed.), p. 183; 1 Taylor on Ev., 478, § 518.

There is a limitation of this doctrine that must be carefully observed in its application. Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, and not to the past. Anything in the nature of narration must be excluded. It must be confined strictly to such complaints, expressions and exclamations as furnish evidence

of "a *present* existing pain or malady." *Bacon v. Inhabitants, etc.*, 7 Cush., 586. Examined by the standard of these rules, the testimony to which this exception relates was properly admitted.

§ 55. *Declarations made by the deceased at or about the time of the injury alleged to have been the cause of his death are competent evidence of the cause and nature of that injury.*

The other exception requires a fuller examination. Was it competent to prove the fall by the declarations of the assured made under the circumstances disclosed in the bill of exceptions? In *Thompson and Wife v. Trevanion, Skinner*, 402, the action was for the battery and wounding of the wife. Lord Chief Justice Holt "allowed what the wife said immediately upon the hurt received, and before that she had time to contrive or devise anything for her own advantage, to be given in evidence." The reporter adds: "*Quod nota.* This was at *nisi prius* in Middlesex, for wounding the wife of the plaintiff." This case was referred to by Lord Ellenborough with approbation in the case before him of *Aveson v. Kinnaird*, 6 East, 197. In that case Lawrence, justice, in answer to the objection that such evidence was hearsay, said: "It is in every day's experience in actions of assault, that what a man has said of himself to his surgeon is evidence to show what he has suffered by the assault." *Id.*, 191.

The *King v. Foster*, 6 Carr. & P., 325, was an indictment for manslaughter, for killing the deceased by driving a cab over him. A wagoner was called as a witness for the prosecution. He stated that he saw the cab drive by at a very rapid rate, but did not see the accident, and that immediately after, on hearing the deceased groan, he went to him and asked him what was the matter. The counsel for the prisoner objected, that what was said by the deceased, in the absence of the prisoner, could not be received in evidence. Gurney, baron, said that what the deceased said at the instant, as to the cause of the accident, was clearly admissible. Park, justice, said that it was the best possible testimony that, under the circumstances, could be adduced to show what knocked the deceased down. Mr. Justice Patterson concurred. The prisoner was convicted.

In *The Commonwealth v. M'Pike*, 3 Cush., 181, the indictment, as in the preceding case, was for manslaughter. The defendant was charged with killing his wife. It appeared that the deceased ran up stairs from her own room, in the night, crying murder, and bleeding. Another woman, into whose room she was admitted, went, at her request, for a physician. A third person, who heard her cries, went for a watchman, and on his return proceeded to the room where she was. He found her on the floor, bleeding profusely. She said the defendant had stabbed her. The defendant's counsel objected to the admission of this declaration in evidence. The objection was overruled. The supreme court of Massachusetts held that the evidence was properly admitted. It was said that the declaration was "of the nature of *res gestæ*," and that the time when it was made was so recent, after the injury was inflicted, as to justify receiving it upon that ground.

It is not easy to distinguish this case and that of *The King v. Foster*, in principle, from the case before us, as regards the point under consideration. In *Aveson v. Kinnaird*, it was said by Lord Ellenborough that the declarations were admitted in the case in *Skinner* because they were a part of the *res gestæ*.

To bring such declarations within this principle, generally, they must be

contemporaneous with the main fact to which they relate. But this rule is by no means of universal application. In *Rawson v. Haigh*, 2 Bingham, 99, a debtor had left England and gone to Paris, where he remained. The question was, whether his departure from England was an act of bankruptcy, and that depended upon the intent by which he was actuated. To show this intent, a letter written in France, a month after his departure, was received in evidence. Upon full argument, it was held that it was properly received. Baron Park said: "It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go the length of saying that a declaration, made a month after the fact, would, of itself, be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form a part of the *whole res gestæ*."

Where a peddler's wagon was struck and the peddler injured by a locomotive, the supreme court of Pennsylvania said: "We cannot say that the declaration of the engineer was no part of the *res gestæ*. It was made at the time—in view of the goods strewn along the road by the breaking up of the boxes—and seems to have grown directly out of and *immediately after the happening of the fact*." The declaration was held to be "*a part of the transaction itself*." *Hanover Railroad Co. v. Coyle*, 55 Penn. St., 402.

§ 56. *Rule as to the admissibility of declarations as part of the res gestæ.*

In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both; but there is no ground of objection to one that does not exist equally as to the other. To reject the *verbal fact* would not unfrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context. The doctrine of *res gestæ* was considered by this court in *Beaver v. Taylor*, 1 Wall., 637. What was said in that case need not be repeated. Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry, the sickness or affection is the principal fact. The *res gestæ* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend, rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below.

In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason. The want of this concurrence in the law is often deeply to be regretted. *Appleton on Evidence*, ch. 11, 12. The weight of this reflection, in reference to the case under consideration, is increased by the fact that what was said could not be received as "dying declarations," although the person who made them was dead, and hence could not be called as a witness.

Judgment affirmed.

Dissenting opinion by MR. JUSTICE CLIFFORD, NELSON, J., concurring.

Questions as to the rules of evidence "are of vast importance to all orders and conditions of men" interested therein, as parties in common law suits, as life, liberty and property depend very largely upon their strict observance, that proper testimony, pertinent to the issue, may not be excluded, and that incompetent and improper testimony may not be received. *Child v. Hepburn*, 7 Cranch, 295; *Rex v. Eriswell*, 3 Term, 721.

"One of these rules," says Chief Justice Marshall, "is that hearsay evidence is, in its own nature, inadmissible. Not only because it supposes that better testimony might be adduced to prove the alleged fact, but on account of its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its color." Experience shows that wrong verdicts are the usual result of wrong rulings in admitting improper testimony, or in rejecting that which was competent and material. Appellate courts, viewing the matter in that light, are therefore prompt to correct such errors and to reverse judgments founded on verdicts produced or influenced by such erroneous rulings.

§ 57. *Rules of evidence.*

All courts agree that the introduction of evidence to the jury is governed by certain fixed principles of law, and text-writers usually treat the subject under four general heads: 1. That the evidence must correspond with the allegations and be confined to the issue. 2. That the substance of the declaration must be proved to warrant a verdict in favor of the plaintiff. 3. That the burden of proving a proposition or issue lies on the party holding the affirmative. 4. That the best evidence, of which the case in its nature is susceptible, must always be produced. 1 Greenl. Ev., § 50.

Founded, as the action is, upon a policy of insurance, it becomes necessary, in order to understand the precise bearing of the rulings embraced in the exceptions, to examine the terms of the contract, and to refer to the exact issue tendered in the declaration. By the terms of the policy, insurance, for the period of one year, in the sum of \$5,000, was granted by the defendants to the late husband of the plaintiff, against "personal injury caused by any accidents within the meaning of this policy," . . . and such injuries as shall occasion death within three months from the happening thereof, and also against any such personal injury, though not fatal, if the assured was thereby absolutely and totally disabled from the prosecution of his usual employment. After setting out the policy in full, the declaration alleges that the assured, on the 1st of July in the same year, "accidentally fell down a pair of stairs in the city of Chicago, in said county, and was severely injured thereby," and that the assured, within three months after the happening of the said accident, died, and that the death of the assured "was occasioned by said injury and accident."

Defendants appeared and pleaded that they never promised in manner and form as alleged in the declaration, which presented the direct issue, whether the assured met with the accident and injury described in the declaration, and whether his death was occasioned by "the personal injuries caused" by that accident, as therein alleged. Payment of the sum insured, in case of such personal injury or death occasioned by any accident within the terms of the policy, was to be made to the plaintiff, and she was examined as a witness to support her claim against the defendant corporation.

Several witnesses "testified as to back stairs being there, leading to the back yard," but "no witness testified that he saw the deceased fall down the steps,"

and there was no testimony upon the subject, except that given by the plaintiff and the son of the deceased, as recited in the bill of exceptions. She testified that between 12 and 1 o'clock (July 18, 1866), he (her husband) got up and went down stairs for the purpose described; that she did not know how long he was gone, but "when he came back, he said he had fallen down the stairs and almost killed himself; that he had hit and hurt the back part of his head in falling down the stairs which led out back." Objection was duly taken to the testimony of the witness as to the declarations of the husband, but the court overruled the objection, and the defendants then and there excepted.

His son was also examined and testified that he saw his father, about 12 o'clock that night, lying with his head on the counter, and that "he asked him what was the matter, and he answered that he had fallen down the back stairs and hurt himself very bad." Seasonable objection was also made to the introduction of this testimony, but the court admitted it, and the defendant excepted, as appears by the transcript. Viewed in the light of the facts, as here stated, which are carefully and accurately drawn from the record, I am clearly of the opinion that the declarations of the deceased, as given in the testimony of those witnesses, were inadmissible, and that the judgment of the circuit court should be reversed.

§ 58. *Definition of res gestæ.*

Mere declarations, made by a third person, not under oath, it is conceded, are hearsay, but the argument is, that the declaration given in evidence in this case may be regarded as part of the *res gestæ*, and, therefore, that the testimony of both witnesses was properly admitted as original evidence. Declarations of a party to a transaction, though he was not under oath, if they were made at the time any act was done which is material as evidence in the issue before the court, and if they were made to explain the act, or to unfold its nature and quality, and were of a character to have that effect, are treated, in the law of evidence, as verbal acts, and as such are not hearsay, but may be introduced with the principal act which they accompany, and to which they relate, as original evidence, because they are regarded as a part of the principal act, and their introduction in evidence is deemed necessary to define that act and unfold its true nature and quality. *Enos v. Tuttle*, 3 Conn., 250.

But such declarations cannot properly be received as evidence, unless the principal act which they accompany, and to which they relate, is, itself, material to the issue to be submitted to the jury, nor unless the declarations were made at the time the principal act was done, nor unless they were of a character to explain that act, or to unfold its true nature and quality, as they are only admissible as incident to the principal act, and because they are a part of it, and are necessary to explain and define its true character. *Corinth v. Lincoln*, 34 Me., 312; *Noyes v. Ward*, 19 Conn., 269; *Moore v. Meacham*, 10 N. Y., 210; *Osborn v. Robbins*, 37 Barb., 482. When the inquiry is into the nature and character of a certain transaction, not only what was done, says Mr. Roscoe, but also what was said by those present, during *the continuance of the transaction*, is admissible for the purpose of illustrating its peculiar character and circumstances. *Roscoe on Ev.*, 23.

Undoubtedly, whenever evidence of an act done by a party is admissible, the declarations he made, at the time the act was done, are also admissible, if they were of a character to elucidate and unfold the act, because they derive a degree of credit from the act itself, and do not rest entirely upon a statement not made under oath. *Sessions v. Little*, 9 N. H., 271. Unless, however,

they were made at the time the act was done, or during the continuance of the transaction constituting the principal fact, they are not admissible, as in that state of the case they cannot derive any credit from the principal fact, which alone renders them admissible in evidence.

Verbal and written declarations are admissible, says Mr. Phillips, "when they accompany some act, the nature, object or motives of which are the subject of inquiry." In such cases, he says, words are receivable as original evidence, on the ground that what is said at the time affords legitimate, if not the best, means of ascertaining the character of such equivocal acts as admit of explanation from those indications of the mind which language affords. Phillips on Ev., ed. 1868, 185.

§ 59. *To be part of the res gestæ, declarations must be made at the time of the act to which they are referred.*

Evidently, the rule as understood by the author of that work would not admit the declarations, unless they were made at the time the act was done, or during the continuance of the transaction; but the annotator is even more explicit, as he expressly adopts the rule laid down in the leading case, that to be a part of the *res gestæ*, the declarations must have been made at the time of the act done, which they are supposed to characterize, and have been well calculated to unfold the nature and character of the facts which they are intended to explain, and so to harmonize with them as obviously to constitute one transaction. *Enos v. Tuttle*, 3 Conn., 250.

Much of the difficulty in the application of the rule arises from the nature of the principal act, especially in cases where it is continuous, or extends for a considerable time, as in questions of domicile, or of bankruptcy; but there is no difficulty in applying the rule in cases where the principal act is single and well defined as to time, nor is there any well-considered case, which gives any countenance to the admission of such declarations, unless they are made at the time the principal act was done, or, as in the case of a riot, during the continuance of the transactions. *Russell v. Frisbie*, 19 Conn., 209; *Carter v. Beals*, 44 N. H., 412; *Price v. Powell*, 3 Comst., 322; *Ridley v. Gyde*, 9 Bing., 351.

Equity rules are the same as the rules at common law, as appears by the decision of Chancellor Walworth, In the matter of Taylor, 9 Paige, 617, in which he held that the declarations of parties, and other attending circumstances, in order to render them admissible as a part of the *res gestæ*, must be contemporaneous with the main fact under consideration, and to which they were intended to give character. *Frink v. Coe*, 4 Greene, 556.

Suppose the rule to be that such declarations are inadmissible, unless made at the time the principal act was done, still it is contended that the rulings of the court, in admitting the declarations in this case, may be sustained as falling within the rule laid down in the case of *Commonwealth v. McPike*, 3 Cush., 184, and the opinion of the majority of the court, as just read, rests chiefly upon that ground. The indictment, in that case, was for manslaughter, and the evidence introduced showed that the deceased, on the morning she received the mortal blow, ran from her room, where her husband, the defendant, was, to a room occupied by the witness, in the same house, crying murder; and when admitted to the room, she said she was killed. Another witness heard the cry of murder, and went for a watchman, and when he returned, he went to the room where the wounded woman was, and, among other things, she said to him that her husband had stabbed her, and told the witness what she wanted done if she died.

Objection was taken to the statement, as to the declaration of the wife, that the defendant had stabbed her, but the court admitted the testimony, and the case was removed to the supreme court for revision. Other exceptions were taken to the rulings of the court, but they were all overruled, the court holding that the statement of the wife, as to the cause and manner of the injury, might be "sustained, upon the ground that the testimony was of the nature of the *res gestæ*." No authorities are cited in support of the proposition, and the opinion upon that point is very brief, and seems to rest mainly upon the closing sentence upon that subject, which is as follows: "In the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge."

Prior to that date all the decisions of that court had been in strict conformity to the rule, that declarations not under oath, in order to be admissible as original evidence, must have been made at the time the principal act was done or committed, as before explained, unless they were admitted as declarations *in articulo mortis*; and every decision made by that court, upon that subject, since that case was determined, is equally explicit in prescribing the same rule. Reference will be made to a few of the subsequent cases to establish that proposition.

§ 60. *Rules of evidence on the subject of hearsay and unsworn declarations.*

Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings are considered competent and original evidence in his favor. *Bacon v. Charlton*, 7 Cush., 586. Such evidence, however, say the court, is not to be extended beyond the necessity on which the rule is founded; and they add, that anything in the nature of narration or statement is to be carefully excluded, and the testimony (unless the statement was made by a patient to a medical man) is to be confined strictly to such complaints and expressions as usually and naturally accompany, and furnish evidence of, a *present* existing pain or malady. Before the year expired, the same question, under a different state of facts, was again presented to that court, and in view of the importance of the questions, and of their frequent occurrence, the court came to the conclusion to consider the subject somewhat more at large than they had heretofore done, and to set forth and illustrate "the principles and tests by which this class of questions must be determined." *Lund v. Tyngsborough*, 9 Cush., 41. They accordingly decided:

1. That the admission of such evidence is not left to the discretion of the presiding judge, as had sometimes been supposed; that its admission is governed by principles of law, which must be applied to particular cases as other principles are applied, in the exercise of a judicial judgment, and that errors of judgment in the case, as in other cases, may be examined and corrected. *Tatham v. Wright*, 6 Nev. & Mann., 151.

2. That a declaration, if it has its force by itself, as an abstract statement, detached from any particular fact in question, is not admissible in evidence, because it depends for its effect on the credit of the person making it, and therefore is hearsay.

3. That mere narrative is never admissible, because such statements are detached from any material act which is pertinent to the issue.

4. That whenever the act of the party may be given in evidence, his declarations, made at the time, are also admissible, if they were calculated to elucidate and explain the character and quality of the act, and were so con-

nected with it as to derive credit from the act itself, and to constitute one transaction.

5. That there must be a main or principal fact or transaction, and that such declarations *only* are admissible as grow out of the principal transaction, serve to illustrate its character, are contemporary with it, and derive some degree of credit from it.

6. That the main act or transaction is not, in every case, necessarily confined to a particular point of time, but whether it is so or not depends solely upon the nature and character of the act or transaction.

Search is made in vain for any decided case, where the principles and tests which regulate and control the admission of such evidence are so satisfactorily stated, and with so much fullness and clearness, as in that case. *Meek v. Perry*, 36 Miss., 261. Narration of the cause and manner of the injury has been carefully excluded since that decision in the courts of that state, even where the statements were made by a patient to his physician, as will be seen by the case of *Chapin v. Marlborough*, 9 Gray, 245, which was decided six years later. By the statement of the case, it appears that the plaintiff called a physician, and wished him to examine his leg, saying that it gave him great pain, and the physician testified that he said that he had been struck by a horse, on that leg, four or five months before.

Seasonable objection was made to the evidence, but the judge, at the trial, admitted it, and the case was transferred to the supreme court, where a new trial was granted. In disposing of the case the court say the exception must be sustained, which was to the admission of the plaintiff's statement to his physician that his leg had been struck by a horse; and the court add, that it was a statement of a fact, "*and was used as evidence of that fact.*" It was, therefore, wrongly admitted, which shows to a demonstration that the evidence in this case was also wrongly admitted, because it was admitted and used as evidence to prove that the injury and death of the assured were occasioned by the alleged accident.

Death was occasioned by a stab, in the case of *Commonwealth v. Hackett*, 2 Allen, 139, and it is suggested that the ruling in that case qualifies the doctrine, as laid down in the preceding case, but there is no foundation for the suggestion, as the court say, that the declaration given in evidence was uttered immediately after the homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him, after so brief an interval of time, that the declaration or exclamation of the deceased (I am stabbed) may fairly be deemed a part of the same sentence as that which followed instantly after the stab with the knife was inflicted.

Many bodily sensations and ailments are of such a character that they can only be known to the person who experiences them, and, in view of that fact, the supreme court of that state decided, in the case of *Barber v. Merriam*, 11 Allen, 322, that the statements of a patient to his physician, as to the character and seat of his ailments, when made for the purpose of receiving medical advice, were admissible in an action for a personal injury; but they expressly affirmed the doctrine of the previous decisions, to which reference has been made.

Declarations of a narrative character were again offered in the subsequent case of *Commonwealth v. Densmore*, 12 Allen, 537, and they were again re-

jected as hearsay evidence; and the leading case of *Lund v. Tyngsborough* was again approved and reaffirmed. Examined in the light of the decisions made by the supreme court of Massachusetts, since the case of *Commonwealth v. McPike*, I am of the opinion that the rulings of the circuit court in this case find no support from any reported case in the volumes of the Massachusetts Reports.

Next suggestion is, that those rulings may be sustained upon the authority of the case of *Rex v. Foster*, 6 Carr. & P., 325, and of the case of *Thompson v. Trevanion, Skinner*, 402, but those cases are so imperfectly reported that they can hardly be said to be reliable. Grant, however, that the reports of the cases, though meager, are reliable, still, I am of the opinion that the rules of evidence there adopted are contrary to the modern decisions in both countries. They are both specially noticed by Mr. Roscoe, in his valuable treatise on the Law of Evidence, and he says they "are difficult to reconcile with established principles." Both admit the declarations to extend to the particulars of what was said, and though they (the declarations) were both made in close proximity to the event to which they relate, it is very questionable, indeed, says the same writer, whether that ground alone is sufficient to render them admissible. Roscoe's *Crim. Ev.*, 26.

§ 61. *Tests of admissible hearsay evidence.*

Both of these cases are also cited by Taylor in his more recent work upon the Law of Evidence, and yet the rules which he promulgates, as tests to regulate the admission of such evidence, show that the rule adopted in those cases is not good law. His leading tests are as follows:

1. That declarations, though admissible as evidence of the declarant's knowledge or belief of the facts to which they relate, and of his intentions respecting them, are *no proof* of the *facts* themselves, and therefore, if it be necessary to show the existence of such facts, proof *aliunde* must be laid before the jury. 1 Taylor on *Ev.*, § 523.

2. That, although acts, by whomsoever done, are *res gestæ*, if relevant to the matter in issue, yet, if they be irrelevant, declarations, qualifying or explaining them, will, together with the acts themselves, be rejected. *Id.*, § 524.

3. That where an act done is evidence *per se*, a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act, but where the act is, in its own nature, irrelevant to the issue, and where the declaration *per se* cannot be received, no case has yet established the rule that the union of the two will render them admissible. *Id.*, § 524; Redfield on Carriers and Bailments, § 454.

4. That an act cannot be varied, qualified or explained by a declaration which amounts to no more *than a mere narrative* of a past transaction, nor by an isolated conversation, nor by an isolated act done at a later period. Taylor on *Ev.*, § 526; *Nutting v. Page*, 4 Gray, 584.

Condemned by all these tests, it is impossible to admit that the two cases relied on, as supporting the rulings of the circuit court, can be good law, and if not, then those rulings stand unsupported in principle or by any well-considered English or American decision. *Wright v. Tatham*, 5 Cl. & Finn., 670; S. C., 7 Ad. & Ell., 389. Obviously, the main fact in the case before the court was the alleged accident, and the bill of exceptions finds that there was no other evidence to prove that material allegation than the testimony of the plaintiff, and the son of the deceased, who knew nothing of what had occurred, except what they were told by the injured party. *Baker v. Griffin*, 10 Bosw., 142.

Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible for that purpose, but they are not admissible to prove *a past occurrence*, nor to prove that they were occasioned by such an accident as that alleged in the declaration as the foundation of the plaintiff's claim.

TURNER v. YATES.

(16 Howard, 14-29. 1853.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the district of Maryland. The action was debt on the bond of the plaintiffs in error, the condition of which was as follows:

“Whereas the said Joseph C. Yates is about to lend and advance to William H. F. Turner the sum of \$12,000, in such sums and at such times as the said William may designate and appoint; which designation, and appointment and advances, it is hereby agreed shall be evidenced by notes drawn by the said William in favor of the said Harry F. Turner, agent, and by the latter indorsed, or by drafts drawn by the said William H. F. Turner in favor of the said Harry F. Turner, agent, on, and accepted or paid by, the said Yates, indorsed by said Harry F.

“And whereas the said Harry F. Turner, Sterling Thomas and James F. Purvis have agreed, as the consideration for the said loan, to secure the said Yates the payment of the sum of \$6,000, and interest thereon, part of the said loan; and the said Harry F. Turner, with Robert Turner and Absalom Hancock, have entered into a bond similar to this, for the payment of the other \$6,000 and interest:

“Now the condition of the above obligation is such, that if the said William H. F. Turner, at the expiration of twelve months from the date hereof, shall well and truly pay to the said Joseph C. Yates, his executors, administrators or assigns, all such sum or sums of money as may be owing to the said Yates, by the said William H. F. Turner, evidenced as aforesaid, at the said expiration of the said twelve months, or in case the said William H. F. Turner should fail or omit to pay said sum or sums of money, at said time, if the said Sterling Thomas and James F. Purvis, or either of them, shall well and truly pay to the said Yates, his executors, administrators or assigns, so much of said sum or sums of money as may then be owing, as shall amount to \$6,000 and interest, in case so much be owing, with full legal interest thereon, or such sum or sums of money as may be owing, with interest thereon, in case the same should amount to less than \$6,000, then this obligation shall be null and void, otherwise to remain in full force and virtue in law.

“HARRY F. TURNER. [SEAL.]

“STERLING THOMAS. [SEAL.]

“JAMES F. PURVIS. [SEAL.]”

The defense was, that seven hundred boxes of bacon had been consigned by William Turner to Gray & Co., in London, for sale, and having been sold, the whole of its proceeds ought to be credited against the advance of \$12,000, mentioned in the condition of the bond. The plaintiff did not deny that the merchandise was received by Gray & Co. for sale, and sold by them, but insisted that the property belonged to Harry, and not to William Turner, and so no part of its proceeds were thus to be credited; and that, if found to

credit any part of these proceeds, there was first to be deducted the amount of a draft for \$5,733, drawn by Harry Turner on the plaintiff specifically against this property, which draft the plaintiff was admitted to have accepted and paid.

Upon this part of the case, the district judge who presided at the trial ruled: "If the jury believe that defendants executed and delivered the bond now sued upon, and that Harry F. Turner, in the transactions, after occurring, in relation to the bacon at Chattanooga, was either the principal in such transactions, or acted as agent of William H. F. Turner, then defendants are entitled only to be credited for one-half of the net amount of the shipments of bacon made by them, after deducting from the proceeds of sales of such bacon all liens thereon, including in such liens the draft of \$5,733 drawn as an advance on such bacon."

This ruling having been excepted to, several objections to its correctness have been urged at the bar by the counsel of the plaintiffs in error. The first is, that the bond does not show the advances were actually made, and, therefore, the judge ought to have directed the jury to inquire concerning that fact. It is a sufficient answer to this objection to state, what the record shows, that, in the course of the trial, the plaintiff, having put in evidence drafts corresponding with those mentioned in the bond, amounting to \$12,000, the defendants admitted their genuineness, and that they were all paid at the times noted thereon. The fact that the \$12,000 was advanced was not therefore in issue between the parties, and there was no error in not directing the jury to inquire concerning it.

§ 62. *Where a contract appears by written papers without reference to extraneous facts, it is for the court to construe those papers.*

It is further objected that in his instruction to the jury the judge assumed that the draft of \$5,733 was drawn against this consignment, instead of leaving the jury to find whether it was so drawn. The draft itself and the letter of advice were in the case. The draft requested the drawee to "charge the same to account as advised." The letter of advice states: "I have this day drawn on you at ninety days for \$5,733, being \$10.50 per box on five hundred and forty-four boxes singed bacon," etc. This was a part of the merchandise in controversy. It was clearly within the province of the court to interpret these written papers, and inform the jury whether they showed a drawing against this property. When a contract is to be gathered from a commercial correspondence which refers to material extraneous facts, or only shows part of a course of dealing between the parties, it is sometimes necessary to leave the meaning and effect of the letters, in connection with the other evidence, to the jury. *Brown v. McGran*, 14 Pet., 493.

But this was not such a case; and we think the judges rightly informed the jury that this draft was drawn against this property. Whether, being so drawn, it bound the property and its proceeds so that in this action its amount was to be deducted therefrom, depended upon other considerations, which are exhibited in the other part of the instruction. Assuming, what we shall presently consider, that there was evidence from which the jury might find that Harry, who drew the draft, was either himself the owner of the property, and so the principal, or, if not, that he was the agent of William, there can be no doubt of the correctness of this instruction, unless there was something in the case to show that the owner of the consignment could not bind its subject by a draft made

and accepted on the faith of it. This is not to be presumed; and if the two defendants, who were sureties on this bond, assert that they had a right to have the whole of the proceeds of this property appropriated to the repayment of the advance of \$12,000 for which they were in part liable, it was incumbent on them to prove that the ordinary power of a consignor, by himself or his agent, to draw against his property, with the consignee's consent, was effectually restrained by some contract with the sureties, or of which they could avail themselves. We have carefully examined the evidence on the record, and are unable to discover any which would have warranted the jury in finding such a contract.

The bond itself contains no intimation of it. And, although the evidence tends to prove that the sureties had reason to expect that bacon would be packed and sent to Gray & Co., and that, through such consignments, the advance of \$12,000 might be partly or wholly repaid, they do not appear to have stipulated or understood that William was to have no advance on such property. Indeed, the real nature of the transaction seems to have been that the bond was taken to cover an ultimate possible deficit, after the property should have been sold and all liens satisfied; leaving William, their principal, free to create such liens as he might find expedient in the course of the business.

We are also of opinion that there was evidence in the case from which the jury might find that Harry was held out to the plaintiff, by William, as his agent, as well for the purpose of drawing against this property as for other purposes. The letter from William Turner to the plaintiff, of the 14th November, 1849, and the agreement of Harry, appended to it, tend strongly to prove this. They are as follows:

“CHATTANOOGA, TENN., November 14, 1849.

“MR. JOS. C. YATES:

“*Dear Sir*—In consideration of the advance of \$12,000 made me by you for the purpose of packing meats for the English market, I hereby bind myself to make my whole shipments, of whatever kind they may be, to your friends in London or Liverpool, Messrs. B. Charles T. Gray & Son, for the entire season, or longer, till such advance shall have been paid off, together with any other that I may be permitted to draw for.

“I am, dear sir, your most obedient servant,

“W. H. F. TURNER.

“I agree to see the above carried out in good faith, and bind myself for the due fulfillment of it.

“HARRY F. TURNER, Agent of

“W. H. F. TURNER.”

It thus appears that further advances to William were contemplated as a part of the arrangement with him; and Harry, as agent of William, was to see the whole arrangement carried out upon his personal responsibility. If, as these witnesses show, Harry was agent for William, for carrying out the whole arrangement, and further drawing was contemplated as a part of it, it necessarily follows he was his agent thus to draw. It is shown by the correspondence that Harry had the sole charge of getting the property down to the sea-board from the interior, and of shipping it; and that he had incurred large debts on account of it; and, finally, William Turner has not, so far as appears, repudiated his act in drawing, and the defendants now claim the benefit of a consignment, on the faith of which the draft in question was accepted.

§ 63. *Whether a party may open upon one line of proof, and during the trial change to another, is a matter of discretion with the court.*

Under these circumstances, our opinion is that it was not improper for the judge to leave it to the jury to find whether Harry was the agent of William, if he were not himself the owner of the property. Nor do we think these two states of fact present such inconsistent grounds as ought not to have been submitted to the jury. It is true, Harry could not be at the same time principal and agent; but it often happens in courts of justice, that a right may be presented in an alternate form or upon different grounds.

If one party has dealt with another as an agent, it would be strange if the transaction should be held invalid because it is proved on the trial he was principal—and *è converso*. The substantial question, in such a case, is a question of power to do an act; and this power may be shown, either by proving he had it in his own right, or derived it from another. Of course, there may be cases where the allegations of the parties on the record restrict them to one line of proof; and there may be others in which the court, to guard against surprise, should not allow a party to open one line of proof, and in the course of the trial abandon it and take an inconsistent one. But this last is a matter of practice, subject to the sound discretion of the court, and not capable of revision here upon a writ of error. We hold the second instruction, which involved the merits of the case, to be correct. The other bills of exception relate chiefly to questions of evidence.

§ 64. *An invoice is presumed to go with every consignment. Secondary evidence is not admissible if the invoice is in the hands of the consignee.*

In the course of the trial, the defendants introduced a witness who testified that he made out an invoice of the seven hundred boxes of bacon, and sent it by mail to the plaintiff, who was the agent of Gray & Co., to whom the property was consigned in London. The defendants then called on the plaintiff to produce this invoice under the following agreement:

“It is agreed between the plaintiff and defendant in this cause, that either party shall produce, upon notice at the trial table, any papers which may be in his possession, subject to all proper legal exceptions as to their admissibility or effect as evidence; and that handwriting, where genuine, shall be admitted without proof.

“S. T. WALLIS, for plaintiff.

“BENJ. C. BARROLL, for defendants.”

The plaintiff said the invoice was not in his possession. The defendants then offered to prove its contents. But the court was of opinion it was to be presumed the invoice had gone to the consignees in London, who were competent witnesses to produce the original; and, therefore, parol evidence of the contents of the paper was excluded.

This ruling was correct. So far as appears, this was the only invoice made. Every consignment of merchandise, regularly made, requires an invoice. It is the universal usage of the commercial world to send one to the consignee. The revenue laws of our own country, and we believe of all countries, assume the existence of such a document in the hands of the consignee on the arrival of the merchandise. It was the clear duty of the plaintiff, when he received the invoice, to send it to the consignees in London. The presumption was, that he had done what is usually done in such cases, and what his duty required. If the paper was in the hands of the consignees in London, secondary evidence was not admissible. For it was not within the written agreement to produce papers which applied only to those in the possession of the plaintiff.

iff; and though the plaintiff was an agent of those consignees, and seems to have been suing for their benefit, yet, aside from the written agreement, they must be treated either as parties or third persons. If as parties, they were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it. This also disposes of the fifth exception; because, if the evidence in the cause had some tendency to prove the document had been retained, the offer of the plaintiff to prove the contrary, and the election by the defendants to rest their motion for the admission of the parol evidence upon a concession that the fact was as the plaintiff offered to prove it, instead of first calling for that proof, must preclude them now from objecting that the proof was not given.

§ 65. *In a commercial case correspondence connected with the facts in issue is generally admissible evidence.*

The second exception relates to the admission of certain correspondence respecting this property, between the plaintiff and Harry Turner and Messrs. Gadsden & Co., of Charleston, S. C., before the property was shipped to London, and also the accounts of sales of the property, which were introduced by the plaintiffs for the purpose of showing that they were dealing with Harry Turner as principal, and under a separate contract with him. We have no doubt of the admissibility of this evidence for the purpose for which it was offered. Whether Harry was principal or agent, it was competent and important for the plaintiff to prove that he was dealt with and treated as a principal; and there could be no better evidence of it than the correspondence concerning the transaction. On the trial of a commercial cause, such a correspondence is not only generally admissible, but it is often the highest evidence of the nature of the acts of the parties and the capacities in which they acted, and the relations they sustained to each other. It must be observed that the plaintiff, in one aspect of his case, had three things to prove: First, that there was a distinct arrangement with Harry to ship property to Gray & Son, and receive advances on it. Second, that the plaintiff and Gray & Son acted on the belief that this consignment was made under that arrangement. Third, that, in point of fact, this consignment was made by Harry on his own account, and not on account of William. And evidence showing that Harry, being in possession of the property, consigned it to them, accompanying or preceded by such letters as showed the consignment to be for his own account, was clearly admissible upon each of these points. It is true it might, nevertheless, be the property of William, and really sent for his account; but that was a question for the jury upon the whole evidence.

§ 66. *Evidence of declarations made in presence of the opposite parties is admissible.*

The third exception relates to the admission of the testimony of Mr. Thomas, respecting certain declarations made to him by Mr. Ward. We do not deem it necessary to detail the evidence, it being sufficient to say that, so far as these declarations were made in the presence of all the defendants, they were of such a character, and made under such circumstances, as imperatively to have required them to deny their correctness if they were untrue; and therefore they were clearly admissible. So far as Mr. Ward's declarations were made to Mr. Teackle, when the defendants were not present, they are stated to have been merely a repetition of his former statements.

The judge left them to the jury, with the following instruction: "If the jury find that W. J. Ward, Esq., was, in his communication with the plaintiff's

counsel, accompanied by the defendants, and that defendants referred plaintiff's counsel to said Ward to adjust and settle the differences between them, that said defendants are bound by the acts and declarations of said Ward, although he was only retained by H. F. Turner as such, unless such limitations of retainer were stated to plaintiff or his counsel."

This was sufficiently favorable to the defendants. It was really of no importance whether Mr. Ward was counsel for one or all the defendants, if they united in referring Mr. Thomas to him to adjust the mode of preparing the papers; and, in our opinion, there was evidence from which the jury might find such an authority to have been given by the defendants jointly. We consider the fourth exception untenable. If it was usual to pay a commission for such services, it was properly charged in this case, there being no evidence to show that there was a special agreement to render the services without pay, or for less than the customary commission. The sixth exception was taken on account of the admission of the testimony of Mr. Teackle, and certain letters of Gray & Co. and Harry Turner. The former has already been disposed of in considering the third exception, and the latter in considering the second exception respecting the correspondence of Harry Turner, most of the observations upon which are applicable to these letters.

§ 67. *The record must show that the exception was taken at the time its cause arose.*

The remaining bill of exceptions is in the following words:

"Upon the further trial of this case, after the instructions prayed for had been argued, and the court had decided to refuse the same, and had granted the two instructions set out on the defendants' seventh exception, the defendants' counsel having prepared out of court their exceptions thereto, and to the other points of law ruled by the court and excepted to during this trial immediately after the court had so decided, and before the bailiff to the jury was sworn, or the jury had withdrawn from the bar of the court, presented their said exceptions, and moved the court to sign and seal the same before the verdict should be rendered; but the court refused so to do, and refused to consider the said exceptions, or either of them, under the rule of that court, November 25, 1846, at the November term thereof.

"Ordered, that whenever either party shall except to any opinion given by the court, the exception shall be stated to the court before the bailiff to the jury is sworn, and the bill of exceptions afterwards drawn out in writing, and presented to the court during the term at which it is reserved, otherwise it will not be sealed by the court."

In *Walton v. The United States*, 9 Wheat., 657, this court said: "We do not mean to say (and in point of practice we know it to be otherwise) that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty, and it may afterwards, according to the rules of the court, be reduced to form and signed by the judge; and so in fact is the general practice. But in all such cases the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if it had been reduced to form and signed during the trial; and it would be a fatal error if it were to appear otherwise; for the original authority under which bills of exception are allowed has always been considered as restricted to matters of exception taken pending the trial and ascertained before the verdict." To what was there said this court has steadily adhered. 4 Pet., 106; 11 Pet., 185;

4 How., 15. The record must show that the exception was taken at that stage of the trial when its cause arose.

§ 68. *The courts may regulate the time and manner of making out bills of exceptions.*

The time and manner of placing the evidence of the exception formally on the record are matters belonging to the practice of the court in which the trial is held. The convenient dispatch of business, in most cases, does not allow the preparation and signature of bills of exceptions during the progress of a trial. Their requisite certainty and accuracy can hardly be secured, if any considerable delay afterwards be permitted; and it is for each court in which cases are tried to secure, by its rules, that prompt attention to the subject necessary for the preservation of the actual occurrences on which the validity of the exception depends; and so to administer those rules that no artificial or imperfect case shall be presented here for adjudication. The rule of the circuit court for the district of Maryland is unobjectionable, and this exception is overruled. The judgment of the circuit court is affirmed, with costs.

BANK v. KENNEDY.

(17 Wallace, 19-29. 1872.)

ERROR to the Supreme Court for the District of Columbia.

STATEMENT OF FACTS.—Kennedy, receiver of the Merchants' National Bank, brought suit for \$50,000 alleged to be due to that bank from the Bank of the Metropolis on a check drawn by Robinson. The Bank of the Metropolis admitted that it owed the \$50,000, but offered in part payment the note of Sherman, the cashier of the Merchants' Bank, for \$20,000, alleging that the note, ostensibly that of Sherman, represented a loan made to the Merchants' Bank. There was a judgment for the plaintiff.

§ 69. *A receiver of a national bank may sue as receiver or in the name of the bank without the order of the comptroller of the currency, in the collection of debts due to the bank.*

Opinion by MR. JUSTICE BRADLEY.

The first and second errors assigned are that the plaintiff, who is a receiver appointed by the comptroller of the currency under the fiftieth section of the national banking law, is not entitled to bring suit without the authority or direction of the said comptroller — which is not alleged or shown in this case; and that the action cannot be maintained by the receiver in his own name as such. These objections are based upon the language of the act referred to, as well as the general nature of the receiver's office. The statute (sec. 50, 13 Stat. at Large, 114) enacts:

“That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the comptroller of the currency may forthwith appoint a *receiver*, and require of him such bond and security as he shall deem proper, who, *under the direction of the comptroller*, shall take possession of the books, records and assets of every description of such association, *collect all debts, dues and claims belonging to such association*, and, upon the order of a court of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section

of this act; and such receiver shall pay over all money so made to the treasurer of the United States, subject to the order of the comptroller," etc.

We have already decided in the case of this very receiver that he may bring suit in his own name or use the name of the association. *Kennedy v. Gibson*, 8 Wall., 506 (BANKS, NAT., §§ 6-12). The subject was also lately discussed in the case of *The Bank of Bethel v. The Pahquioque Bank*, 14 Wall., 383. (BANKS, NAT., §§ 252-56), and the same views were held; the action in that case being brought against the insolvent bank. This disposes of the question as to the legal right of the receiver to sue.

§ 70. *A receiver cannot, without the sanction of the comptroller, sue the stockholders for contribution under the banking act.*

It remains, therefore, to determine whether it is necessary for the receiver, before bringing suit in an ordinary case of a debt or claim due the bank, to have the order of the comptroller for that purpose. In the case already referred to, the receiver had instituted a suit in equity against some of the stockholders of the bank for the purpose of charging them with the personal liability prescribed by the twelfth section of the act; and we held that he had no right to do this without the comptroller's direction. But it will be perceived that that was a very special case, out of the ordinary course, and one which involved an important consideration of the polity to be pursued. Stockholders are not ordinary debtors of the bank, but are rather in the light of creditors, their stock being regarded as a liability. They are entitled to all the surplus that remains, if any should remain, after the payment of the debts. They are only conditionally liable for those debts after all the ordinary resources of the bank have been exhausted, and they ought not to be prosecuted without due regard to the circumstances of the case. The determination on the part of those charged with winding up the affairs of the bank to resort to this ultimate remedy requires the exercise of due consideration; and a receiver ought not to take it upon himself to decide so important a question without reference to the comptroller, under whose direction he acts. Although it is his duty to collect the assets of the institution, he does not distribute them, and cannot ordinarily know, without reference to the comptroller, whether a prosecution of the stockholders will be necessary or not. Hence our decision in the case of *Kennedy v. Gibson* cannot fairly be quoted for the government of a case like the present, which is a suit to recover an ordinary debt.

The language of the statute authorizing the appointment of a receiver to act *under the direction of the comptroller* means no more than that the receiver shall be *subject* to the direction of the comptroller. It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts, no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do. We think there was no error in the decision of the court below on these points, and that the action was properly brought by the receiver.

§ 71. *Conversations between parties to a transaction relative to it are competent evidence as part of the res gestæ, although such conversations related to written papers other than the one sued' on.*

We next come to the special ground of litigation in this case. The cause was tried before a jury, and evidence was adduced *pro* and *con.* upon the principal subject of controversy, namely, whether the note given by Sherman to

the defendants, on the 27th of February, was given on his individual account for a loan made to him personally, or whether it was given on the account of the Merchants' Bank (of which he was cashier) for a loan made to it. We are called upon to decide upon the legality of certain rulings as to evidence which took place during the trial and upon the correctness of the charge to the jury.

After the plaintiff had proved the presentation of the check on the 1st of May, and the payment of it to the messenger of the Merchants' Bank, in certain moneys and securities, including the note in question; and had proved by Sherman, the cashier of the Merchants' Bank, that the defendants refused to take the note back and pay the cash instead, he proceeded to prove by Sherman the circumstances under which the note had been given to the defendants, the substance of which was that on the 27th of February he applied to Hutchinson, cashier of the defendants, for a loan to himself of \$20,000, to enable him to purchase some stock in the Merchants' Bank, and that this note was given for that loan, with the certificate of the stock attached as collateral; and that he received therefor two drafts for \$10,000 each on Baltimore and Philadelphia banks, payable to C. A. Sherman, cashier; that he indorsed them as cashier, and that the proceeds, when paid, went to the credit of the Merchants' Bank. The drafts being produced in evidence, the plaintiff's counsel then asked the witness what took place, when the drafts were about to be drawn, between him and Hutchinson in regard to the form of the drafts. This evidence was objected to, was allowed, and an exception taken, which is the subject of the third assignment of error.

It is argued by the counsel for plaintiffs in error that this evidence was calculated to explain or vary the legal effect of the drafts themselves. We do not think so. Those drafts are not sued on in this action. They are introduced merely as part of the *res gestæ* of the loan, and the conversation of the parties on the subject of the drafts was also a part of that *res gestæ*. They equally constituted parts of the transaction. The witness might have preferred to receive the drafts in that form; he might have preferred to receive drafts payable to any third person. Evidence as to the reason why they were made in one form rather than another does not in the least vary or contradict the drafts themselves. As the form of the drafts might confuse the jury, the plaintiffs had a clear right to explain how they came to be made as they were. The fact in question was the loan. The circumstances of the negotiation constituted the *res gestæ* of the loan. The drafts were one of those circumstances; the conversation of the parties was another. Evidence of the reason why a loan was made in particular funds or securities, instead of cash, is perfectly competent where it will tend to elucidate the nature of the transaction when that is the question at issue. The question here was, whether the loan was made to Sherman or to the bank. The note given for the repayment of the loan was given by Sherman individually. The drafts in which he received the loan were made payable to him as cashier. Neither the one nor the other of these documents can prevent the parties from showing, as a matter of fact, to whom the loan was really made. The defendants were endeavoring throughout the cause, contrary to the form of the note, to show that it was really the obligation of the bank, and that the loan was made to the bank. This they had a clear right to do, as the plaintiff had an equally clear right to show the contrary. The principle which governs such cases was explained and enforced by this court in the case of *Baldwin v. The Bank of Newbury*, 1 Wall., 240, 241 (§§ 1067-69, *infra*). There was no error in the admission of this evidence.

§ 72. *Conversations relative to a purchase which is consummated by means of such conversations constitute part of the res gestæ of the purchase.*

The next exception, which is the subject of the fourth assignment of error, related to evidence of a similar character. Sherman, on his cross-examination, stated that he had learned about the stock being for sale from Mr. Huyck, the president of the Merchants' Bank, without knowing whose stock it was until he had made arrangements for his loan, and went to Huyck for the certificate of stock, when he found that it belonged to one English, a director of the bank. He was then asked, on re-examination by the plaintiff, what Huyck said at the time of delivering him the certificate, as to the sale, delivery and price of the stock. To this the defendants' counsel objected, but the question was allowed.

We think that in this also there was no error. The object of the cross-examination evidently was to show that the bank, through its president, was concerned in the purchase of the stock, and that, therefore, the loan must have been made on its account. As the witness' purchase of the stock was made through Huyck, the conversation between them when the purchase was made was part of the *res gestæ* of the purchase—part of the transaction itself. For that reason it was clearly competent. Like the loan, the purchase of the stock was a fact accomplished by conversations and acts. In proving this fact these conversations and acts were competent evidence. Conversations, in such cases, are not adduced so much to prove ulterior facts stated therein as to prove the conversations themselves as facts constituting part of the transaction. Hence they are not hearsay, but original evidence.

It further appeared from Sherman's testimony that when he had received the two drafts from Hutchinson he delivered them to Huyck, the president of the Merchants' Bank, who delivered them to English upon his entering the bank a few minutes afterwards, and that English handed them to the receiving teller. The plaintiffs' counsel then asked the witness for what purpose the drafts were delivered to English. The allowance of this question (which was objected to) is the fifth error assigned. Its propriety is evinced by the answer to it, which was that the drafts were delivered to English in payment of the stock. The position of the parties is material. It had appeared by Sherman's testimony that he was the purchaser of the stock; that the drafts belonged to him, having been borrowed by him to pay for the stock; that he had purchased it through Huyck, but that the stock belonged to English, who was the vendor; that he, the witness, handed the drafts to Huyck on his return from the defendants' bank, and that Huyck, a few minutes after, handed them to English. Surely one of the principals in this transaction, under these circumstances, was competent to testify as to the purpose for which the drafts were delivered to English. If the declarations of a man when doing an act may be proved in his own behalf to show the purpose and intent with which it was done, as numerous authorities show (Starkie on Ev., 51, 87; 1 Greenl. Ev., § 108), it must be competent for a party to the transaction, cognizant of all the circumstances, and a witness of the act, to state its purpose, being subject, of course, to cross-examination. The manner and form in which an act is done, being one of several acts concurring to one purpose or transaction, indicate even to a mere observer, by shades of circumstance often difficult to analyze, what was the character of the act or the intent and purpose with which it was done.

§ 73. *Res gestæ.*

It further appearing, on Sherman's cross-examination, that the drafts were not indorsed by him until after English had delivered them to the receiving teller, the defendants objected to Sherman's being asked the reason why they were not indorsed when given to English. The allowance of this question was made the ground of another exception, and is the subject of the sixth assignment. We can see no objection to the question. If the fact that the drafts were not indorsed when delivered to English is of any consequence, the reason why they were not indorsed would seem to be of equal consequence. It might have been an oversight. It might have been something else. Whatever it was, the reason should go with the fact, so that the latter might not have a greater effect on one side or the other than it ought to have. Facts proved by way of circumstantial evidence may always be explained by the party against whom they are adduced.

Further evidence was given in the case tending to show that the loan was entered in a memorandum book kept by the defendants, as made on the note of Sherman individually and not as cashier; and that the amount of the two drafts was placed to the credit of English on the books of the Merchants' Bank, and that he checked out the same; and that Sherman was credited for the amount of dividend due on the stock. A statement of further evidence, containing the testimony of Hutchinson and Frissell, the cashier and assistant cashier of the defendants, materially conflicting with that of Sherman, is annexed to the bill of exceptions, but not made a part of it, and therefore cannot properly be taken into consideration.

The evidence being closed, the respective parties prayed the court to give certain instructions to the jury. The seventh error assigned is that the court granted the plaintiffs' first prayer for instructions, which was in substance that if the jury found, from the evidence, that the note of Sherman was passed to and received by the defendant as the evidence of money or negotiable drafts lent to him, and that the sole consideration on which the loan was made was the personal responsibility of Sherman on said note and the collateral stock, then the said Merchants' Bank was in no way chargeable with the note, nor could it be legally tendered to them by the defendant as part payment of Robinson's check, unless the jury should find from the evidence that said loan was really made to Sherman in behalf of the Merchants' Bank, and the proceeds thereof went to its use and benefit. This instruction was given, subject to the qualifications contained in the first instruction prayed for by the defendant, which were, in effect, that if the contract of loan was really between the two banks, then the note ought to be allowed as part payment of the check. The substance and effect of the instruction, and indeed of the whole charge, was, that if the jury believed that the loan was made to Sherman for the Merchants' Bank, they must find for the defendants; but if made to him on his own behalf they must find for the plaintiff. This seemed to be the polestar which guided the court in all its answers to the various instructions applied for. And we think the court was clearly right. The case seems to have been very fairly put to the jury on this cardinal point, and it would be a useless task to make a critical examination of each request for the purpose of showing the truth of this proposition.

The tenth error assigned is the refusal of the court to charge that the plaintiff could not recover unless the jury found that, before suit brought, the note

of Sherman and the collateral certificate of stock attached thereto were tendered to the defendants. Why should these papers be again tendered? They were once tendered and refused. The objection is not even plausible.

§ 74. *The fact that a bank was in the habit of borrowing money from another bank on the credit of its cashier cannot authorize the conclusion that a specific loan was made to the bank.*

The eleventh assignment complains of the refusal to charge that the Merchants' Bank was liable for the loan, if it had been in the habit of borrowing money of the defendants by Sherman, as cashier, and if the defendants *believed* that the loan in question was for the benefit of the Merchants' Bank. The evident answer to this assignment is, that the *belief* of one party to a transaction is not the criterion by which the rights of the parties are to be governed, unless the other party, by his conduct or declarations, induced that belief. The naked fact of previous loans being made to the Merchants' Bank, through Sherman as cashier, could not, as a matter of law, be adjudged as sufficient cause for such a belief on the part of the defendants in view of the other evidence in the cause.

The eighth, ninth and twelfth errors are founded upon the refusal of the court to instruct the jury that the Merchants' Bank was bound by an alleged settlement of the controversy if they believed certain evidence which does not appear upon the bill of exceptions, namely, to the effect that the president of the Merchants' Bank, on the day after the presentation of the check sued on, in a conversation with Hutchinson, acceded to his view of the subject and allowed Sherman's note as part payment of the check. It appears that the court granted the two former instructions prayed for, with this qualification, namely, *provided* the loan was originally made between the defendant and the Merchants' Bank, and not with Sherman, or that the proceeds went to the benefit of the bank as part of its assets or property. As the bank went into bankruptcy within forty-eight hours after this supposed settlement, the qualification was probably not an unreasonable one. But as the bill of exceptions before us does not contain a particle of evidence on the subject, it is unnecessary to decide this question. These being all the errors assigned, the judgment must be affirmed.

FLINT v. THE NORWICH & NEW YORK TRANSPORTATION COMPANY.

(Circuit Court for Connecticut: 7 Blatchford, 536-547. 1870.)

STATEMENT OF FACTS.—Suit by Flint for damages. Flint was a passenger on the defendant company's boat, together with a detachment of United States troops, who became unruly and raised a tumult in which plaintiff was shot in the foot. The company's liability depended partly upon the fact that the United States officers were inefficient and unable to suppress the riot. To prove the extent of the riot and their inability to suppress it, the condition and situation of the officers as well as the duration of the riot, the plaintiff offered evidence of passengers who heard a conversation between two of the officers at the time of the riot, although in a different part of the boat. The evidence was, in substance, that the witnesses were in the dining saloon and at table when a man in military uniform, whom they supposed from the stripes on his arms to be a sergeant, entered, and saluted an officer in uniform, whom they supposed to be a lieutenant, and said: "There is a row on deck and I can't suppress it." The officer replied, "Mind your orders." The sergeant said:

"I am afraid some one will be hurt." The officer replied, "You have your orders. Mind your orders." The sergeant retired and soon came down again, hurriedly, soon after the report of a gun had been heard, and said: "For God's sake come up; a man has been shot." This evidence was admitted under objection, and this is the error relied on.

Opinion by WOODRUFF, J.

It was conceded on the argument of this motion, by the counsel for the defendants, that the general question whether a common carrier of passengers is liable for an injury received by one passenger through the negligence or from the misconduct of a fellow passenger is not raised by this motion or involved therein. Nor does the case now before us disclose upon what grounds, either of law or fact, the verdict for the plaintiff in this case was rendered. It must, however, have necessarily proceeded upon some neglect of duty or violation of obligation to employ the utmost care and diligence that the plaintiff might be carried safely to his destination.

Against what possible injuries the defendants were bound to adopt precaution; what dangers they were bound to foresee and guard against in advance; whether, in these days, in which the means of carriage are customarily furnished on a large scale and are used by many hundreds together, owners of steamboats and proprietors of railroad lines are under obligations to have at command a force adequate to the protection of passengers against possible assaults and injury from other passengers, and, therefore, should be prepared in advance to furnish such protection, even against the just presumption that their passengers will be orderly, keep the peace, and do each other no harm; and, especially, whether the presence of a detachment of soldiers, received as passengers, under the ordinary command of proper officers, ought to have suggested to the defendants that there was any danger whatsoever that other passengers would be injured, and so required them to provide special defense or protection to such other passengers,—are, it may be, questions of interest to carriers of passengers. It would seem that, in respect to such a detachment, the presumption of obedience and subordination should obtain, and that a common carrier would not be bound to anticipate the contrary. On the other hand, if a carrier has already received a company of soldiers, or a party, whether soldiers or not, whom he finds to be "crazy drunk" (to use the language of the case before us), and who become riotous and disorderly, so as to menace danger to other passengers to thereafter arrive for carriage, a different question arises.

§ 75. *If condition of soldiers as crazy drunk had become manifest before the arrival of passengers by train, it was the duty of defendants to adopt precautions to restrain them.*

The case, as made for the purposes of the motion, is not very distinct upon that point; but if, before the train on which the plaintiff and other passengers arrived, such a condition of the soldiers had already become manifest, the duty of the defendants to adopt such precautions as were in their power to restrain them, for the protection of the plaintiff and such other passengers, would seem obvious. And if, after their arrival on board, disorder and violence arose among the soldiers or among any passengers, it is no harsh rule that holds it to have been the carrier's duty to use such means as he had, or by ordinary care might have had, for the protection of the peaceable. The evidence which was objected to and was received was, if pertinent at all, applicable to this view of the duty of the defendants. The rule of liability pre-

scribed by the court is not stated in the case before us, but as it was not excepted to, it must be assumed, for all the purposes of this motion, to be the correct rule, and I have made the foregoing suggestions for the sole purpose of seeing whether, under any rule of liability, the evidence so given was competent in its nature and relevant to the question.

Assuming that the defendants, when the disorderly conduct of these soldiers began, became bound to employ their means diligently for the protection of other passengers, the question for the jury was, did they do so? and, if not, did their negligence in this cause the injury to the plaintiff of which he complained?

§ 76. — *questions pertinent to the inquiry in the matter of due diligence.*

It was pertinent to this question to inquire how many riotous persons there were, how long the disturbance continued, and to what extent it was carried, and as especially bearing on the question of due diligence, how far the officers of the soldiers, whose plain duty it was to use every means which even military law would warrant to preserve order, were in the actual discharge of that duty; for, under any view of their own duty to be diligent, the defendants had a right to rely upon and take the aid of such officers, and until it appeared that such aid was withheld or inefficiently furnished, a jury might well conclude that the defendants were themselves excused from any interference. In this view, then, was the evidence in question competent and relevant?

§ 77. *Where whole of testimony is admissible in the aggregate, then it was properly received, although specific parts might be pointed out which court should exclude.*

The objection on the trial was not to any parts of the testimony of the witnesses, but to the whole; and it would not now be just to the plaintiff, or conformable to the rule of law governing the subject, to permit the defendants to divide the testimony into parts or sentences, and argue, as to one or more, that it or they are not competent. If, on the trial, the defendants had objected to a part or portion of the testimony, the plaintiff might have waived it. If it were claimed that the words of the sergeant addressed to the officer in the cabin were not competent evidence, as against the defendants, of the fact which he stated, still if the testimony apart from these words was admissible, the objection must fail. In short, if the whole testimony, as an aggregate, was admissible for the purposes for which it was offered, then it was properly received, although specific parts of it might have been pointed out which it would have been the duty of the court to exclude.

§ 78. *Counsel should make objections specific, so that adverse party may waive what is objectionable.*

Counsel should make their objections in such case specific, so that the adverse party may have an opportunity to waive what is objectionable, and so that the court may have its attention called specifically to the precise point which counsel propose to urge, in any stage of the cause, to the testimony offered.

Another preliminary observation should be made, in view of the arguments presented on the motion. The objection which was made is itself of a somewhat equivocal meaning. The defendants objected to the admission of the evidence for all the purposes for which it was offered. This, it is argued by the plaintiff, means simply a general objection to the evidence for the purposes for which it was offered, and is not a specific objection that the evidence is not admissible for any of the purposes for which it was offered, and, hence, that if

the evidence was admissible for any one of the purposes for which it was offered (other than to prove the condition of affairs on deck, which was particularized), the objection was not well taken and should be overruled. Although the form in which the objection is stated is somewhat equivocal, I am inclined to think its import, as intended and understood, was particular and not general.

§ 79. *When plaintiff stated several purposes for which he offered the testimony, and defendants objected to its admission for all the purposes, they meant for each or any of those purposes.*

The plaintiff had stated several purposes for which he offered the testimony, and when the defendants said they objected to its admission for *all* the purposes for which it was offered, they meant for each or any of these purposes, and they added their particular specification of the purpose to show the condition of affairs on deck, because they laid special stress upon that point. I admit that the language is not the best chosen to convey the idea, but on a motion for a new trial, a rigid technical criticism ought not to have much weight, if the court are satisfied that there was error operating to the prejudice of the party objecting.

I shall deal with the objection, therefore, as if it were made distinctly and consecutively, to the admission of the testimony for each of the purposes specified by the plaintiff, as each purpose was separately announced.

Reverting to the questions in issue, it was material, or certainly relevant, to show the character of the disturbance on deck, whether formidable or slight, to show its duration, and whether any and what efforts were made to repress it, or to protect passengers from injury therefrom, and, as connected with this last, whether the officers of the detachment were using their power and means for the purpose. Indeed, it was not denied, on the argument of this motion, that these were relevant and proper subjects of inquiry; and these are the precise purposes for which the testimony was received. If, then, the testimony bore on these matters, and was, in its nature, competent, the objection was properly overruled.

1. There was evidence that a detachment of soldiers in command of two lieutenants, a sergeant and two corporals, were on the boat, and that a conflict between some of the men and others who had been selected as a guard was in progress; and that it began shortly after the other passengers came on board. At a time plainly concurrent with the disturbance, a person in uniform, with stripes on his arm, descends from the very place of the disturbance, near the saloon stairs, into the saloon, and, with the form of military etiquette, salutes a man in military uniform, which, in the judgment of the witnesses, was that of a lieutenant; the latter replies to him in manner and terms of military authority, and the former yields obedience, but again returns and invokes the aid of the other. Now, all this is not conclusive evidence that these were officers of the disorderly soldiers; but the uniforms, and the evident relation between them, testified by acts as well as words, were circumstances which were proper to be submitted to a jury on that question of identity. If a witness had been produced, and had testified that he saw a person in the uniform of an officer give orders to the detachment, which they obeyed, it would not be conclusive evidence that such person was an officer, or that he had, in fact, any authority; but it would tend to show both. Transactions which, in all probability, would not take place unless certain other facts existed, are evidence oftentimes from which such other facts may be inferred; and the affairs of life are to be judged of according to their usual and natural signification.

When, therefore, proof has been given that a detachment of soldiers and their officers are on board the steamer, and persons are pointed out, in the uniform of officers, acting toward each other as such, and, in reference to the soldiers, giving and obeying commands, although not in the very presence of the soldiers, there is, certainly, a presumption that they are the officers, because it would be unnatural, and against the ordinary course of human experience, to think otherwise. Although the witnesses had no actual knowledge other than what they witnessed, the transaction would, certainly, aid the jury in determining whether they were officers of the detachment, because, in the absence of counter evidence or explanation, it was grossly improbable that they were not. I have no hesitation in saying that upon the question of the identity of the officers, and their connection with the detachment of soldiers, the testimony was proper for the consideration of the jury. It follows that it bore distinctly on the question — where were such officers, and were they doing anything, and what, for the preservation of order, the repression of the violence, and the protection of peaceable passengers?

2. It was of some materiality, under the rule of duty resting on the defendants, above stated, to show how long the disturbance continued before the plaintiff was injured, because, in view of the other evidence as to the number of men engaged therein, the jury were to consider whether the defendants made suitable endeavors, by the means then in their power, to suppress it. If the acts of the supposed sergeant and lieutenant were any evidence of the condition of things on deck, then, clearly, his coming and departure, and the subsequent report of the gun, were evidence, slight, I admit, and of very little importance, but yet evidence, that the duration was somewhat greater than the time thus consumed in these acts of the sergeant, at least, that it began before he came down, and continued during his interview and afterwards, until the report of the gun was heard.

§ 80. *Testimony tended to show the condition of affairs on deck, in that it tended to show the soldiers were left without the care of the lieutenant.*

3. Did the transaction legitimately tend to show the condition of things on the deck? Clearly, in the view above taken, it tended to show that the soldiers were left without the care of the lieutenant. For, if the jury should be satisfied that the supposed sergeant and lieutenant were officers of this detachment, then they necessarily must find, first, that such lieutenant was doing nothing personally for the promotion of order, and that temporarily, at least, the men were left without the presence of either him or the sergeant; and this to some extent appertained to the condition of affairs on deck.

§ 81. *Testimony admissible as showing extent and character of disturbance.*

But, more than this, the entire transaction was of significant import touching the extent and character of the disturbance there; for there was other proof of the fact of disturbance and that it was caused by the soldiers. Pending the disturbance, their chief non-commissioned officer comes to his superior officer, expresses his inability to deal successfully with it, and invokes his aid in suppressing it. It is refused, and he returns, and soon after hurries in evident excitement down the stairs and implores assistance in terms of despair. It seems scarcely possible to doubt the significance of these acts, or their relevancy, if competent. An illustration alike in kind, and only differing in that its competency and relevancy may be more strikingly obvious, may be suggested. A company of disorderly persons enter a house and begin a disturbance, and women and children come rushing from the house in evident

fright and screaming for aid. This would be evidence that what was enacted within was of a character and extent calculated to create alarm and awaken apprehension of danger. It would not, perhaps, be proof of particular acts, and, possibly, their declarations might not be used to fix guilt upon particular individuals; but, of the general fact that the disturbance, the existence of which was otherwise proved, was of such proportions or extent as to excite and alarm, and so to call for interference to stay or suppress it, it would clearly be competent evidence.

§ 82. *Declarations admissible as part of res gestæ.*

4. It is strongly urged that the declarations of the sergeant to his superior are not evidence as against the defendants, and should not be received. I have already observed that the declarations were not objected to as such. The objection was general, to all the testimony. But I do not think it necessary to dispose of that objection by any technical answer. In my judgment, the declarations were admissible, as indicating, first, the relation of the sergeant to his officer — not as a mere declaration, but as an act of subordination; second, as showing the alarm and fright of the sergeant and a state of mind indicating need of assistance; and, finally, the whole transaction was a part of the *res gestæ*, in such sense that the jury might properly be permitted to hear it. His declarations were not, upon their own isolated and separate credit, to be received as evidence of the facts he stated, but the facts to be inferred do obtain credit from the circumstance that, in the situation in which he was placed, in the fright and alarm under which he spoke, and in the condition of things on deck already proved, he did make such utterances to his superior officer. Declarations, when part of the *res gestæ*, bear the character and have oftentimes the force of acts, and, still oftener, are used as proper evidence, giving character and explanation to other acts. Mr. Starkie says, with singular pertinency to the declarations now in question: “If the declaration has no tendency to illustrate the question, except as a mere abstract statement, detached from any particular fact in dispute, and depending for its effect entirely on the credit of the person making the declaration, it is not admissible; but, if any importance can be attached to it as a circumstance which is part of the transaction itself, and deriving a degree of credit from its connection with the circumstances, independently of any credit to be attached to the speaker, then the declaration is admissible.” This describes the testimony in question. The connection of the whole with the circumstances of the case gives it credit and significance, not as the isolated act or statement of the sergeant, but as a narrative of occurrences in their connection with the principal events, receiving significance and inviting belief. Confining myself to the single question presented on this motion, I am constrained to say that the motion for a new trial must be denied. (a)

SHIPMAN, J., concurred.

(a) This case was affirmed in the supreme court (*Norwich Transp. Co. v. Flint*, 13 Wall., 3), MR. JUSTICE BRADLEY rendering the opinion, as follows:

“It is hardly necessary for us to enter into a lengthy discussion on the admissibility of the testimony in question. The opinion of the circuit court, which has been laid before us, is sufficiently full on the subject, and need not be repeated. We have no hesitation in regarding the incident testified to as part of the *res gestæ*, and as entirely competent for the purposes for which it was offered. The statements of the sergeant were not offered in evidence for the purpose of proving the facts stated by him, but the whole incident (including those statements) was adduced in evidence for the purpose of showing the manner in which the officers attended

SMITH v. SHOEMAKER.

(17 Wallace, 630-639. 1873.)

ERROR to the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—This is an action of ejectment by Shoemaker, who claims as grantee of John Chandler Smith, against Mary Smith and others, who claim under Hamilton Smith. The land was conveyed in 1810 to Beal as trustee, to hold for Kilty Smith for life, and on his death to his son John Chandler Smith. Hamilton Smith was another son of Kilty Smith. Defendants assert that their ancestor, Hamilton Smith, took possession of the property in 1845, under a parol gift from his father, Kilty Smith. Shoemaker's deed from John Chandler Smith was dated June 20, 1868. Plaintiff gave in evidence a letter from John Chandler Smith to Hamilton Smith, dated September 10, 1845, in which he says that he will place the latter in possession of the property; the letter tending to show that Hamilton Smith entered and occupied as his brother's tenant at will. The plaintiff offered no evidence of when the letter was written or how he obtained it. The admission of this letter was objected to by defendants. Two letters from Hamilton Smith to John Chandler Smith were also put in, dated respectively March 5 and March 11, 1856, which contained admissions of Hamilton Smith tending to prove that he occupied under his brothers.

§ 83. *It is not competent for a party to introduce and make evidence of his own declarations, oral or written, or those of the persons under whom he claims, unless such declarations form part of the res gestæ.*

Opinion by MR. JUSTICE MILLER.

The admission of the letter having at its head, as a date, "September 10, 1845," was objected to, and an exception taken, on the ground, among others, that the plaintiff could not introduce his own declaration, or that of those under whom he claimed, to show that the ancestor of the defendants had entered under the person making the declaration. Other and more specific grounds of objection were taken, but it is not necessary to mention them here, for it is certainly a sound principle of evidence that such a declaration as this, whether oral or in writing, is inadmissible, unless some exception to the general rule be shown. And this disposes of one of the arguments against the validity of the exception, namely, that while seven distinct objections are stated in the bill of exceptions, none of them are sound, though the letter may really have been inadmissible. We are of opinion that the one above mentioned is sufficient, unless the record shows some matter which would obviate it.

§ 84. *A letter cannot be admitted in evidence as part of the res gestæ when its right to be so considered depends upon the date on the letter itself.*

The objection is supposed to be removed by treating the letter as a part of the transaction by which Hamilton Smith obtained possession of the property, and thus coming within the rule of exceptional evidence admitted as part of the *res gestæ*.

But the difficulty is that there is no evidence that the letter *was* a part of that transaction. The precise time when Hamilton Smith took possession is

to their duty whilst the disturbance was going on, the fact that notice of its progress was communicated, the time that it continued, and the degree of alarm it was calculated to excite in such a person as the sergeant appeared to be. These were substantially the purposes for which the evidence was professedly offered, and for these purposes, as part of the *res gestæ*, it was clearly competent. Judgment affirmed."

not stated, save that it was in 1845, and after the 28th of May. The date found in the letter itself is relied on to show that it was written about the time possession was taken, and, perhaps, if the other essential requisites were proven, the time would be near enough to let it go to the jury. But it is obvious that, as the date is only proved by the letter, the fact that the letter was written and received must be proved before the date can be used to justify the admission of the letter. Many authorities are cited to show that, while the date found in an instrument may be disputed or disproved by other evidence, it is *prima facie* to be taken as the true date. All these cases, however, have reference to the case of an instrument which has been admitted in evidence on other and sufficient ground, and where the true date has become important on some other issue than the admission of the letter. It is a most vicious example of reasoning in a circle, to admit the letter to prove the time when it was written, and assume this to be the real date for the purpose of admitting the letter.

Another objection is, that there is nothing in the record to show that the letter was delivered to Hamilton Smith, or was ever in his possession or acted upon by him. It is not shown how the plaintiff came into possession of it, or from what source it was produced by his counsel at the time of the trial. It would violate nothing found in the record to suppose that the letter was written and delivered to the plaintiff by its supposed author on the same day it was read in evidence. When a party seeks to justify in a court of review the admission of such *ex parte* declarations of himself or his vendor, against the objection of the other side, he must show by the record some circumstance which would obviate the manifest soundness of the objection.

§ 85. *If evidence has been wrongly admitted, the judgment must be reversed, unless it is clear beyond doubt that the error did no injury to the party complaining.*

It is said, however, that, conceding the letter to have been improperly admitted, there is enough found in the record to show that the verdict was right, if it had been excluded, and therefore its admission worked the defendants no prejudice.

Two letters from Hamilton Smith to his brother are relied on to show his admission, as late as 1856, that he held under that brother, and acknowledged his superior title. And it must be conceded that they have a strong tendency to establish that proposition. But they are not conclusive; and, in the face of the statement that the defendants introduced parol evidence tending to show that Hamilton Smith entered under a parol gift of his father, it is impossible to say the letter worked no prejudice. This *parol* evidence is not given in the bill of exception, and may have been very strong. It is possible, nay, probable, that the jury, balancing between the weight of the parol evidence on one side and the letters of Hamilton Smith on the other, may have rested their verdict on this letter, as the best evidence of what really occurred at the time possession was taken. The jury might very well have said that, if this letter was written and received about the time the possession was taken — written by the man who had title to the land to the party about to enter into possession — they would presume that the latter entered on the premises under the permission given in the letter, while they might disregard the improvident admissions of a weak-minded and dependent man made to his brother ten or twelve years later.

We repeat the doctrine of this court laid down in *Deery v. Cray*, 5 Wall.,

795, that while it is a sound principle that no judgment should be reversed on error when the error complained of worked no injury to the party against whom the ruling was made, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party. The case must be such that this court is not called on to decide upon the preponderance of evidence that the verdict was right, notwithstanding the error complained of.

Other errors are assigned as to the charge of the court, but, as no exception was taken to that charge, it cannot be considered; nor do we deem the errors alleged as growing out of the prayers asked and refused likely to occur again, even if they are fairly presented by the record now.

For the error in admitting the letter objected to, the judgment is reversed and the case remanded for new trial.

PACKET COMPANY *v.* CLOUGH.

(20 Wallace, 528-543. 1874.)

ERROR to U. S. Circuit Court, Eastern District of Wisconsin.

STATEMENT OF FACTS.—Mrs. Clough was injured while going on board one of the Packet Company's steamboats in Minnesota. Suit was brought by her and her husband, and a judgment obtained against the company. Further facts appear in the opinion of the court.

§ 86. *Under act of congress of July 6, 1862, the competency of a witness in a federal court must be determined by the laws of the state where the case is tried.*

Opinion by MR. JUSTICE STRONG.

In considering the first assignment of error—that is to say, the question whether on the trial the deposition of Mrs. Clough was rightly admitted in support of her claim—it is unnecessary to inquire whose will be the damages, if any, which may be recovered—whether they will belong to the husband or to the wife. The competency of the witness, or her incompetency, must be determined by the statutes of Wisconsin, where the case was tried. The act of congress of July 6, 1862, has enacted that “the laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity, and admiralty.” And the statutes of Wisconsin very plainly declare that the wife is a competent witness for herself in such a case as this. The first assignment of error cannot, therefore, be sustained.

§ 87. *Proof of non-cohabitation of husband and wife is not admissible under the general issue for any purpose in a suit for damages for an injury to the wife.*

The second, third and fourth assignments present substantially the same question, and they may be considered together. After direct testimony had been given by Mrs. Clough that the plaintiffs were married on the 24th day of December, 1845, the defendants proposed to prove by other witnesses that the plaintiffs had not lived and cohabited together as husband and wife since December, 1869; that it was commonly reputed that they had not so lived together, and that there was a common reputation that Carlos Clough was living and cohabiting with another woman. This proof the court refused to receive. It was offered for two avowed purposes—one in mitigation of damages, and the other to disprove the fact alleged in the declaration that the plaintiffs were husband and wife. But how, if received, it could have tended to mitigate

damages has not been made plain to us. The suit, as the case shows, was for an injury inflicted upon the wife. Surely the injury was the same whether the husband lived with her or not. And the evidence was inadmissible for the other purpose for which it was offered. It is true, ordinarily, the general issue in an action of trespass on the case imposes upon the plaintiff the necessity of proving all the material facts averred in the declaration, but the ability of the plaintiffs to sue is not a fact directly averred, and, therefore, it cannot be disproved under a plea of not guilty. In fact, it is not put in issue by such a plea. The defense that the plaintiffs suing as husband and wife are not married goes to the form of the writ, rather than to the cause of action, and it should, therefore, be pleaded in abatement and not in bar. Thus, in Chitty's Pleadings (vol. i, p. 392), it is laid down as a proper plea in abatement to the form of the writ that the plaintiffs or defendants suing, or being sued, as husband and wife, are not married. And in Stephen on Pleading (page 160) it is said, "the plea of not guilty in trespass on the case operates as a denial of the breach of duty, or wrongful act alleged to have been committed by the defendant. . . . But not guilty will apply to no other defense than a denial of the wrongful act." The general issue at length is that the defendant is not guilty of the grievances laid to his charge, in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, etc. 1 Chitty's Pl., 432. While, since the time of Lord Mansfield, the scope of this issue has been much enlarged, it has not been supposed to extend to a denial of the ability of the plaintiff to sue. In *Combs v. Williams*, 15 Mass., 243, it was ruled that in the trial of an action upon a promise to a *feme sole*, brought by her husband and herself after marriage, it is not competent for the defendant under the general issue to prove the illegality of the marriage, such matter being wholly in abatement. True, this was in an action of *assumpsit*, but the general issue is as broad in such a case as it is in case for a tort. And if this were not so, even if, in the state of the pleadings, the defendants were at liberty to prove that the plaintiffs were not husband and wife, they could not prove it by such evidence as that which they offered. Cohabitation as husband and wife may tend to prove marriage, but non-cohabitation has not been accepted as disproving the existence of the marital relation in face of uncontradicted evidence that a marriage in fact had taken place.

The fifth assignment of error is without any foundation. It would be very extraordinary were we to hold that the plaintiff had settled and discharged her claim upon the defendants without any intention or understanding on her part to give it up.

§ 88. *The declarations of an agent, two days after the cause of action accrued, are not evidence to bind his principal.*

The next assignment is more important. The accident by which the plaintiff was injured occurred at Read's Landing, in Minnesota, on the 30th day of September, 1869, about 2 o'clock in the afternoon. Two days afterwards, as the boat approached Davenport, in the state of Iowa, Mrs. Clough, the witness, had a conversation with the captain, in which he made some statements respecting the accident, and these statements the court allowed to be given in evidence against the defendants. In this we think there was error. Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so far as he had authority to make them, and authority to make them is not necessarily to be inferred from power given to do certain acts. A cap-

tain of a passenger steamer is empowered to receive passengers on board, but it is not necessary to this power that he be authorized to admit that either his principal, or any servant of his principal, has been guilty of negligence in receiving passengers. There is no necessary connection between the admission and the act. It is not needful the captain should have such power to enable him to conduct the business intrusted to him to wit, the reception of passengers, and, hence, his possession of the power to make such admissions affecting his principals is not to be inferred from his employment. 1 Taylor on Ev., § 541. It is true that whatever the agent does in the lawful prosecution of the business intrusted to him is the act of the principal, and the rule is well stated by Mr. Justice Story (Story on Agency, § 134), that "where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject-matter will also bind him, *if made at the same time, and constituting part of the res gestæ.*" A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent cannot be varied, qualified or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done at a later period. 1 Taylor on Ev., § 526. The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the "*res gestæ.*"

Applying this rule to the present case, how does it stand? The thing of which the plaintiffs complain was negligence, on the 30th of September—a fault in providing for Mrs. Clough's embarkation on the steamer. That, and that alone, caused the injury she sustained. That, and nothing else, was the "*res gestæ.*" What the captain of the boat said of the transaction two days afterwards was, therefore, but a narrative of a past occurrence, and for that reason it could not affect his principals. It had no tendency to determine the nature, quality or character of the act done, or left undone, and it is not, therefore, within the rule stated by Judge Story. That rule has been recognized "*in totidem verbis*" in Wisconsin by Chief Justice Dixon, in delivering the opinion of the court in *The Milwaukee & Mississippi Railroad Company v. Finney*, 10 Wis., 388. And there is nothing in any of the decisions cited by the defendants in error inconsistent with such a rule. The case of *The Enterprise*, cited from 2d Curtis, was a suit in admiralty for subtraction of wages, and the declarations of the master respecting the contract with the seamen were admitted, though not a part of the *res gestæ*. But the decision was rested upon the ground that the admiralty rule is different from the rule at common law. The case of *Burnside v. The Grand Trunk Railroad Company*, cited from 47 New Hampshire, simply decides that the statements of the general freight agent as to the condition of goods delivered to him for transportation, made while the goods are still in transit, or while the duty of the carrier continues, are admissible in evidence against the company. This was a case of contract not executed, and, while it remained unexecuted, the agent had power to vary it; had, in fact, complete control over it. The transaction was still depending, and the agent was still in the execution of an act which was within the scope of his authority. But in the present case the declarations admitted were not made in the transaction of which the plaintiffs complain, or while it was pending. They refer to nothing present. They are only a history of the past.

It is argued they were made before the voyage upon which Mrs. Clough

entered was completed. True, they were, but they were not the less mere narration. The accident was past. The injury to Mrs. Clough was complete. The only wrong she sustained, if any, had been consummated two days before. We cannot think the fact that she had not arrived at her port of destination is at all material. If she had left the steamer before the declarations were made, it is not claimed, as certainly it could not be, that they were admissible. Now, suppose two persons were injured by the negligence which the plaintiffs assert, and one of them had left the boat before the captain's declarations were made, clearly they would have been inadmissible in favor of the person whose voyage had been completed. This is not denied. Yet the connection between them and the accident would be as close in that case as in this. Can they be admissible in the one case and not in the other? Assuredly not. We must hold, therefore, that there was error in admitting in evidence the statement of the captain of the steamboat made two days after the wrong was done of which the plaintiffs complain.

§ 89. *A party who complains of the rejection of evidence must show how he is injured by such rejection.*

The last assignment of error is the rejection of the deposition of Turner. Of this it is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our twenty-first rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect upon the verdict. But, for the reception of the statement made by the captain shortly after the arrival of the boat at Davenport, the judgment must be reversed.

§ 90. In general, the rules of evidence in civil and in criminal cases are the same. *United States v. Gooding*, 12 Wheat., 460.

§ 91. Where no act of congress interferes, the rules of evidence at common law govern the court of claims. *Moore v. United States*, 1 Otto, 273 (§§ 2191-92).

§ 92. Parties may, by contract, determine what shall be evidence of a given fact. And, under a policy of insurance declaring that if the vessel, upon a regular survey, shall be thereby declared unseaworthy by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of being unsound or rotten, then the insurers shall not be bound to pay their subscription. A state of rottenness, ascertained at any period of the voyage insured, is conclusive evidence of original unsoundness, and the determination of this fact by means of a regular survey must be received as conclusive evidence between the parties. An exemplification of the proceedings of the court of vice-admiralty, introduced in evidence by the plaintiff in an action on the policy to show a condemnation and sale of the vessel, is also evidence for the defendant to prove the survey. *Dorr v. Pacific Insurance Co.*, 7 Wheat., 581.

§ 93. **Admissibility — Competency.**— Questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise at different stages of the trial, and cannot, with strict propriety, be propounded at the same time. The court may refuse a prayer embodying both, unless the entire prayer, as made, should be granted. *Columbian Insurance Co. v. Lawrence*, 2 Pet., 25.

§ 94. Legally incompetent evidence, though admitted without objection, should not be considered by the jury in making up their verdict. *United States v. Roudenbush*, Bald., 515.

§ 95. If evidence is admissible for any one of the purposes for which it is offered, it is error to reject it. *Hinde v. Longworth*, 11 Wheat., 199.

§ 96. Evidence, if competent for any purpose, though incompetent for others, is admissible, subject to proper instructions from the court. *Lastrapes v. Blanc*, 3 Woods, 134.

§ 97. In the federal circuit court, if the court is equally divided upon a question of the admission of evidence, the evidence is admissible. *Henry v. Ricketts*, 1 Cr. C. C., 545.

§ 98. In an action on a bill of lading for damages for the non-delivery of the freight in time and at the place of consignment, evidence of verbal instructions from the wharf-master to the clerk of the boat to make certain inquiries, and in a certain contingency to deliver the freight at a place other than that named in the bill, is inadmissible. *Espey v. Blanks*,* 9 Fed. R., 432.

§ 99. In a suit involving the question of the bigamy of a third person, it is competent to show the state of feeling, affection and sympathy of the alleged bigamist to his wife, and a letter written by him is admissible for that purpose when it does not appear to be collusive. It is admissible also to show where the writer was at its date. *Gaines v. Relf*,* 12 How., 472.

§ 100. The deposition of W. was read on behalf of plaintiff. Defendant offered in evidence a letter received some time before from W. to himself relating to the same matters as were testified to in W.'s deposition, though not qualifying or contradicting it in any way. *Held*, that the letter was not admissible. *Crocker v. Lewis*,* 3 Sumn., 1.

§ 101. Upon an indictment for forging a bill of exchange in the name of a fictitious drawer, payee and indorser, it was held that the bill might be shown in evidence although it had certain genuine subsequent indorsements not set forth in the indictment. *United States v. Peacock*, 1 Cr. C. C., 215.

§ 102. In Pennsylvania a power of attorney acknowledged before a mayor or other chief magistrate of a city is admissible in evidence by virtue of long existing usage, notwithstanding the law of 1705, that a power of attorney certified to have been proved by two or more witnesses thereunto before any mayor, etc., under the common seal, etc., shall be good and effectual at law, etc. *Milligan v. Dickson*,* Pet. C. C., 433.

§ 103. **Erroneous rulings.**—If evidence was properly rejected, it is no ground for reversing the judgment that an erroneous reason was given. *Silsby v. Foote*, 14 How., 218.

§ 104. A charge of the court that the jury shall not consider certain evidence which has been improperly admitted is equivalent to striking it out of the court; and its admission is no longer error. *Pennsylvania Company v. Roy*, 12 Otto, 451.

§ 105. The ruling of the court in admitting evidence which is wholly unnecessary, the plaintiff's case being perfect without it, even if erroneous, will not operate to reverse the judgment. *Sheppard v. Graves*, 14 How., 512.

§ 106. Where *prima facie* evidence of a fact has been given, and no proof to the contrary offered, it is not a ground of reversal that other evidence which was incompetent was admitted to prove the same fact. *Cooper v. Coates*, 21 Wall., 105.

§ 107. An error in excluding a record is harmless and will not justify a new trial, where the party proved in another way everything which the record would prove. *Lucas v. Brooks*, 18 Wall., 436.

§ 108. It seems that where a party has assented by his silence to the correctness of a settlement, and a judgment which he had confessed, for four years and a half, the evidence ought to be very clear that a mistake was in fact made, in order to justify unraveling what was done. *Willett v. Fister*,* 18 Wall., 91.

§ 109. Where improper testimony has been admitted, the appellate court cannot look into its importance or operation, but the verdict founded on it cannot stand. *Smith v. Carrington*, 4 Cr., 62.

§ 110. If the trial court errs in receiving inadmissible evidence, the judgment must be reversed and a new trial awarded. The supreme court can give no direction as to what judgment the court below ought to have rendered, on the ground of the sufficiency of the evidence, independent of that objected to. *Church v. Hubbard*, 2 Cr., 187.

§ 111. Where the cause is, by consent, tried by the court, and not by a jury, an objection to the admission of evidence is not properly the subject of a bill of exceptions. But if the court has admitted improper evidence, the supreme court will reject it, and proceed to decide the case as if it were not in the record. Nor does it, of itself, constitute a ground for the reversal of the judgment. *Field v. United States*, 9 Pet., 182.

§ 112. **Relevancy.**—Evidence must be relevant as well as competent, and if objection is made the court will exclude it on either ground, if the irrelevancy or incompetency clearly appears. *Polk v. Robertson*,* 1 Overt. (Tenn.), 456.

§ 113. The admission of immaterial or irrelevant evidence is no sufficient reason for reversing a judgment, when it is apparent that it cannot have affected the verdict or the finding injuriously to the plaintiff in error. *Mining Co. v. Taylor*, 10 Otto, 37.

§ 114. There is no error in rejecting evidence whose relevancy cannot be seen. *Collins v. Johnson, Hemp.*, 279.

§ 115. Testimony irrelevant to the issue on which the jury are to pass is inadmissible. *Winans v. New York & Erie R. Co.*,* 21 How., 88.

§ 116. It is not error to reject legal evidence of a fact which is not relevant to the case. *Turner v. Fendall*, 1 Cr., 117.

§ 117. If the relevancy of a question is not shown at the time, it should not be put. *United States v. Gibert*, 2 Sumn., 19.

§ 118. The defendant cannot claim a right to introduce irrelevant evidence for the purpose of rebutting equally irrelevant evidence introduced on the part of the plaintiff, and not objected to, where the plaintiff's improper evidence is not such as is calculated to make an impression on the jury which no instruction given by the court can efface. *Stringer v. Young*, 3 Pet., 320.

§ 119. It is error to refuse to instruct the jury to disregard evidence which is irrelevant. *Ibid.*

§ 120. In a suit by a passenger for damages for personal injuries consequent upon the breaking down of a railroad bridge, it appeared that this bridge was undermined by an unusual flood. Evidence of subsequent floods was held inadmissible. *Kansas Pacific R'y Co. v. Miller*,* 2 Colo. T'y, 442.

§ 121. Where a vessel was libeled for breaking her license to catch cod fish by catching mackerel at a certain time and place, it was held that parol evidence might be given of her catching mackerel at other times and places during the trip, as showing the real business of the voyage. *United States v. The Davis*, 1 Cliff., 532.

§ 122. Where distilled spirits were seized in October for violation of the revenue laws, and a large part of the same spirits had been seized the month previous for similar fraudulent practices for which an information was now pending, evidence of similar fraudulent acts in and through each of the seven months preceding October cannot be objected to either on the ground that the September information precluded inquiry into acts taking place before it, or that such acts do not show the intent of the October act because too remote, these acts being held, under the circumstances of the case, to be practically contemporaneous. *The United States v. Thirty-six Barrels of High Wines*, 7 Blatch., 469.

§ 123. On the trial of an indictment for receiving, concealing and aiding in concealing property stolen from the mails, testimony that the defendant attempted to suborn the witness to swear falsely on the trial of the one who stole the property is not relevant or competent proof of the charge in the indictment. *United States v. Montgomery*, 3 Saw., 544.

§ 124. Upon a preliminary hearing before a commissioner, upon a charge of engaging in and giving aid and comfort to the rebellion, and that the offense was committed within the district, evidence tending to show that the accused was an officer in the rebel army is irrelevant, since it does not tend to prove the commission of the offense within the district, unless the fact is in some manner connected with an unlawful act done within the district. *In re Martin*, 5 Blatch., 303.

§ 125. On the trial of an indictment for depositing scurrilous postal cards in the mail, the cards put in evidence displaying instances of misspelling, it was held competent to show writings of the defendant containing identical errors, in order to connect the defendant with the writing of the cards. *United States v. Chamberlain*, 12 Blatch., 390.

§ 126. Where the master of a vessel is charged with having sailed on a voyage from the coast of Africa with a sick crew, whereby delay and damage was caused, the question is what were the facts on which he was called to exercise his best judgment at the time he sailed; not what actually happened afterwards. *The Gentleman*, 1 Blatch., 196.

§ 127. In an action for the violation of a patent-right, a compromise made by the plaintiff with another infringer, between whom and the defendant there is no privity, is *res inter alios acta*, and is irrelevant and incompetent as evidence in chief in behalf of the defendants in the cause. It is also inconsequential as showing that the compromise was not founded on any admission of the plaintiff's right in the invention, since it has no tendency to disprove the plaintiff's right. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet., 448.

§ 128. When a question arises as to the quality of goods furnished the defendant under a contract, evidence of the quality of goods delivered to others than the defendant, if proved to be of the same general quality with those delivered to the defendant, is admissible. *Ames v. Quimby*, 16 Otto, 347 (§§ 49-53).

§ 129. In a suit for breach of contract on the part of the defendant in refusing to receive articles for the manufacture of which he contracted with the plaintiff, the defendant cannot show at what rate he contracted for the articles with others, on the difficulty occurring with the plaintiff; or how the offers of others compared with the plaintiff's when he took the contract. *Chicago v. Greer*, 9 Wall., 726.

§ 130. In an action by an indorsee against indorser, where the parties had agreed that the note, which was payable at a certain bank, should be sent by the plaintiff to that bank for collection, it is not admissible to give in evidence against the plaintiff the usage in collecting of any other bank. *Camden v. Doremus*, 3 How., 515.

§ 131. In an action against a railroad company for personal injuries alleged to have been received through the negligence of the defendant's servants, the damages to which the plaintiff is entitled being merely compensatory, evidence of his financial condition, or that he has infant children depending on him for support, is irrelevant and ought to be rejected. *Pennsylvania Company v. Roy*, 12 Otto, 451.

§ 132. In trespass against an officer for seizing goods on suspicion that they had not paid duty, circumstances which did not amount to reasonable cause were allowed to be shown in evidence in mitigation of damages—as the plaintiff claimed vindictive damages. *Hall v. Warren*, 2 McL., 332.

§ 133. A deed which does not convey or purport to convey the land in controversy is irrelevant and inadmissible in evidence. *Hollingsworth v. Flint*,* 11 Otto, 591.

§ 134. To an issue as to the ownership of certain property at the date of the levy of a writ of attachment thereon, a deed purporting to convey the property, made by the parties against whom the attachment ran, two months before the writ issued, is not irrelevant. *People's Bank v. Calhoun*, 12 Otto, 256.

§ 135. In an action on a covenant of seizin, the question whether the patent granting the land to the defendants is voidable by the state is not properly examinable; and testimony tending to establish that point is irrelevant and inadmissible. *Pollard v. Dwight*, 4 Cr., 421.

§ 136. An information under the fourteenth section of the act of July 14, 1832, claimed the forfeiture of goods imported into the United States, under the allegation that the packages were made up with intent to evade and defraud the revenue. The oath taken by the claimant was the one prescribed to be taken in cases where the goods have been actually purchased. The government offered to prove that the claimant was not the owner of the goods at the time of their entry and importation, but was merely a consignee. The evidence was rejected as irrelevant, the duties being the same whether the claimant was owner or consignee. *United States v. Four Cases of Printed Merinoes*, 2 Paine, 200.

§ 137. A charge of fraud cannot be proved by evidence of other fraudulent transactions with other parties. *Jones v. Knowles*,* 1 Cr. C. C., 523.

§ 138. Evidence which has no connection with the matter in issue, but merely tends to create a personal prejudice against one of the parties, should be excluded. But where fraud is charged, and the charge is to be made out by circumstantial evidence, the acts of the parties near the time when the fraud is alleged to have been committed, and connected with it, should be admitted. Thus in an action by an assignee in bankruptcy charging that certain property belonging to the bankrupt had been fraudulently placed in the name of one of the defendants, and the question was whether the property belonged to this defendant at the time of its sale by him to a third person, testimony tending to show that the bankrupt claimed and exercised the same control over the property after the sale as before, when he claimed to be acting as agent for the defendant in whose name the property was placed, was held to be relevant. *Carr v. Gale*, Dav., 328.

§ 139. Where the title of the purchaser of a wrecked vessel is disputed, proof that the master believed he could get her off with the means he had at command is pertinent to show that the sale was not made in good faith. *The Schooner Lucinda Snow*,* 11 N. Y. Leg. Obs., 97.

§ 140. In a suit upon an insurance policy made in August, a medical expert cannot be permitted to testify that he had examined the assured in the June preceding and pronounced him unworthy of insurance, nor to testify as to the condition of his health at that time and the nature of his malady, there being no issue as to his health prior to the insurance. *Insurance Co. v. Mahone*, 21 Wall., 152.

§ 141. In an action for damages for the continuance of a nuisance, former bills of indictment for the same nuisance are not irrelevant evidence, when they constitute a part of the history of the case, and were referred to in the evidence of the plaintiff. *Richardson v. City of Boston*, 24 How., 188.

§ 142. In an action against the indorser of a note, a judgment in an action on the note between other parties is not admissible in evidence. *Welsh v. Lindo*,* 1 Cr. C. C., 497.

§ 143. Upon an action for the value of a slave carried away as a seaman by the defendant, evidence was rejected that the slave hired himself as a free man to another master of a vessel on a previous voyage. *Washington v. Wilson*, 2 Cr. C. C., 153.

§ 144. In an information for the forfeiture of goods on account of fraudulent undervaluation, invoices of other importations made by the claimant are admissible to show fraud in this case. *Buckley v. United States*, 4 How., 251.

§ 145. In an action by the owner of a mortgage on certain premises for damages for the removal of a building therefrom by the defendant, the latter having erected the building under an agreement with the owner of the land prior to the execution of the mortgage, it was held that, as the building was so peculiarly constructed and so located as to have no value which could be fixed by the market, evidence as to its cost was relevant, not to show its value directly, but to enable the jury to test the worth of the opinions of the witnesses as to its value, such evidence being coupled with an instruction that they were not to take the cost as the measure of damages. *Patterson v. Kingsland*, 8 Blatch., 278.

§ 146. Materiality.—It is the duty of the court to exclude immaterial evidence. *Lucas v. Brooks*, 18 Wall., 436.

§ 147. If evidence offered tends in any degree to establish the existence of any material fact, it cannot be rejected as irrelevant, but must be received and submitted to the consideration of the jury in connection with all the other facts and circumstances of the case. *United States v. Babcock*,* 3 Dill., 571.

§ 148. In an action by assignees of a bankrupt to recover the proceeds of property sold under a judgment entered upon a power of attorney given by the bankrupt, evidence that he was surprised by the entry of the judgment and the issuing of the execution is wholly immaterial, and may be rejected. *Clarion Bank v. Jones*, 21 Wall., 325.

§ 149. Where the books of the plaintiff had been made evidence by being called for and examined by the defendants, and the court suffered a witness to testify that he had examined the books, then in court and lying before him, and that he could find no entry in them respecting the note and check which were the subject of controversy, the testimony was regarded as immaterial and its admission as affording no ground for a new trial. *Coote v. Bank of United States*, 3 Cr. C. C., 100.

§ 150. The court refused to admit the record of a petition for freedom by the mother of the petitioner, against one under whom this defendant claims, the record stating that the petitioner "no further prosecuted her petition," on the ground that it was immaterial. *Negro Joice v. Alexander*, 1 Cr. C. C., 528.

§ 151. In an action against a railroad company for damages for the burning of buildings of the plaintiff by a fire communicated by a locomotive, through the negligence of the servants of the company, the buildings injured being within the line of the defendants' roadway, it was held not immaterial to show that they were placed there by the license of the company. And a receipt for land-rent, signed by the station agent, and given after the occurrence of the fire, was held competent to show this fact. *Grand Trunk R. Co. v. Richardson*, 1 Otto, 454.

§ 152. In an action to recover compensation for the destruction of the plaintiff's buildings by a fire alleged to have been occasioned by the negligence of the defendant, evidence as to the title to the land on which the buildings stood is immaterial, where by the law of the state an occupant of land who in good faith erects improvements thereon is the owner of the improvements. *Milwaukee & St. Paul R'y Co. v. Kellogg*, 4 Otto, 469.

§ 153. *Res gestæ*.—When the question whether a conveyance is fraudulent arises between the grantee and the creditor of the grantor, the creditor may always show that, notwithstanding the conveyance, the grantor continued in possession and control. To this end, acts of the grantor implying ownership and control may be shown, and also, as a part of the *res gestæ*, the declarations accompanying such acts or possession may be proved to show the nature, extent and purpose thereof. *United States v. Griswold*, 8 Fed. R., 556; 7 Saw., 311.

§ 154. Where fraud is set up as a defense to an action for the price of hogs sold to the defendant by the plaintiff, and represented to have been imported and to be of high value, the representations as to the value of the hogs by the agent of the plaintiff, at the time of the sale, are admissible in evidence as a part of the *res gestæ*. *Henckley v. Hendrickson*, 5 McL., 170.

§ 155. The declarations of a deputy collector, made at the time he was engaged in the seizure of certain property for an alleged forfeiture, as to the cause of the seizure, are to be considered as a part of the *res gestæ*, and are admissible in evidence against the collector. But an admission made after the property had been seized and stored is not admissible. *Wescot v. Bradford*, 4 Wash., 492.

§ 156. In a suit on a life insurance policy, where the issue was whether the insured died by his own hand, the declarations of a person who came out of the room where the deceased was, to the effect that the deceased had shot himself, are admissible evidence as part of the *res gestæ*. *Newton v. Insurance Co.*,* 2 Dill., 155.

§ 157. The declarations of a testator, made before and at the execution of the will, and so soon afterwards as to be considered a part of the *res gestæ*, are admissible to show that the will was procured by fraud. *Smith v. Fenner*, 1 Gall., 170.

§ 158. The conversations and declarations of an inventor, stating that he has made an invention, and describing its details and explaining its terms, are to be deemed a part of the *res*

gestæ, and are admissible in his favor as evidence that the invention was at that time known to and claimed by him. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet., 448.

§ 159. The declarations of a person as to his intentions in changing his residence, accompanying his acts, are a part of the *res gestæ*, and are admissible as affecting the question of domicile. *Burnham v. Rangeley*, 1 Woodb. & M., 7.

§ 160. The declarations of a ship-master, shortly after his vessel has been wrecked, expressive of his intention to return home, are admissible to explain his motives in connection with his acts, as part of the *res gestæ*. *Propeller Niagara v. Cordes*, 21 How., 7.

§ 161. Conversations between the owners of a vessel at the time of fitting it out, illustrative of their acts, are admissible in evidence. *Macy v. DeWolf*, 3 Woodb. & M., 193.

§ 162. In a proceeding for the forfeiture of a vessel as having been fitted out for the slave trade, the declarations of the person fitting out the vessel, accompanying his acts, and explanatory of them, or giving them character, are admissible as a part of the *res gestæ*. *The Yacht Wanderer*, 1 Spr., 515.

§ 163. The declarations of an agent in a particular business, made while engaged in it, and in relation to it, become a part of the *res gestæ*, and bind the principal as if made by himself. But it should be distinctly shown that the agency extended to the particular business. *Aiken v. Bemis*, 3 Woodb. & M., 349.

§ 164. When declarations are admissible as *res gestæ*, they are always admissible in favor of the party making them, as well as against him. *The Emma Silver Mining Co. v. Park*, 14 Blatch., 411.

§ 165. On the question whether a railroad company had contracted to transport two carloads of horses beyond the terminus of their own road to Boston, a way-bill headed a way-bill of merchandise transported by the company from the starting point to Boston, and describing the two cars with horses, and as consigned to certain persons at Boston, having been exhibited to the shipper before the cars started, was held to be competent evidence, it being the best evidence, if the way-bill was to be considered as a contract, and, if not, as an act done and a declaration made by the agent in the very act of transacting the business, and as a part of it, and coming within the principle of *res gestæ*. *Railroad Company v. Pratt*, 22 Wall., 123.

§ 166. A letter written by the master of a vessel to an agent of the owner, advising what shall be done for the owner's interest in an emergency created in part by the act of the master himself, which advice was followed by the agent to whom it was addressed, may be given in evidence as part of the *res gestæ*. *Law v. Cross*, 1 Black, 533.

§ 167. In an action by a marine in an exploring expedition against the commander for causing him to be whipped and imprisoned, the plaintiff claiming that the term for which he was bound to serve as a marine had then expired, a letter written by the defendant to certain officers of the navy department concerning the bounty given to the seamen on their contracting to serve till the termination of the expedition, being a part of the *res gestæ*, is competent evidence. It is also admissible as official correspondence of the commander in respect to official matters. *Wilkes v. Dinsman*, 7 How., 89.

§ 168. In an action of ejectment, where it was material for the defendants to prove that they had paid the taxes on the land for a certain number of years, they offered in evidence two tax receipts without dates. To prove the dates, they offered two letters with dates, written to them by their agent, and inclosing the tax receipts. The letters gave an account of the agent's debits and credits in respect of the taxes, and referred particularly to the receipts in question. They also offered their account-book containing entries relating to the property, and showing a recognition of the agency in the transaction. It appeared that the book was kept where the agent resided, and that the clerk who made the entries was dead; but the handwriting of the clerk was proved. It was held that the receipts were admissible upon the plainest principles of evidence, in connection with the proof of the agency; that the contents of the letters relative to the receipt were within the rule admitting what is said and done as a part of the *res gestæ*; and that the book entries were admissible on the same principle. *Beaver v. Taylor*, 1 Wall., 637.

§ 169. In an action of ejectment in which the plaintiff claims as heir of her father, a notice published in a newspaper by the father, soon after he had ceased to cohabit with plaintiff's mother, to the effect that she was not his wife, is admissible in evidence as a part of the *res gestæ*, and as one of the circumstances connected with the separation and previous cohabitation. *Jewell v. Jewell*, 1 How., 219.

§ 170. Copies of letters of a navy agent to the navy department demanding payment, and replies by the secretary in answer to this demand, are to be considered as a part of the *res gestæ* in the administration of the office, and, if properly certified, are admissible in evidence against the sureties of such agent. Where the agent is an absconding defaulter, and his place of abode unknown to the district attorney, the failure to produce the original letters to the agent is accounted for. *United States v. Cutter*, 2 Curt., 617.

§ 171. In an action by the United States for the forfeiture of goods alleged to have been illegally imported, evidence that certain goods, marked with the same mark as the goods in controversy, and imported in the same ship on which the claimant is alleged to have paid the freight, are still in the custom-house, is admissible as a part of the *res gestæ*. *Taylor v. United States*, 3 How., 197.

§ 172. In a prosecution, under section 3894 of the Revised Statutes, for using the mail to promote lotteries, and under a count charging that the defendant deposited in the mail a certain letter and circular concerning a lottery, setting it forth at length, other papers inclosed in the same envelope, tending to show that the paper set forth related to a lottery, may be admitted in evidence as a part of the *res gestæ*. *United States v. Noelke*, 17 Blatch., 554.

§ 173. In a prosecution under the law of congress designed for the suppression of the slave trade, ordinary and usual acts of ownership by a person in fitting out a vessel, being a part of the *res gestæ*, are to be taken into consideration in determining the question whether the vessel was navigated for or on his account. *United States v. Darnaud*, 3 Wall. Jr., 143.

§ 174. A woman may conspire with others to procure miscarriage of her own person, and the conspiracy being shown, her declarations, made while returning from a visit, to one of the conspirators, explaining the object of the visit and what took place, are considered a part of the visit and admissible against the others as belonging to the *res gestæ*. Such declarations are proper evidence for the jury in determining the fact of conspiracy—the court having given them that question—as well as other facts. *Lolander v. People*,* 2 Colo. T'y, 48.

§ 175. In a trial for conspiracy to destroy a vessel with intent to defraud the underwriters, the declaration of a drayman, while engaged in hauling, that he was hauling goods for one of the defendants to the boat which was destroyed, was admitted as a part of the *res gestæ*. *United States v. Cole*, 5 McL., 513.

§ 176. Upon an indictment for selling liquor without a license, declarations made by the defendant to the witness, that a club was being formed for the purpose of sending for a barrel of rum, and that he might join them, were held not to be admissible as a part of the *res gestæ*, because they derived no credit from the transaction between the witness and the defendant, and were not offered to elucidate or explain that transaction. *United States v. Angell*, 11 Fed. R., 34.

§ 177. Miscellaneous cases on sufficiency, competency, etc.—Evidence constitutes full proof when it satisfies the mind of the truth of the fact in dispute beyond all reasonable doubt. *The Slavers (Sarah)*, 2 Wall., 366.

§ 178. Where evidence seems unimportant in its bearings, it is well to admit it, unless clearly irrelevant, in order avoid a motion for a new trial in case of its rejection. *Crocker v. Lewis*, 3 Sumn., 1.

§ 179. If the answer to a question has a tendency to prove the fact sought to be established, if it is a link in the chain of proof, it is competent; it is not necessary that it should be sufficient for the purpose. *Schuchardt v. Allens*, 1 Wall., 359.

§ 180. Evidence of an ancient transaction is not expected to be as full and specific as if it had occurred at a more recent period. *Hogan v. Page*, 2 Wall., 605.

§ 181. Where there was competent evidence before the jury on which they might find the existence of an alleged contract, the weight and force or the degree of the evidence is not before the supreme court. *Railroad Company v. Pratt*, 22 Wall., 123.

§ 182. The testimony of a witness that he thought a certain order was given on board of a vessel, and that he believed that such order was obeyed, is not an oath contradictory to the fact that no such order was given or obeyed. *The Pacific and Brig Fashion, Newb.*, 8; *Fashion v. Wards*, 6 McL., 152.

§ 183. It being incompetent for a tenant to impeach his landlord's title, evidence for this purpose is inadmissible. *Lucas v. Brooks*, 18 Wall., 436.

§ 183a. A report made to the legislature declaring certain land warrants to be fraudulent fabrications is not competent evidence of the fact. *Polk v. Wendell*, 5 Wheat., 293.

§ 184. In a claim for salvage, a statement published in the newspaper, and furnished by the mate of distressed vessel, narrating the occurrences of the voyage in the usual animated and exaggerated manner of such communications made for the public, is not evidence of the facts stated. *Hand v. The Elvira, Gilp.*, 60.

§ 185. In an action against the warrantor on a contract of indemnity, a judgment previously obtained by a third person against the person to be indemnified, if fairly obtained, and especially if obtained on notice to the warrantor, is admissible evidence against the defendant. *Clark's Ex'rs v. Carrington*, 7 Cr., 308.

§ 186. A military board of survey is an *ex parte* tribunal, whose decision is not binding upon a contractor, and whose proceedings are not evidence against him. *Heathfield's Case*,* 8 Ct. Cl., 213.

§ 187. **Evidence obtained illegally.**—The right of using evidence does not depend on the lawfulness or unlawfulness of the mode by which it was obtained. If it is competent or pertinent to the issue, and not in its own nature objectionable, as having been created by constraint or oppression, such as confessions extorted by threats or fraud, the evidence is admissible on charges for the highest crimes, even though it may have been obtained by trespass upon the person, or by any other forcible and illegal means. *La Jeune Eugenie*, 2 Mason, 409.

§ 188. Where, upon complaint or affidavit that a fraud on the revenue laws has been committed by an importer of goods, a search warrant has been issued by the district judge, under the second section of the act of March 2, 1867, upon which the marshal has entered the store of the defendant and seized account book, letters and other documents, and produced them before the district judge, such documents, if pertinent, and in the same condition in which they were when they came from the possession of the defendant, without mutilation or alteration, may be admitted in evidence against the defendant, although the search warrant is illegal. *Stockwell v. United States*, 3 Cliff., 284.

§ 189. The district judge may place the papers so seized and brought before him into the possession of the district attorney to be used as evidence. *Ibid.*

§ 190. **Cumulative evidence** is further proof on the same point or fact on which evidence has already been given. If it only serves to strengthen the old point or fact, and not to introduce any new one to the jury, it is cumulative. *Aiken v. Bemis*, 3 Woodb. & M., 348.

§ 191. In an action for the violation of a patent, where the defense is want of originality, evidence of subordinate points or facts bearing on the general question is not cumulative. *Ibid.*

§ 192. **Positive and negative evidence.**—It is sometimes necessary to prove a negative, although from the nature of things this is usually difficult, and for this reason plenary proof of a negative is not always expected or required. *Parrott v. Barney*, 1 Saw., 423.

§ 193. Positive testimony will outweigh negative testimony, where the case depends upon that circumstance alone. *Sayles v. Chicago & Northwestern R. Co.*, 3 Biss., 52.

§ 194. It is a rule of evidence that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten, while it is impossible to remember what never happened. *Stitt v. Huidekopers*, 17 Wall., 384.

§ 195. A witness who swears affirmatively that he did hear or see a thing is entitled to more weight with the jury than one who swears he did not hear or see the same thing at that time. *Cable v. Paine*,* 3 McC., 169.

§ 196. Affirmative evidence of facts as to the cargo and its disposition on board the vessel is entitled to more weight than negative evidence that the witness did not notice deficiency or breakage of the cargo, etc. *The Thomas and Henry*,* 1 Marsh., 367.

§ 197. **The construction of written instruments** offered in evidence is for the court. *Iasigi v. Brown*, 17 How., 183.

§ 198. The construction of a written instrument offered in evidence, and the determination of whether the contract it discloses is usurious, belongs exclusively to the court; and the jury should not be allowed to infer from it any extrinsic facts which might show the contract not to be usurious. *Levy v. Gadsby*, 3 Cr., 180.

§ 199. No paper can be read in evidence to the jury without leave of the court, and if the court be divided in opinion on its admissibility, it must be rejected. *Melvin v. Lackland*, 2 Cr. C. C., 636.

§ 200. When objections are taken to written testimony, it should be handed to the court for their inspection without reading, so that it may not have an effect upon the jury. *Polk v. Robertson*,* 1 Overt. (Tenn.), 456.

§ 201. Where, in a suit founded on letters patent, the defendant offered a patent in evidence in order to show that the plaintiff's patent was not original, the court ruled that the evidence thus offered must be construed by the court, and if it had a tendency to support the issue for which it was offered, it was admissible, otherwise not. *Cahoon v. Ring*, 1 Cliff., 592.

§ 202. In action of ejectment defendant put in evidence an authenticated copy of proceedings in bankruptcy, in which plaintiff's lessor was declared a bankrupt, and B. appointed assignee and removed, and M. appointed in B.'s place. *Held*, that defendant could not insist on the effect of that part of the evidence which showed that the title of plaintiff's lessor had been divested, and at the same time object to the plaintiff's using that part which showed the title passed to M. and thence to plaintiff's lessor again. *Greenleaf v. Birth*,* 5 Pet., 132.

§ 203. **Law and fact.**—The question whether one fact can be inferred from another is a question of law, and to be decided by the court; and if the inference can, in law, be drawn, it ought to be drawn by the jury, if there be no contradictory evidence. *United States v. Stockwell*, 4 Cr. C. C., 671.

§ 204. In a deposition taken *de bene esse* and without notice, on a question of limitation by

adverse possession, the testimony of the witness that the defendant and his tenants had continuous possession of the premises from a certain date to the present time was excluded as being on a mixed question of law and fact, the facts respecting the possession having already been testified to by the witness from the commencement to its termination. *Cook v. Burnley*, 11 Wall., 659.

§ 205. The testimony of witnesses is not competent to prove that it is the custom, when insurance is effected on articles with a particular mark, that they must be on board to enable the party to recover. This would be evidence to show what the law is. *Ruan v. Gardiner*, 1 Wash., 145.

§ 206. In an action against a common carrier, a witness will not be allowed to answer whether the horse for whose injury the action was brought had in fact been delivered to the defendant, other witnesses having already stated the facts and circumstances of the delivery. The question is one to be determined by the court and jury upon the evidence. *Bowie v. Baltimore & Ohio R. Co.*,* 1 MacArth., 609.

§ 207. Sufficiency and weight — Miscellaneous cases.— When there is no evidence to support the theory of one party, it would be a total disregard of all the rules of evidence to allow his counsel to go to the jury with an argument founded on mere suspicion, and then have the court charge that there is in the evidence a foundation for this suspicion. *Ward v. United States*,* 14 Wall., 38.

§ 208. The effect and sufficiency of evidence are for the jury. If they err, the error is to be corrected, if at all, by application to the court for a new trial. *United States v. Laub*,* 12 Pet., 5.

§ 209. The affidavit of one stating that when he testified before the grand jury he was not sworn will outweigh the affidavits of two who were present at the time, stating that they are strongly impressed that the witness was sworn. *United States v. Coolidge*, 2 Gall., 364.

§ 210. An averment that a seaman was discharged at his own request and at that of the captain is not sufficiently supported by the statement in the consular certificate that it was given "in accordance with the laws of the United States." *The Atlantic*, Abb. Adm., 465.

§ 211. The only reliable evidence as to the course of a vessel is the testimony of those at her wheel. Testimony from those on another moving vessel is very unreliable. *McNally v. Myer*, 5 Ben., 239.

§ 212. The words "probable cause" in the seventy-first section of the collection act of 1799 mean on less evidence than would justify condemnation — on the strength of circumstances which warrant suspicion. *Locke v. United States*, 7 Cr., 339.

§ 213. On a libel against a vessel for violation of the non-intercourse act, strong presumptive evidence of her identity was held sufficient. *Schooner Jane v. United States*, 7 Cr., 363.

§ 214. Where a ship is seized for breach of blockade, its cargo is presumptively condemned — there must be clear proof of its innocence. *The Hiawatha*, Bl. Pr. Cas., 3.

§ 215. The alleged sale of an enemy vessel, in time of war, to a neutral by an enemy resident in the enemy country, is not proved by the testimony of one witness of doubtful credit that he knew, from conversation with the alleged owner, that the latter was the owner of the vessel, and that he has seen the bill of sale, but was not present when it was made. *Schooner Wm. H. Northup*, Bl. Pr. Cas., 235.

§ 216. Where a sale of a stranded vessel is made by her master, the necessity of the sale is sufficiently proved by evidence that there was no reasonable hope of saving her by any means at the master's command. *The Lucinda Snow*, Abb. Adm., 312.

§ 217. Where a stranded vessel was sold by her master, it was held that the survey usual in such cases by competent persons, and their report stating her condition, and advising a sale, was very important evidence. *The Henry*, Bl. & How., 465.

§ 218. Where a boat's engine was broken, the testimony of her captain and engineer — their characters as experts not being established and they not being free from suspicion of interest — was held not sufficient to prove the cause of breakage. *Schultz and Markley's Case*,* 2 Ct. Cl., 380.

§ 219. The declarations of a party that he voluntarily abandoned a society, though against his interests, are entitled to very little weight, against the clear evidence of his expulsion. *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr., 66.

§ 220. Where an attachment was issued by a justice of the peace, under the act of Virginia of December 26, 1792, section 6, and the plaintiff offered his own oath as to the debt, stating that it arose in part upon the defendant's note, which had been indorsed by the plaintiff and taken up by him, but did not produce the note, the court required him to produce further evidence. *Mills v. Wilson*, 2 Cr. C. C., 216.

§ 221. If one assumes to act as a deputy sheriff, and his acts are recognized by the sheriff, this is sufficient proof of an authority in an action against the sheriff for attaching the property of a third person. *Lawrence v. Sherman*,* 2 McL., 488.

§ 222. A bottomry bond is not of itself sufficient proof of the necessity of the expenditures or the amount advanced and expended; this must be shown by evidence *aliunde*. The Brig Bridgewater, Olc., 35.

§ 223. The receiving of a postmaster's bond by the postmaster-general, and its detention for a considerable time without objection, is sufficient evidence of acceptance to complete the delivery. The return of the bond to be strengthened by an additional surety is no evidence to the contrary. Postmaster-General v. Norvell, Gilp., 106.

§ 224. A settlement was made between two parties on the basis of what appeared to be due by the accounts kept, both in complainant's pass-book and in the books of the defendants. Four years and a half afterwards complainant brings an action, contending that payment was made by him, which did not appear on any of the books, and which was not credited to him. The evidence of this is an undated receipt for \$1,500, but the books of both the parties show a credit for that sum October 30, 1865; and the testimony of complainant's wife and daughter that they saw the receipt, April, 1865. Their testimony was taken nearly six years after they say they saw the receipt, and they give conflicting statements as to the reasons that caused the date at which they say they saw the receipt to be impressed or not impressed on their memory. Held, that considering the length of time since the settlement, and all the evidence, there was not sufficient proof of a mistake to warrant a decree in favor of complainant. Willett v. Fister,* 18 Wall., 91.

§ 225. Where, as a defense for the violation of a charter-party, the charterers alleged that the vessel did not arrive seasonably at the port of loading, and that the voyage was frustrated in consequence, evidence that the vessel when she did arrive was actually dispatched on the proposed voyage, and that the goods were received by the consignees without complaint, is sufficient to show that the voyage was not frustrated. Fearing v. Cheeseman, 3 Cliff., 91.

§ 226. It was held not to be sufficient evidence of a legal entry upon land, where the witness stated that the party attended upon the land every year, prosecuting and claiming title thereto, and that he was with him every year upon the land, but did not remember what he did while he was there. Holtzapple v. Phillibaum, 4 Wash., 356.

§ 227. To establish collateral heirship, the claimant must prove not only the death of the person under whom he claims, but also his death without issue. Chirac v. Reinecker, 2 Pet., 625 (§§ 2621-28).

§ 228. Evidence that the defendant kept an open house for the sale of spirituous liquors; that such liquors were sold in the house to other persons than boarders and lodgers, and drunk by them in the house; that the house was kept open on Sundays, and such liquors were sold and drunk on the premises on Sundays, and at late hours of the night; and that drunken and disorderly persons were seen in the house and coming out of the house, is sufficient to support an indictment for keeping a disorderly house. United States v. Columbus, 5 Cr. C. C., 304.

§ 229. Where a firm brought suit, it was held that the names of its members must be proved; but as there was some evidence on this point it was left to the jury, and the court refused to instruct them that the evidence was insufficient to prove the partnership. Varnum v. Campbell, 1 McL., 313.

§ 230. When a disastrous explosion has occurred in a race between two boats, and a suit is brought by a passenger injured by it, the court cannot treat the evidence of those engaged in it, and *prima facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes. Steamboat New World v. King, 16 How., 469.

§ 231. The fact that notes taken by a ship-owner for the freight money were made payable near the time when it was expected that the ship would arrive, and that they were given for the accommodation of the owner, and were to be held over or renewed if they fell due before the ship reached home, is sufficient to repel the presumption, which arises under the law of Massachusetts, that they were taken in discharge or payment of the claim for charter-money. The Kimball, 3 Wall., 37.

§ 232. In a prosecution for perjury, it is not necessary to prove the whole of the testimony given by the accused; it is sufficient to prove that which was false. United States v. Erskine,* 4 Cr. C. C., 299.

§ 233. In a prosecution for an assault committed upon an alleged public minister, the fact that he has been recognized as a public minister by that department of the government authorized to receive ministers is sufficient and conclusive as to his public character. United States v. Ortega, 4 Wash., 531.

§ 234. Four instances in the course of two years is not sufficient to establish a usage of a particular bank, variant from the law merchant, as to the time of giving notice to indorsers. Adams v. Otterback, 15 How., 539.

§ 235. Where a vessel was lost at sea, in the absence of evidence of her value at her last port of departure, evidence of her value at place of destination is the best evidence. Steamship Pennsylvania, 5 Ben., 253.

§ 236. Where the owner of a steamboat which had been seized presented to a military commission at the time of seizure his estimate of her value, this was deemed better evidence than an estimate made by witnesses several years after the seizure. *Campbell's Case*,* 8 Ct. Cl., 241.

§ 237. Evidence of a testator's intention to alter his will, unaccompanied by acts done or attempted to be done and suppressed by fraud or violence, is inadmissible to show that the testator wished to revoke, but was fraudulently prevented. *Smith v. Fenner*, 1 Gall., 170.

§ 238. Where a survey is made under a military land warrant in Virginia, the certificate of survey is sufficient evidence that the warrant was in the hands of the surveyor. *Taylor v. Brown*, 5 Cr., 234.

§ 239. — **deeds.**— The exemplification of a record of a mortgage is, in a court of equity, in Washington county, in the District of Columbia, sufficient evidence of the existence of the mortgage and the debt. *Beall v. Dick*, 4 Cr. C. C., 18.

§ 240. Objection was made to the reading of a deed on the ground that the acknowledgment was made by power of attorney, and it did not appear that the grantor in the deed was a non-resident so as to entitle the deed to be acknowledged in that way. Other evidence which the party objecting had before introduced in the cause described the grantor of the deed as living in a place which is outside of the state, and the grantor described himself in the deed to be "of the city of Philadelphia," a place outside of the state. *Held*, that the non-residence sufficiently appeared in the absence of evidence to the contrary. *Greenleaf v. Birth*,* 5 Pet., 132.

§ 241. A statute of Arkansas providing for the confirmation of sales of land by a sheriff or other public officer enacts that such officer's deed shall be "*sufficient*" evidence of the authority under which such sale was made, the description of the land and the price at which it was purchased. "*Sufficient*" here means *prima facie*. *Parker v. Overman*, 18 How., 137.

§ 242. — **ejectment.**— The plaintiff in ejectment must prove a *legal* title to the premises in himself at the time of the demise laid in the declaration. Evidence of an equitable estate is not sufficient for a recovery. *Fenn v. Holme*, 21 How., 481.

§ 243. In ejectment under the statute 4 Geo. II., ch. 28, the proofs of the plaintiff were held deficient in not showing that any examination had been made to ascertain what amount of personal property was upon the premises at any time, or that there was some day between the accrual of the rent and the date of the demise on which there was not sufficient personal property on the premises to countervail the owners. *Connor v. Bradley*, 1 How., 213.

§ 244. — **fraud.**— When a mortgage, regular in appearance, and bearing the genuine signature and duly certified acknowledgment of the mortgagor, is attacked, the evidence, to impeach it, should be clear and convincing. And where it is claimed, in defense to the foreclosure of a mortgage upon the lands of a married woman, that her signature was obtained by means of the false representations of her husband, and by compulsion through the application of physical force, and that the acknowledgment was obtained by means of the false representations of her husband and the officer before whom it was made, in respect to the contents of the mortgage; and she is the only living witness to what transpired when the mortgage was signed and acknowledged, her testimony is not sufficient to impeach it, her signature appearing to be genuine and bearing no marks of having been made under constraint. *Insurance Co. v. Nelson*, 13 Otto, 544.

§ 245. Where a bill is filed by creditors to set aside a deed for fraud, and in reply to the allegation in the bill that the purchase money has never been paid, the answer simply states that it has been paid — the payment having been, by the defendants' admission, a transaction between themselves, the evidence of which was thus exclusively within their own knowledge — and there being suspicious circumstances surrounding the transaction, such answer is not sufficient. *Callan v. Statham*, 23 How., 477.

§ 246. — **limitations.**— In an action on a promissory note against the maker, evidence of a witness that he had presented the note to the maker for payment within the three years; that the maker said that he could not pay it, but that it was his note and had not been paid, and that he would resist payment, but offered to compromise in some way, which the witness refused, was held sufficient to prove an acknowledgment to take the case out of the statute of limitations. *Rhodes v. Hadfield*, 2 Cr. C. C., 566.

§ 247. It is sufficient evidence of a new promise to pay that a defendant said, when his note was produced to him, that his note was as good as money. *Arnold v. Dexter*, 4 Mason, 122.

§ 248. — **revenue cases.**— Under a count in an information for the forfeiture of a package of goods imported, alleging that the package was made up with intent to evade and defraud the revenue, evidence that the goods were entered as worsted shawls, and that they were in fact part cotton, but that there was no attempt made to conceal and no difficulty in detecting the cotton in the shawls, was held to be competent on the part of the government, but so insufficient that its exclusion should not be ground for reversal. *United States v. Ten Cases of Shawls*, 2 Paine, 162.

§ 249. Where one sued for the recovery of taxes alleged to have been illegally assessed, the fact that certain affidavits and certificates in the case were sent to the treasury department, and that upon them is indorsed "examined and rejected September 8, 1868, by J. Dille," is not sufficient evidence that a decision in the case has been made by the commissioner of internal revenue. *Lauer's Case*,* 5 Ct. Cl., 447.

§ 250. In an action under the internal revenue act to recover a penalty for selling boxes of sardines and bottles of hair oil, without being stamped, the uncontradicted testimony of one credible witness is sufficient proof of any fact in the case. *United States v. Brown, Deady*, 566.

§ 251. Possession by the accused of cigars in his store, and a sale of some of them which he appeared to concede had been smuggled, is sufficient, unless explained, to charge him, under section 50 of the act of March 2, 1799, with the offense of aiding to remove or store cigars landed without special permit. *Walsh v. United States*, 3 Woodb. & M., 341.

§ 252. The fact that unstamped spirits are found in a distillery, unexplained, is sufficient to prove that they were distilled there since the last inspection by the gauger. *United States v. Mathoit*, 1 Saw., 142.

§ 253. In a proceeding for forfeiture of a vessel, under section 50 of the act of March 2, 1799, for the smuggling of cigars subject to duty, conducted by the seamen on board of her, the evidence of the seamen engaged in the smuggling is sufficient to sustain the action, though the seamen were promised immunity, and none of the owners or officers of the vessel were engaged in or privy to the smuggling. *The Steamship Cleopatra*, 5 Ben., 290.

§ 254. Where distilled spirits were seized on the charge that the provisions of the internal revenue statute had not been complied with, and the claimant set up as a defense that the spirits were removed from his bonded warehouse to a general bonded warehouse, the burden of proving that the provisions of the law in such case had been complied with — which, by the statute, is laid upon him — was not sufficiently sustained by the permit of the deputy-collector, where the distillery was situated, allowing the transportation from one warehouse to the other. *United States v. Five Hundred and Eight Barrels of Distilled Spirits*, 5 Blatch., 407.

§ 255. — possession. — Where one who claims land on the ground of adverse occupation for the required period held it originally in subserviency to the title of the rightful owner, a degree of proof stronger than if this were not the case is required to establish the adverse character of his possession. *Zeller v. Eckert*, 4 How., 289.

§ 256. Actual residence on a lot under a deed to the resident, and payment of taxes, is sufficient evidence of possession under a claim of ownership. *Burt v. Panjaud*, 9 Otto, 180.

§ 257. In an action against a collector for refusing clearance to a vessel owned by plaintiffs, possession and assertion of ownership are sufficient evidence thereof. Documentary evidence is not necessary, unless the asserted ownership is denied, and the party has been called on to produce the documents. The registry of the vessel would not be sufficient evidence of ownership if produced. *Bas v. Steele*, 3 Wash., 381.

§ 258. — judgments. — If, in an action by a surety against a principal, a record offered in evidence is a mere minute of the proceedings of the court, taken by the clerk to enable him to make up a record, and contains no judgment for any definite amount, and only a general entry of judgment for the plaintiff, this will not prove the recovery of a judgment against the surety; nor will a paper purporting to be a receipt of the amount by a person styling himself a United States marshal be evidence of payment, without proof of judgment and execution. *Leveringe v. Dayton*,* 4 Wash., 698.

§ 259. In Massachusetts the general issue in an action of case does not necessarily put the title in issue. Therefore in case for the continuance of a nuisance, a previous verdict obtained by the plaintiff in a suit between the same parties in respect to the same nuisance, although admissible, is only *prima facie* evidence of the right to recover. If there is any evidence to support an averment, it is error for the court to instruct the jury that it is not sufficient. *Richardson v. City of Boston*, 19 How., 263.

§ 260. — bills and notes. — A bill of exchange purporting to have been made at the office of the company, and which directs the drawee to charge the amount thereof to the account of the company, of which the signers describe themselves as president and secretary, bears upon its face sufficient evidence that it is the contract of the company. *Hitchcock v. Buchanan*, 15 Otto, 416.

§ 261. The testimony of a witness that he had once been in possession of notes which were admitted by the defendant to be his notes, and the notes now produced are like those, and that he believes them to be genuine, is not sufficient proof of the execution of the notes to permit them to be given in evidence to the jury. *Costin v. Corporation of Washington*, 2 Cr. C. C., 253.

§ 262. A witness, in an action upon certain notes, testified that he had had notes admitted by the defendants to be theirs, that they were like the notes in suit, and that he believed the

notes in suit to be genuine, but the court did not consider the evidence sufficient proof of the execution of the notes to allow them to be given in evidence. *Brown v. Piatt*,* 2 Cr. C. C., 253.

§ 263. If a note made payable at a particular bank is discounted and becomes the property of the bank, and is at the bank and unpaid at maturity, it is sufficient evidence of demand. *Fullerton v. Bank of United States*, 1 Pet., 604.

§ 264. The oath of the notary that he put the notice into the postoffice on the day of the protest of the bill is sufficient to prove due diligence without producing a copy of the notice or proving its contents. *Dickens v. Beal*, 10 Pet., 572.

§ 265. Evidence of notice of non-payment of a note having been put into the postoffice, directed to an indorser, at his place of residence, is sufficient proof of notice to be left to the jury, though the notary who gave the notice and testifies to the fact says that he has no recollection of these facts, and only knows them from his notarial books and the protest made at the time, and from his invariable practice to give notice to indorsers, either by letter or personally, on the same day. It is not necessary to give notice to the indorser, the defendant, to produce the letter before such evidence can be admitted. *Lindenberger v. Beall*, 6 Wheat., 104.

§ 266. The testimony of a person employed in a postoffice that a party had requested him to forward to another postoffice any letters which might come there for him, and that he believed that he forwarded all such as came, and that it was his invariable practice to observe such instructions, but that he does not remember any particular instance in which he did so, is not sufficient to prove that he forwarded a particular letter, in order to prove that such party, as indorser of a note, received a notice contained in the letter. *Taylor v. Union Bank of Florida*,* 3 N. Y. Leg. Obs., 73.

§ 267. In a suit against an indorser of a promissory note, where the notary, after demanding payment from the maker after banking hours on the last day of grace, on the same day called at the shop of the defendant and demanded payment, but did not remember whether he saw the defendant, and thought that if he had, he would have so stated in his protest, the court held that the evidence of notice was not sufficient. *Mechanics' Bank v. Taylor*, 2 Cr. C. C., 217.

§ 268. — **citizenship.**— The general evidence of expatriation is actual emigration, with other concurrent acts showing a determination and intention to transfer allegiance. In this case, emigration more than twelve years prior, swearing allegiance to another government eight years prior, entering into its service, and continuing in it uniformly from that time, was held to be sufficient evidence of expatriation. *Stoughton v. Taylor*, 2 Paine, 652.

§ 269. The fact of incorporation and transaction of business within the state may be enough, *prima facie*, to warrant the jury in finding that the members of the corporation are citizens of the state. *Catlett v. Pacific Insurance Co.*, 1 Paine, 594.

§ 270. — **province of court and jury.**— In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. *Pleasants v. Fant*, 22 Wall., 116.

§ 271. The question of the sufficiency of evidence to prove any material issue is for the jury and not for the court. *Chadwick v. United States*, 3 Fed. R., 750.

§ 272. It is error for the judge presiding at the trial of a case to express to the jury an opinion on the evidence laid before it. *Tayloe v. Riggs*, 1 Pet., 601 (§§ 811-16).

§ 273. A motion to overrule evidence cannot be granted where it is competent and conduces to prove the case made in the declaration. The jury are the proper judges of the sufficiency of the testimony. *Jones v. Vanzandt*, 2 McL., 596.

§ 274. It is error for the court to instruct the jury to find for the plaintiff on evidence not given to the jury at the trial, though known to the court and given at a former trial. The case must be decided on the evidence given to the jury. *Barney v. Schneider*, 9 Wall., 248.

§ 275. The jury has no right to assume the truth of any material fact, without some evidence legally sufficient to support it. It is error, therefore, for the court to instruct the jury that they may find a material fact, of which there is no evidence, from which it may be legally inferred. *Park v. Ross*, 11 How., 362.

§ 276. Whether evidence is admissible is a question for the court to decide; but whether it is sufficient to support the issue is a question for the jury, and it is for them to draw from the evidence before them all such inferences and conclusions as that evidence conduces to prove. The only case in which the court can make such inferences or pass upon the sufficiency of the evidence is where there is a demurrer to the evidence. *Bank of the Metropolis v. Guttschlick*, 14 Pet., 19.

§ 277. When evidence is offered to the jury, which is in its nature *prima facie* proof, or presumptive proof, its character as such ought not to be disregarded; and the court has no

right to direct the jury to disregard it, or view it under a different aspect from that in which it is actually presented to them. *Crane v. Morris*, 6 Pet., 598.

§ 278. The court may decline to instruct the jury concerning the relative weight of the different parts of the evidence. *Ibid.*

§ 279. Preponderance in number of witnesses does not constitute preponderance of evidence. The jury are at liberty to believe one witness in opposition to several. *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Biss., 31.

§ 280. Where the evidence as to an alleged payment is directly in conflict, and that adduced on both sides is liable to suspicion, the weight of the evidence is with the greater number of witnesses. *The Brig Napoleon, Olc.*, 208.

§ 281. When all the witnesses are trustworthy, the court will be governed by the means of knowledge they respectively possessed, rather than by their numbers. *Taylor v. Harwood*, Taney, 437.

§ 282. Surplusage and immaterial averments.—An immaterial averment need not be proved unless it is descriptive of a written instrument, which, by being untruly described, may possibly mislead the opposite party. *Wilson v. Codman*, 3 Cr., 193.

§ 283. If an indictment against the owner of a vessel for destroying it, with intent to prejudice the underwriters, adds that it was done by the defendant in order to gain a corrupt advantage to himself, this latter allegation is mere surplusage and need not be proved. *United States v. Johns*, 1 Wash., 363.

§ 284. If an indictment for stealing a letter intended to be conveyed by post names the place from which and the place to which it was to be carried, this cannot be treated as surplusage, but must be proved substantially as laid. *United States v. Foye*, 1 Curt., 364.

§ 285. Mere surplusage, that is, allegations which might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, may be disregarded in the evidence. But no allegation, whether necessary or not, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage. In an indictment under the act of congress of 1825, for an assault committed on board of a vessel belonging to citizens of the United States, the vessel then being within the jurisdiction of a foreign state, an allegation of the names of the owners is immaterial and unnecessary, it being only necessary to allege and prove that the vessel is owned by citizens of the United States. Nor is such an allegation matter of essential description. *United States v. Howard*, 3 Sumn., 12.

§ 286. Accounts and accounting — Account books.—It is a general rule that long acquiescence in letters containing accounts is *prima facie* evidence of an acquiescence in their contents. *Hopkirk v. Page*, 2 Marsh., 20.

§ 287. An account received and not objected to for several years may be inferred by the jury to be correct. *White v. Macon*, 3 Cr. C. C., 250.

§ 288. A settled account is only *prima facie* evidence of its correctness; and if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it. *Perkins v. Hart*, 11 Wheat., 237.

§ 289. In an action upon an open account, the plaintiff may give evidence of any item of which the defendant has had reasonable notice; and the exhibiting and filing of claims before the auditor to whom the accounts have been referred is reasonable notice that he means to rely on such items. Because the account filed commences with a balance of a certain sum, the plaintiff is not restricted to evidence of only such items as constitute part of an account, the balance of which is the sum stated. *Barry v. Barry*, 3 Cr. C. C., 120.

§ 290. By receiving and keeping accounts current transmitted to him, without objection, except as to particular items, the party receiving them does not preclude himself from offering evidence to surcharge and falsify as to items not objected to. *Ibid.*

§ 291. In a suit for a sum claimed to be due as a balance of account, where it appears that the plaintiff and defendant have been in partnership in a tanyard, and that some of the items in the plaintiff's account are for leather, these items may be given in evidence to the jury, but it is competent for the defendant to prove that any of the items were for the joint concern, in which case the jury cannot find for the plaintiff as to those items, if the partnership concerns have not been settled. *Ibid.*

§ 292. A settlement of an account may be evidence of a contract. Thus, if in such a settlement an interest in a vessel belonging to one of the parties is debited in the account to another of the parties, this may be evidence from which the jury might infer a transfer of the share. *Peterson v. United States*, 2 Wash., 36.

§ 293. If the defendant means to rely on the credit side of an account delivered by the plaintiff, as evidence against the latter, he must admit the debit side, unless he can falsify it by evidence. *Morris v. Hurst*, 1 Wash., 433.

§ 294. Although evidence to explain or contradict a settled account is inadmissible, yet de-

defendant may set off an account which plaintiff's intestate acknowledged was due, and which he promised to pay. *Vuyton v. Brenell*,* 1 Wash., 468.

§ 295. If an account stated be pleaded in bar to a bill in equity, such plea will be sustained, except so far as the complaint shall show it to be erroneous. *Chappedelaine v. Dechenaux*, 4 Cr., 306.

§ 296. Upon an issue to try whether any and what sum is due between the parties, the books of each are not evidence for himself, nor against the other, superior to that of a witness proving the same fact. *Cambioso v. Maffit*, 2 Wash., 98.

§ 297. It is competent to prove by one party the results reached in an accounting, without calling the other or producing the account. Where indorsees sued the accommodation indorser of a promissory note, it was incumbent on them to prove a debt due themselves from the maker at the time they received the note. *Molson v. Hawley*, 1 Blatch., 409.

§ 298. Where a party reads in evidence a portion of an account the whole account becomes evidence for the opposite party. *Griffin v. Jeffers*,* 5 Cr. C. C., 444.

§ 299. If one party relies on the account of the other party, to prove credits, he admits *prima facie* the debits, though he may disprove them by evidence that they were not properly made. *Bell v. Davidson*,* 3 Wash., 328.

§ 300. When a deponent is asked to testify as to the contents of his account books, he may do so, if the books are beyond his power to bring into court and beyond the jurisdiction of the court. *Gass v. Stinson*, 3 Sumn., 108 (§§ 4044-52).

§ 301. In an action for a sum due as a balance of account, where the accounts have been referred to an auditor, under the twelfth section of the Maryland act of 1798, chapter 80, authorizing the court "to order the accounts and dealings between the parties to be audited and stated by an auditor or auditors, to be appointed by such court," and enacting that "there shall be such proceedings thereon as in cases of actions of accounts," only so much of the report will be permitted to be read to the jury as states the items claimed by either party and objected to by the other, so as to show what is litigated by the parties. Arguments or statements of evidence made by the auditor in his report cannot be read. *Barry v. Barry*, 3 Cr. C. C., 120.

§ 302. In *assumpsit* the court refused to admit an account sworn to by the plaintiff, in evidence, because the certificate of probate did not follow the words of the acts of assembly of 1729, chapter 20, section 9. *Rogers v. Fenwick*, 1 Cr. C. C., 136.

§ 303. The books of a bankrupt are admissible in evidence to invalidate liens created to benefit certain creditors to the prejudice of others. *McLean v. Lafayette Bank*, 3 McL., 589.

§ 304. Where the books of a bank do not show whether a check was payable to order or bearer, nor whether it was paid to the person whose name appears in them, they are not admissible to prove that the check was paid to any particular person. *Boyd v. Wilson*,* 2 Cr. C. C., 525.

§ 305. Where, in an action by a bank against one of its tellers for a balance in his hands unaccounted for, the cause is referred to an auditor to state an account, an account rendered by the teller to the bank may be admitted as evidence for the plaintiff before the auditor. *Bank of United States v. Johnson*, 3 Cr. C. C., 228.

§ 306. The freight books of a railroad company may be used to refresh the memory of a witness, but they are not evidence to prove that the entries therein are correct. *Martin v. Union Pacific R. Co.*,* 1 Wyom. T'y, 143.

§ 307. In an action at law between partners, a partnership book kept by the defendant is not admissible against the plaintiff, although it was admitted that the book had been in possession of plaintiff. *Sutton v. Mandeville*,* 1 Cr. C. C., 2.

§ 308. The books of a partnership are admissible to show how the accounts stand between the partners. All the clerks who made the entries need not be called, where the principal clerk, who had the superintendence of all the books, and made most of the entries, is called. *Pomeroy v. Manin*, 2 Paine, 476.

§ 309. Where a fraudulent partner, who has destroyed the books, brings a bill for an account, the injured partner cannot be held to such proof of the charges as would be necessary in an ordinary case between partners, but some proof, however, is required. *Askew v. Odenheimer*, 1 Bald., 389.

§ 310. A. & B. were sued as partners; A. made default, and B. pleaded the general issue. An account-book kept by A. & B. was permitted to go to the jury on the question of partnership. *Champlin v. Tilley*,* 3 Day (Conn.), 306.

§ 311. Suit upon a bond given by A. with two sureties to his partner B., that he would pay over to B., after dissolution of partnership, such sum as should be found due on settlement of their accounts. By arbitration and award, A. was found indebted to B. in a certain sum. In a suit against A. and his sureties on the bond for this sum, it was held that the award with accounts annexed could not be offered in evidence; that the admissions of A. as to amounts due were properly admitted, and that entries made by either partner in the partnership books after

dissolution were admissible against the party making them, but not otherwise. *Simonton v. Boucher*,* 2 Wash., 473.

§ 312. K. & Co. being indebted to C. & Co. on joint account, they made an agreement in writing, reciting that the exact amount of the indebtedness was to be ascertained from the books of K. & Co., by a certain accountant, under the supervision of the parties (the amount so found to be final), by which agreement K. & Co., in consideration of the indebtedness, assigned to the creditor firm certain accounts referred to as attached to the agreement and marked as an exhibit, together with certain chattels, and all other accounts due the debtor firm upon their books. The creditor firm was to collect the accounts and apply the proceeds in extinguishment of the indebtedness. No exhibit of any kind was annexed to the agreement at the time of its execution or ever afterwards. The accountant examined the books and found a certain sum to be due. In a suit for the sum which the collection of the accounts assigned failed to satisfy, it was held that, notwithstanding no exhibit was annexed, the agreement was admissible in evidence, in connection with the statement of the accountant showing the amount due. *Kelly v. Crawford*, 5 Wall., 785.

§ 313. After a judgment on the common law side of the court had been rendered against an administrator, to be satisfied out of the assets of his testator when they came into his hands, the plaintiff therein filed a bill on the equity side, claiming that the administrator had assets in his hands, and demanding an account. The accounts were referred to a commissioner. On exception to his report, it was held that he had erred in admitting an *ex parte* report, made by certain county commissioners while the suit demanding an account was pending in equity, settling the account of the administrator. *Backhouse v. Jett*, 1 Marsh., 500.

§ 314. In an action by the government against a clerk in one of its departments to recover a balance charged against him on the books of the treasury, he may, by way of offset, give evidence of a claim for services rendered under the orders of the head of the department. It is not necessary that the claim should be one which ought to have been allowed when presented to the auditor of the treasury. *United States v. Macdaniel*, 7 Pet., 1.

§ 315. The settlement of an administrator's account in the probate court, procured by fraud, is not conclusive. *Pratt v. Northam*, 5 Mason, 95.

§ 316. Where the accounts of an administrator are referred to a commissioner for settlement, vouchers to sustain his account ought not to be required, where the transactions are of long standing; but the books of the administrator, if they appear to have been fairly kept, and the account of a former commissioner founded upon them, ought to be received as *prima facie* evidence, subject to be disproved so far as either party may disprove them, or to such exceptions as either party may be able to sustain. *Hoffman v. Porter*, 2 Marsh., 159.

§ 317. In a suit by an executor for goods sold by the testator, the book of original entries made by the plaintiff as clerk is admissible in evidence. *Hodge v. Higgs*,* 2 Cr. C. C., 552.

§ 318. In an action upon an account for work and labor, it was held that the witness might refresh his memory from the original entries made by himself or another in his presence; and, if he had no distinct recollection, independent of such entries, of each particular item charged, he must, at least, have a distinct recollection of such work as was charged in the account generally, being done by the plaintiff for the defendant, and if, after having so refreshed his memory, he could swear that the work was done as charged in the entry, his testimony was competent. *Jones v. Johns*,* 2 Cr. C. C., 426.

§ 319. In an action for the recovery of money claimed to be due for the sale and delivery of goods, a deposition of the plaintiff's clerk, stating that the several articles of merchandise contained in the account annexed to his deposition were sold to the defendant by the plaintiff, and were charged in the day-book by the deponent and another person who is dead, and were delivered by the deponent; and that he has referred to the original entries in the day-book, is sufficient to render the account annexed admissible in evidence. *McCoul v. Lecamp*, 2 Wheat., 111.

§ 320. In an action for goods sold and delivered, where the plaintiff testified that his books showed the continuous dealings, and that the entries were made by himself and his clerks, and were made or supposed to be made at the time of the transactions, the books were held to be admissible in evidence, without the introduction of the testimony of the clerks. *Dear v. Tracy*,* 1 Wyom. T'y, 389.

§ 321. An account is rightly rejected where the party offering it in evidence refuses to produce the book in which the original entries are contained. But receipts and vouchers in support of its items should be received. *Lyman v. Lyman*, 2 Paine, 11.

§ 322. Original entries in the handwriting of a deceased clerk cannot be proved by parol. *Ellicott v. Chapman*,* 1 Cr. C. C., 419.

§ 323. A book of original entries, in defendant's own handwriting, is not evidence for him. *Bennett v. Wilson*,* 1 Cr. C. C., 446.

§ 324. Where a party offered his own book in evidence, the entries being in the handwriting

of a deceased clerk, it was rejected, there being no proof that the entries were the first entries. *Fendall v. Billy*,* 1 Cr. C. C., 87.

§ 325. An original book of entries was offered in evidence by a party to a suit after proof had been given that this book belonged to the party offering it, that he was a regular merchant and kept a correct book of accounts, and that the book was in his handwriting. The book was then read in evidence. On appeal, it was held to be error. *Jeffrey v. Schlasinger*,* Hemp., 13.

§ 326. Accounts and balances stated by the accounting officers of the government, being made up on evidence which would not be admitted in a court of justice, are not *prima facie* evidence to charge the United States. *McKnight's Case*,* 13 Ct. Cl., 292.

§ 327. An account which is certified by the auditor of the treasury for the postoffice department to be "a true and correct copy of the account of a former postmaster" is a sufficient statement of his account under section 15 of the postoffice act of July 2, 1836. *United States v. Harrill*,* 1 McAl., 243.

§ 328. If, in an action by the United States against a paymaster for a balance due, the United States give in evidence the accounts current of the defendant, and such accounts show a balance in favor of the defendant, he is entitled to a verdict on such evidence, unless the plaintiff shall further prove errors and omissions in said accounts which shall destroy such balance in his favor. *United States v. Kuhn*, 4 Cr. C. C., 401.

§ 329. Accounts rendered to the government by an officer are admissible in behalf of the government in an action against the sureties on his bond. *United States v. Gaussen*,* 19 Wall., 198.

§ 330. Letters and correspondence — Admissibility, etc. — A letter written by a person cannot be given in evidence to prove a fact, when the person can be examined as to the fact under a commission. *Munns v. Dupont*, 3 Wash., 31.

§ 331. A letter of a deponent is not admissible in evidence except for the purpose of contradicting or qualifying some of the statements made in his deposition, and thus to affect the credibility of his testimony. *Crocker v. Lewis*, 3 Sumn., 1.

§ 332. The contents of a letter written by defendant to one not a party to the suit cannot be proved by parol. *Richardson v. Peyton*,* 1 Cr. C. C., 418.

§ 333. It cannot be objected to the admission in evidence of a part of a correspondence that all is not produced, when the correspondence referred to is in the possession of the party objecting or his agent. *United States v. Burdett*, 9 Pet., 682.

§ 334. A letter, although not issued, may be used for whatever admissions it contains. *Medway's Case*,* 6 Ct. Cl., 421.

§ 335. A letter from the defendant in a suit, to a third person, is admissible in favor of the plaintiff, if it makes against the defendant and supports the plaintiff's case. *Mulhall v. Keenan*,* 18 Wall., 348.

§ 336. A letter which is an offer to compromise is not admissible in evidence. No part of it can be admitted if it contains no statement which can be separated from the offer. *Home Insurance Co. v. Baltimore Warehouse Co.*, 3 Otto, 527.

§ 337. Though a letter containing a mere offer to compromise is not admissible in evidence to prove a compromise, yet, if it contains a waiver, it may be admitted, not to prove the offer, but the waiver. *Unthank v. Travellers' Ins. Co.*, 4 Biss., 357.

§ 338. In *assumpsit* against a partnership, a letter written by one of the partners, after the dissolution of the partnership, acknowledging the justice of the account on which the action is brought, is not admissible in evidence. *Bispham v. Patterson*, 2 McL., 87.

§ 339. The expression "and so forth," used by the agent for the government in an advertisement for proposals to buy certain property, was omitted in the contract sent to the claimant to execute. A letter written soon after by the agent to the claimant as an inducement for the latter to execute the contract, implying that the articles referred to by the words "and so forth" were to be included in the contract, is admissible evidence either as a written reformation of the instrument before execution or as an agreed construction to be given to it. The advertisement for proposals is admissible for the better construction of the contract, but is regarded as merged in it. *Gibbons' Case*,* 5 Ct. Cl., 416.

§ 340. It is not necessary, in case of a letter testified to have been deposited in the postoffice, that the original envelope be produced to show to whom it was directed, but parol evidence is admissible. *United States v. Babcock*,* 3 Dill., 571.

§ 341. Where one directed letters to a person abroad, giving him a certain name and address, and received in reply letters signed with the same name and postmarked at the place of address, such letters last mentioned were received in evidence, without further proof of handwriting, as the letters of the foreign correspondent. *Kansas Pacific Railway v. Miller*,* 2 Colo. T'y, 442.

§ 342. In such case the envelopes of these letters should be produced to show the postmark. *Ibid.*

§ 343. In an action against a railroad company on a contract to procure certain legislation favorable to the company, where the defense is the illegality of the contract, a letter from the plaintiff to the president of the company, on the basis of which the contract was made, and the reply of the president thereto, is competent evidence to show the nature and object of the agreement. *Marshal v. Baltimore & Ohio R. Co.*, 16 How., 314.

§ 344. Where a letter, received by the plaintiff and purporting to have been written by the defendant, was charged by the defendant to be a forgery, a letter written by the plaintiff to the defendant, and acknowledged to have been received by the latter, to which the letter charged as a forgery was a pertinent answer, was held to be admissible on the question whether there was not fraud in the transaction to which the defendant was a party. *Smith v. Kennedy*,* 1 Wash. T'y, 66.

§ 345. Certain letters were admitted to explain a conversation, though written subsequently to it. The letters referred to later transactions, but it was in evidence that these transactions and the one referred to in the conversation were all parts of a continuing course of business which had remained unchanged from the time of the conversation to a period beyond the date of the letters. They were admitted as part of the *res gestæ*. *United States v. Graff*,* 14 Blatch., 381.

§ 346. In an action by the purchasers of a mine for fraud and deceit on the part of the vendors in making the sale, letters written from one of the defendants to his co-defendant, during the time when they were, on the plaintiffs' theory, engaged in getting up the fraudulent scheme which was consummated in the sale to the plaintiffs, purporting to convey information of what was transpiring at the time, advices of the developments, and indications and value of the mine, are admissible in evidence in favor of the defendants, as indicative of good faith or inconsistent with fraud. *The Emma Silver Mining Co. v. Park*, 14 Blatch., 411.

§ 347. In an action against the commissioner of patents for refusal to furnish copies of records of his office, where the demand for the copies has been made through the agency of a third person accompanied by a letter from the plaintiff to the defendant requesting him to deliver the copies to the third person, this letter and the answer of the defendant thereto may be received in evidence as a part of the *res gestæ*, or as a conversation between the parties reduced to writing. *Boyden v. Burke*, 14 How., 575.

§ 348. Correspondence between the parties containing reference to a dispute respecting certain lands is competent to prove that the matters in dispute were submitted to arbitrators under an arbitration bond. *Lyle v. Rodgers*, 5 Wheat., 394.

§ 349. In an action against a bank to recover the purchase money paid by the plaintiff for a conveyance of land from the bank, a letter written by the plaintiff to the defendants, stating that he had received a deed for the land, may be read in evidence by the plaintiff; and the deed may also be read by him to show that it is not a deed from the bank, but from the president of the bank under his private seal, and, therefore, conveyed nothing. *Guttschlick v. Bank of the Metropolis*, 5 Cr. C. C., 435.

§ 350. Where the defendant had agreed in writing to ship to the plaintiffs certain sugar for account of a third person, on board such vessel as such third person should direct, it was held that a letter written by the third person to the plaintiffs, authorizing them to select the vessel, was admissible in evidence. *DeWolf v. Rabaud*, 1 Pet., 476.

§ 351. Where defendants in an action are charged to have been partners with a third person, or to have held themselves out to the public as such, they cannot, to rebut the plaintiff's proof, introduce private correspondence between themselves, or letters from their agent to them. *Freeborn v. Smith*, 2 Wall., 160.

§ 352. In an action on a contract, for breach in not delivering teas of the quality contracted for, it was held that the defendant could not give in evidence a letter written by the plaintiff's agents, who sold the teas for them, to one of the separate owners of a part of the cargo, containing an account of the sales of the whole cargo. *Gilpin v. Consequa*, 3 Wash., 184.

§ 353. A letter from an agent to his principal in extenuation of his conduct in selling certain certificates of debt belonging to the principal, and affirming that he had a power of attorney and letters from the principal authorizing him to sell, if admissible at all, is insufficient to establish the fact which it asserts. *Combs v. Hodge*, 21 How., 397.

§ 354. A letter written by a clerk to his employer, stating that he will not serve without increased pay, is not admissible in evidence to prove an agreement to pay more, the employer having refused the demand, and the clerk having continued in the service, though admissible in the first instance until it is proved that the demand was not acceded to by the employer. *Nutt v. Minor*, 14 How., 464.

§ 355. The letters of an agent to his principal cannot be given in evidence against a third person. *United States v. Barker*, 4 Wash., 464.

§ 356. In a suit for an infringement of a patent plaintiff offered in evidence letters from himself to the secretary of state, containing applications for the patent alleged to have been infringed, and specifications certified under the seal of that department. *Held*, that as papers remaining in that office they were admissible in evidence. *Pettibone v. Derringer*,* 4 Wash., 215.

§ 357. A letter written by an ex-quartermaster to the adjutant-general, inclosing an account showing the sale of the captured property, is, when properly certified by the war department, competent evidence of the amount realized by the sale. *Furman & Co.'s Case*,* 5 Ct. Cl., 579.

§ 358. A letter of the secretary of the navy addressed to the clerk of the court of claims, in relation to a matter in question before said court, is not competent evidence. *Mason's Case*,* 4 Ct. Cl., 495.

§ 359. Where parties agreed to refer a matter of prize or no prize to their respective governments, the decision of the ministers of those governments residing in this country concludes them. And a letter of one of those ministers, stating the decision, is conclusive evidence of it. *Gernon v. Cockran, Bee*, 210.

§ 360. On an indictment for conspiracy a letter written to the defendant by an alleged co-conspirator, relating to the subject-matter of the conspiracy, is evidence against the former. *United States v. Graff*,* 14 Blatch., 381.

§ 361. Under an indictment for a conspiracy, letters written by one defendant to a person cognizant of the unlawful transactions subsequent to the act charged, and relating to future transactions of the same character, are admissible to show the character of the transactions forming the subject-matter of the conspiracy. *Ibid.*

§ 362. **Admissibility of public records and documents.**—In all public matters the journals of congress and of the state legislatures, and also the reports which have been sanctioned and published by authority, are admissible in evidence. *Watkins v. Holman*, 16 Pet., 25. See XVIII, XIX, *infra*.

§ 363. The fourth article of the constitution of the United States makes the official acts of one state evidence in all others. And a paper purporting to be a pardon granted by the governor of a state, under his signature and the great seal of the state, is admissible evidence in the courts of other states. *United States v. Wilson*, 1 Bald., 78.

§ 364. A volume of state papers, published under an act of congress, and authenticated as required by the act, is admissible in evidence to show the report of commissioners under an act of congress confirming a land title. *Watkins v. Holman*, 16 Pet., 25.

§ 365. The volumes of the American State Papers, selected and edited under the authority of the senate of the United States, by its secretary, and printed by Duff Green, contain authentic papers which are admissible as testimony without further proof. *Gregg v. Forsyth*, 24 How., 179.

§ 366. The report of the register of a land office, found in the American State Papers, is competent evidence in the investigation of claims to land in the courts of justice. *Bryan v. Forsyth*, 19 How., 334.

§ 367. In an information for the forfeiture of goods on account of fraudulent undervaluation, evidence of the official appraisement and of the appraisement made upon the claimant's appeal from the official valuation is not inadmissible on the ground that the appraisements have not been made in the presence of the jury. Such appraisements have the character of public non-judicial documents. *Buckley v. United States*, 4 How., 251.

§ 368. In an action by the United States to recover penalties and duties for goods unlawfully imported into the United States, documents from the custom-house are admissible and *prima facie* evidence to prove an allegation in the declaration that the goods were withdrawn from a bonded warehouse and exported in a certain vessel. Authenticated copies of the manifest of the owner and the outward foreign manifest are also admissible to prove the exportation. *McGlinchy v. United States*, 4 Cliff., 312.

§ 369. Public documents of the government, accompanying property found on board of the private ships of a foreign country, are, under the law of nations, *prima facie* evidence of the facts they purport to state. But they are always open to be impugned for fraud, whether it consists in the original obtaining of the documents, or in the subsequent fraudulent and illegal use of them. *United States v. The Armistad*, 15 Pet., 518.

§ 370. Mexican archives are public documents which the court has a right to consult, even if not made formal proofs in the cause. *Romero v. United States*, 1 Wall., 721.

§ 371. The catalogue of land grants termed Jimeno's Index is not authoritative proof of the grants enumerated therein, nor does it operate to exclude conclusively grants not so registered, although they may bear date within the time to which the Index relates. In a case where Jimeno was acting as governor, and made an entry in the Index, the Index may be referred to as an auxiliary memorandum of his executive action in the case. *United States v. West's Heirs*, 22 How., 315.

§ 372. The records of the land office are admissible in the courts of justice as evidence of the facts stated in them, the facts proved by the records being *prima facie* evidence of the right of the person at whose instance they were recorded, and conclusive in regard to such things as the law requires to be recorded. The withdrawal of an entry not being required by law to be recorded, the record of it made at the instance of the party is but *prima facie* evidence of his right. *Galt v. Galloway*, 4 Pet., 332.

§ 373. A certificate of the surveyor-general, made in accordance with the second section of the act of congress of May 26, 1824, that a certain portion of land is thereby set apart for the support of schools, such certificate being accepted by the grantees, is record evidence of title. *Kissell v. St. Louis Public Schools*, 18 How., 19.

§ 374. The fact that the records of a land office for a long series of years fail to show any traces of a kind of land title which would necessarily have appeared there if it existed is evidence that the title did not exist. *Fisher v. Carter*,* 1 Wall. Jr., 80.

§ 375. Maps, charts and surveys, made under the authority and direction of the war department or department of interior, and published by authority of congress, are admissible in evidence on the question of territorial limits or boundary. *McCall v. United States*,* 1 Dak. T'y, 320.

§ 376. A survey of a city, made by the original proprietor of the whole city when it was laid out, and kept in his possession, more than twenty years old, acknowledged and publicly acted upon as correct by the city authorities, is admissible evidence to prove the location and boundaries of lots, streets and alleys. *Morris v. Harmer*,* 7 Pet., 560.

§ 377. Maps stating boundaries are admissible in evidence, if it appears that they have been made by persons having adequate knowledge, and in cases where they have been admitted, their admissibility has depended on their being public documents, or in the nature of admissions. *McCall v. United States*,* 1 Dak. T'y, 320.

§ 378. A recorded map, according to which a sale of lots has been made, and which has been treated and considered as the original plat of that part of the city, may be received as evidence of the boundaries of the lots. But remarks made upon it in the handwriting of its owner are not so admissible. *Harmer v. Morris*, 1 McL., 44.

§ 379. A recorded plat is not evidence of the existence of a road; it is only evidence of its precise locality. *Naylor v. Beeks*,* 1 Or., 216.

§ 380. The records kept by a county school commissioner in Missouri, preserved as a public monument in the county archives, are admissible in evidence to show his official acts in selling school lands within the county, being *de facto* public records. And if such school commissioner be dead, they are admissible as entries of a deceased person made in the course of his official duty. *Hendrick v. Hughes*, 15 Wall., 123.

§ 381. The fact that a paper purporting to be a grant of public lands is not officially registered is so contrary to the practice of a well regulated government that it will raise a serious doubt as to the authenticity of the paper. *United States v. Vallejo*, 1 Black, 541.

§ 382. **Official letters.**—In an action by importers to recover duties exacted by the collector, on the ground that the goods were appraised more than ten per cent. above the invoice, a letter from the secretary of the treasury cannot be read in evidence to show that the removal of one of the merchant appraisers was made by his order, because, as to third persons, the validity of such removal is to be determined by the laws. *Greely v. Thompson*, 10 How., 225. See § 330.

§ 383. In an action for the violation of a patent-right, a letter from the commissioner of patents acknowledging the application for the patent, being a letter from a public officer under an official oath and upon official business, is probably competent evidence that the party had made the discovery as early as the day of its date, and applied to the patent office for a patent for it. But if the competency of such correspondence may be questioned, its admission will not afford a ground for a new trial where the fact which it was introduced to prove afterwards became immaterial by the proof of other facts. *Allen v. Blunt*, 2 Woodb. & M., 121.

§ 384. The official returns of a receiver to the treasury department are not conclusive upon the sureties on his bond. *United States v. Boyd*, 5 How., 29.

§ 385. The official letter of a public officer is admissible in evidence, and deemed as efficient as his deposition to the same effect. *Savage's Case*,* 1 Ct. Cl., 170.

§ 386. A letter written to an assistant quartermaster by his employee, concerning matters with which the latter had no official connection, is not an official report, and not competent evidence. *Lender's Case*,* 5 Ct. Cl., 544.

§ 387. **Official certificates.**—A certificate by the secretary of state, under seal of office, that a person has been recognized as a foreign minister, is full evidence that he has been authorized and received as such by the president of the United States. *United States v. Benner*, 1 Bald., 239. See § 382.

§ 388. The certificate of the secretary of state is evidence, and the best evidence, to prove

that an alleged member of the legation from Spain has been received and accredited as such by our government. It also proves the time that he was presented and received as a member of the legation. *United States v. Liddle*, 2 Wash., 205.

§ 389. A certificate from the secretary of the government of East Florida is sufficient evidence of a grant or concession, the original being preserved as a record. *United States v. Rodman*, 15 Pet., 130; *United States v. Delespine*, 15 Pet., 226.

§ 390. The certificate of the register of the treasury, under his hand, that certain receipts, of which copies are annexed, are on file in his office, with a certificate of the secretary of the treasury, under the seal of the department, to the official character of the person purporting to be the register, is not admissible in evidence, because the register is not authorized by law to certify such papers. A sworn copy must be produced. *Bleecker v. Bond*, 3 Wash., 529.

§ 391. In order to prove the date at which the lesser seal of the governor of Pennsylvania was affixed to a land warrant, a certificate of the secretary of the commonwealth, "that the certificate annexed of the receiver-general is a true extract from a certificate of that officer, dated the 2d May, 1794, now remaining on file in the said office; which certificate contains the names of four hundred persons, to whom warrants were granted for land, and of the amounts of the purchase money; sealed with the lesser seal at that time; and that the usual practice is, not to affix the seal in this office till it appears by a certificate from the receiver-general that the purchase money has been paid," is held not to be competent evidence. *Brown v. Galloway*, Pet. C. C., 291.

§ 392. The certificate of a quartermaster, made after he has left the service, is not competent evidence. *Lender's Case*,* 5 Ct. Cl., 544.

§ 393. The certificate of the commissioner of pensions that one is entitled to a pension is *prima facie* evidence of title and of all the facts that make the title. *Alexander v. United States*,* 4 Ct. Cl., 218.

§ 394. A vessel, on a voyage from New York to New Orleans, after passing Havana, returned to that port for water. The government there ordered her cargo to be landed, and would not permit her to depart with it. In an action on a policy of insurance upon her cargo, it was ruled that a certificate of the collector of customs of Havana, stating that the ship arrived at the place for water, and that in order to carry this into effect the unloading and sale of the cargo was decreed by the government, on account of the market being in want of the articles of which it consisted, was not admissible in evidence, although admitted to be an authentic certificate of a fact which the officer was authorized to certify, since the deposition of the officer might have been taken. *Wood v. Pleasants*, 3 Wash., 201.

§ 395. In an action of debt on an embargo bond, where the defense was that the vessel was by stress of weather forced into St. Thomas, and that the government prohibited her from carrying away her cargo, the certificate of the governor of St. Thomas, whose signature was proved, but to which there was no seal, given at the time of the petition of the captain of a vessel for leave to take away the cargo, and stating that the petition was refused, was admitted as evidence of the fact, it being supposed that the governor would not consent to give a deposition. *United States v. Mitchel*, 3 Wash., 95.

§ 396. A consul's certificate to proceedings of which he had no official nor personal knowledge is not admissible. *Brown v. The Independence*, 1 Crabbe, 54.

§ 397. A consul's certificate of a fact which he is not required by law to certify is not valid evidence. *Levy v. Burley*,* 2 Sumn., 355.

§ 398. The certificate of a United States consul to the fact that a seaman was discharged by his own consent will outweigh the opinions of other witnesses to the discharge, however numerous they may be. *Lamb v. Briard*, Abb. Adm., 371.

§ 399. In an action under the act of February 28, 1803, against the master of a vessel to recover the penalty prescribed by the act for refusing to take a destitute seaman of the United States on board at a foreign port, the certificate of the consul is *prima facie* evidence of all the facts necessary to bring the case within the penalty. *Matthews v. Offley*, 3 Sumn., 115.

§ 400. A consular certificate cannot be accepted as evidence except where it has been made such by statute; and a consular certificate that a certain paper is a copy of an original bill of lading is inadmissible. *The Alice*,* 12 Fed. R., 923.

§ 401. A consul's certificate of the facts which led to the summary imprisonment of a seaman in a foreign port is not evidence, and the court will examine the facts for itself. *Johnson v. The Coriolanus*, 1 Crabbe, 239.

§ 402. If an acknowledgment of a deed is taken in New York, to be recorded in Pennsylvania, and the justice who takes it does not state himself to be a justice, this omission may be cured by such statement in the certificate of the county clerk that the justice is a justice of the peace. If the county clerk does not certify that he himself is the chief officer in the county, his certificate is invalid. *Rhoades v. Selin*,* 4 Wash., 718.

§ 403. When the certificate to an office copy of a deed is that it is a true copy of the record

and original deed so far as the same is legible, the copy is admissible; the objection goes only to the effect of the deed. *Ibid.*

§ 404. A copy of a return of an election in a township filed with the clerk of the county, accompanied by a certificate of the clerk of the county that it was a full and correct return of such election, as filed in his office, sent to the office of the secretary of state, is not made and certified in the manner, and does not come from the source, required by the election law of New Jersey to constitute it an official paper. *United States v. Souders*, 2 Abb., 456.

§ 405. In a proceeding against a vessel for being registered as an American bottom after having been transferred to a foreigner, papers relating to the transfer, certified by a foreign notary, may be impeached by oral evidence. *United States v. Jason*,* Pet. C. C., 450.

§ 406. A certificate of marriage made some years after the marriage by the officiating clergyman is inadmissible in evidence to prove the marriage. *Gaines v. Relf*,* 12 How., 472.

§ 407. The certificate and seal of a notary are sufficient proof of his authority to act as such. *Dinsmore v. Maroney*,* 4 Blatch., 416.

§ 408. A certificate of seaworthiness given by marine surveyors will not avail against clear evidence, furnished within a week after, that the vessel was unseaworthy. Such proof will establish the fact of unseaworthiness at the time of the certificate. *Bucker v. Klorkgeter*, Abb. Adm., 410.

§ 409. A certificate of survey of a vessel, though not *per se* evidence of the facts stated therein, is made evidence by being incorporated into a deposition. *United States v. Mitchell*, 2 Wash., 478.

§ 410. A consul's certificate that a certain ship's papers were lodged with him, in accordance with the provisions of the act of congress, was admitted in evidence as to such fact stated, but rejected as to other facts contained therein. *Ibid.*

§ 411. **Principal and agent.**—While an agent is acting within his authority, his statements which form a part of the *res gestæ* may be proved as evidence against his principal. *United States v. The Brig Burdett*, 9 Pet., 632.

§ 412. Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as in a civil case, in all respects, as if the principal were the actor or the speaker. *Cliquot's Champagne*, 3 Wall., 115.

§ 413. Whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal, and may be proved, as well in a criminal as in a civil case, in like manner as if the evidence applied personally to the principal. *American Fur Company v. United States*, 2 Pet., 358.

§ 414. Declarations of an agent are admissible in evidence to bind the principal only when made in the course of the agency, and within the scope of the employment. Statements of an agent in relation to past transactions, after the employment has terminated, are hearsay as to the principal. *United States v. A Lot of Jewelry*,* 13 Blatch., 61.

§ 415. The declarations and letters of an agent, made and written after the termination of his agency, are not evidence against the principal. *Blight v. Ashley*, Pet. C. C., 15.

§ 416. Whether there is sufficient proof of agency to warrant the admission of the acts and declarations of the agent as evidence against the principal is a preliminary question for the court. *Cliquot's Champagne*, 3 Wall., 114.

§ 417. An agent has always been admitted as a witness from necessity to prove his authority and agency in a suit by his principal. *Lowber v. Shaw*,* 5 Mason, 241.

§ 418. An agent is a competent witness to prove his agency. *Pannil v. Eliason*,* 3 Cr. C. C., 358.

§ 419. Where on the face of a note the person to whom it was given was designated "cashier," and it was furthermore agreed in the case that such person was in fact cashier of Newbury Bank, evidence was held admissible to show that in taking the note the cashier was acting as the agent of the bank. *Bank of Newbury v. Baldwin*, 1 Cliff., 519.

§ 420. In a suit by an indorsee against the maker, authority of the indorser's agent to indorse may be proved by parol. *Miller v. Moore*,* 1 Cr. C. C., 471.

§ 421. Admissions made by the agent of a defendant, having charge of that branch of the principal's business out of which the cause of action arises, touching the cause of the action, is within the scope of his employment and binds the principal. *Dowdall v. Pennsylvania Railroad Co.*,* 13 Blatch., 405.

§ 422. The master of a vessel when upon a voyage is the agent of the owners, and his admissions and declarations, while acting as master are admissible against them, when within the scope of his authority. *The Steamboat H. D. Bacon*, Newb., 274.

§ 423. The admissions of the master in a case of collision are admissible against the owner. *The Potomac*, 8 Wall., 590.

§ 424. The acts and admissions of one of several joint contractors or promisors are evidence

for some purposes against all, and are binding upon all if within the scope of his authority. *Bank of United States v. Lyman*, 1 Blatch., 297.

§ 425. On a libel against a steamer for damages occasioned to a schooner by a collision between the two, the testimony of one of the part owners of the schooner as to the extent and value of her repairs, given in another suit, is not evidence against the other part owners, who are merely tenants in common with him, and not partners. *The New Orleans*, 16 Otto, 13.

§ 426. The United States is not bound by the representations of its agent proceeding from a mistake of fact, unless it clearly appear that to make such representations was within his capacity as agent. *Lee v. Munroe*, 7 Cr., 366.

§ 427. The vouchers given in the ordinary scope of his duties by an agent or officer of the government acting notoriously as such, and recognized by the superiors under whom he acts, are, as against the government, *prima facie* evidence that their statements are true. *Parish v. United States*,* 2 N. & H., 341.

§ 428. The United States are not bound by the confessions and declarations of their agents, made after the transaction was done. *United States v. Martin*, 2 Paine, 68.

§ 429. **Testimony given in a former trial and in suits between other parties.**—The testimony of a deceased witness on a former trial of the same cause may be proved in substance, and it is not necessary to prove his exact statements. *United States v. White*, 5 Cr. C. C., 457.

§ 430. The deposition of a witness, since deceased, regularly taken in a former suit, in which both the plaintiff and defendant were parties, touching the same subject-matter, is admissible. It is not necessary that the parties should be identical. *Philadelphia, Wilmington, etc., R. Co. v. Howard*, 13 How., 307.

§ 431. The testimony of a deceased witness, given in an action which was not between the same parties, is only hearsay. *Boardman v. Reed*, 6 Pet., 328.

§ 432. What a witness has testified to in another cause, in which the plaintiff was not a party, without any attempt to account for the absence of the person whose testimony is thus given at second hand, cannot be received. *Fresh v. Gilson*, 16 Pet., 327.

§ 433. Although the constitution gives an accused the right to be confronted with the witnesses against him, yet if he wrongfully procures the absence of such witnesses, he cannot complain if competent evidence is admitted to supply their place. If enough has been shown to cast upon the defendant the burden of showing that he has not been instrumental in concealing or keeping away a witness, and, having the means of making the necessary explanation, he fails to do so, the testimony of the witness, given at a former trial of the accused, for the same offense, upon a different indictment, may be proved. *Reynolds v. United States*, 8 Otto, 145.

§ 434. Proof of the testimony of a witness for the prosecution, given at a former trial of the cause, the witness being then under oath and subject to be cross-examined by the defendant, may be introduced in behalf of the United States, where, when the second trial came on, the witness being a resident at the house of the defendant, the officer sought her there, but was told by the defendant that she was not at home, and that she would not appear in the case, and the defendant refused to tell where she was. *United States v. Reynolds*,* 1 Utah T'y, 319.

§ 435. Where a witness whose deposition was taken and used at a former trial is dead, and the deposition has been destroyed by a fire, in order to admit a deposition to prove the contents of the one which has been burned, its substance and not its language may be stated. The deponent may refer to his notes taken at the trial in order to refresh his memory. *Ruch v. Rock Island*, 7 Otto, 693.

§ 436. On a preliminary examination on a criminal charge, a witness produced for the prosecution was sworn, testified and was cross-examined by the defendant. Pending the trial of the action he died, and the court permitted witnesses to testify as to his evidence on the examination. *Held*, that such testimony was proper, and that it was sufficient, in such a case, if the substance of the testimony of the deceased witness could be given. *United States v. Macomb*, 5 McL., 287.

§ 437. Where a witness is beyond the jurisdiction of the United States, his testimony given before the committing magistrate, in a preliminary examination, where he was cross-examined, cannot be given in evidence in a trial upon the indictment found in the same case. If living, he must be produced or his testimony cannot be received in a criminal case. *United States v. Angell*, 11 Fed. R., 34.

§ 438. The testimony of a deceased witness, given at the trial of a former indictment for the same offense, may be given in evidence, if the person giving it can repeat the testimony, and does not merely state what he conceives to be the substance of it. He may refresh his memory from notes which he took at the trial, or from a newspaper, printed by himself, containing the testimony of the deceased as taken down by him. But he must be sure of the accuracy of the statement from his own recollection and not from confidence in the statement. *United States v. Wood*, 3 Wash., 440.

§ 439. In an ejectment suit in which the plaintiff claimed under an executor of a will, who had propounded it for probate, the deposition of a deceased witness which had been taken in the prerogative court, in a suit there upon a caveat to the will, in which the defendants in the ejectment were among the caveators, was held admissible in evidence; and the record of the prerogative court was held admissible for the purpose of the offer, but not to show what the decision there was as to the validity of the will. *Turner v. Hand*, 3 Wall. Jr., 88.

§ 440. Wills—Admissibility, etc.—The rule as to the evidence required to prove a will, where a party claims title under it, does not apply in a proceeding to set aside the will. *Tarver v. Tarver*, 9 Pet., 174.

§ 441. It is competent to give evidence of a custom in California as to the manner of making wills, even if the effect of such custom be to establish a law different from the written law. *Adams v. Norris*, 23 How., 353.

§ 442. A will made in Missouri territory under the civil law, which is not proved to have been executed, and under which nothing has been done for many years, cannot be received in evidence as against persons claiming through the heirs. *Meegan v. Boyle*, 19 How., 130.

§ 443. Upon the question of the validity of a will under which the defendant claims, he cannot offer evidence to prove that a former will of the testator was stolen by the plaintiff, when it is not pretended that the defendant means to prove the contents of such former will, and he relies wholly on the one whose validity is in question. *Stevens v. Vancleve*, 4 Wash., 262.

§ 444. Before any testamentary paper of personalty can be admitted in evidence, it must receive probate in the courts having exclusive jurisdiction of wills of personal estate. *Armstrong v. Lear*, 12 Wheat., 169.

§ 445. A will which the court has refused to admit to probate is not admissible in favor of petitioners for freedom, nor can it be admitted as an instrument of manumission. *Bell v. Greenfield*, 5 Cr. C. C., 669.

§ 446. The register is authorized by the laws of Pennsylvania to receive probate of wills, and copies of such wills and probates, under the public seals of the courts or officers where the same shall have been taken or granted, if in force, are declared to be matters of record and good evidence of the matters therein contained. This authority, being general, extends as well to a republication as the publication of the will. But the same evidence is required to prove a republication as the publication, and proof by one witness is not sufficient. *Musser v. Curry*, 3 Wash., 481.

§ 447. A will cannot be admitted in evidence as a devise of lands, under the law of Rhode Island, until it has been duly proved by the competent authority empowered to allow wills and admit them to probate. *Moore v. Greene*, 2 Curt., 202.

§ 448. A foreign will may be used in evidence here to show a derivative title to personalty, without being probated in our courts. *Trecothick v. Austin*, 4 Mason, 16.

§ 449. Where the title by devise to land in Massachusetts comes incidentally in question in a suit in Rhode Island, the will under which the devisee claims—it having been probated in Massachusetts—is admissible in evidence without being probated in the state of Rhode Island. *Slack v. Walcott*, 3 Mason, 508.

§ 450. It is held in California that, although it is the general rule that a party cannot give in evidence in support of his title a will which has never been probated, this rule does not apply to wills executed prior to the act requiring the probate of wills; and that the fact that the will had never been probated under the Mexican law existing at the time it was made makes no difference, notwithstanding there was some interposition of judicial authority necessary to authenticate the execution of a will. *Adams v. De Cook*, McAl., 253.

§ 451. A codicil executed in California in 1845 is not inadmissible as evidence because it has never been admitted to probate; nor because the witnesses who were present at its execution had never been examined to establish its authenticity. *Adams v. Norris*, 23 How., 353.

§ 452. It cannot be objected to the admission of a will in evidence that it was not registered before the commencement of the suit, if registered after the suit is commenced. *Poole v. Fleeger*, 11 Pet., 185.

§ 453. An interpreter sworn in the cause may use the suggestions of others not sworn as interpreters, to assist his judgment in any case of doubt, giving his own interpretation finally to the court. *United States v. Gibert*, 2 Sumn., 19.

§ 454. Interpreters are always sworn, and the certificate of a consul, not on oath, to a translation of a foreign judgment, is not admissible. *Church v. Hubbard*, 2 Cr., 187.

§ 455. The court refused to issue a *capias* to compel the attendance of a person who had been subpoenaed as an interpreter, but without deciding what it would do if it appeared that no other interpreter could be obtained by reasonable diligence. *In re Roelker*,* 1 Spr., 276.

§ 456. Surprise.—A motion to withdraw a juror and go to trial at the next term, on the ground of surprise because evidence has been excluded, will not be granted when it is not

clear that the evidence, if admitted, would constitute a defense. *Foot v. Silsby*, 1 Blatch., 445.

§ 457. A party cannot claim to be surprised by the introduction in evidence of a letter written by himself to the opposite party. *Henckley v. Hendrickson*, 5 McL., 170.

§ 458. When evidence material to the case is given by a deponent, in answer to the general interrogatory at the end of his deposition, the other party cannot object to this on the ground of surprise. *Rhoades v. Selin*,* 4 Wash., 722.

§ 459. In all cases of forgery the indictment is in itself notice that all competent evidence will be produced, and the defendant cannot, therefore, be taken by surprise when the passing of any other forged notes of a manufacture similar to the one laid in the indictment is offered: whether the mode of proof is by the production of letters, copies, or proof of their contents, or by the notes is immaterial, so that the evidence conduces to prove the *scienter* as to the one charged. *United States v. Doeblen*,* Bald., 519.

§ 460. In prosecutions for forgery, as the intention and knowledge with which the act is done constitute the crime, it may be made out by evidence of other acts of a similar kind to that charged in the indictment. This being the well settled rule, the prisoner cannot be taken by surprise when such evidence is offered. He must come prepared to meet not only the evidence which applies directly to the specific act charged, but all other acts which, according to the known rules of evidence, a prosecutor may adduce to prove the act charged. If the note he is charged with forging, passing or delivering is of the same kind or character with others which he has disposed of, or retains in his possession, he has notice, in effect, that if practicable to procure it, evidence will be given of their counterfeit character and of his having passed them as true. *Ibid.*

II. IN PARTICULAR CASES.

§ 461. *Miscellaneous.*—In an action for a debt which has been assigned by the plaintiff, where the defendant has had notice of the assignment, payments made to the plaintiff after such notice cannot be given in evidence, the action being in the name of the original creditor for the benefit of the assignee. *Gardner v. Tennison*, 2 Cr. C. C., 338.

§ 462. In an action on a deed of trust, the notes secured by it and made a part of it may be read to the jury as evidence of the amount due. *Wilcox v. Hunt*, 13 Pet., 378.

§ 463. If a release, not executed by all the creditors whom it enumerates, is found in the possession of the debtor, this circumstance is entitled to consideration as in favor of its delivery; but it is not conclusive, and it may be shown that it was placed in his hands to obtain the signatures of the other creditors. *Dick v. Balch*, 8 Pet., 30.

§ 464. If the defendants consent to the blending of two causes of action, one legal and the other equitable, they thereby consent that evidence may be received in any of the modes applicable in an action at law or a suit in equity. *Fraley v. Bentley*,* 1 Dak. Ty., 25.

§ 465. It is competent to prove notice to an agent by the testimony of a participant in the transaction, although the agent is present. *Holbrook v. Worcester Bank*, 2 Curt., 244.

§ 466. In an action by a marine against his commanding officer, for punishment inflicted upon him for refusing to do duty, a letter written to the defendant by a lieutenant, calculated to make an impression on his mind as to the temper and disposition of the marines, was held to be admissible in evidence for the purpose of showing probable cause and the absence of malice in inflicting the punishment. But proceedings of courts-martial against two marines for offenses committed a long time before the refusal of the plaintiff to do duty were rejected as not evidence of a spirit existing at the time. Evidence of the punishment of others of the crew for desertion, insolence, and neglect of duty, was also rejected as having no bearing on the matter in issue. The defendant having given testimony to show that American seamen were confined in the fort at the time the plaintiff was imprisoned there, the defendant was held to be entitled to show that it was not the usual place of confinement, and that it was the practice to confine on the armed ships of the United States. *Dinsman v. Wilkes*, 12 How., 390.

§ 467. Where the defendant cannot be held responsible if the plaintiff's attorney assented to a certain act, it is pertinent to ask a witness what the plaintiff's attorney said after the act was done. *Rogers v. The Marshal*, 1 Wall., 644.

§ 468. A mere offer to compromise cannot be given in evidence to take the case out of the statute of limitations. *Ash v. Hayman*, 2 Cr. C. C., 452.

§ 469. An act which is penal, and for which the person is liable to indictment, cannot be received in evidence. *United States v. Cole*, 5 McL., 513.

§ 470. If an agreement to admit depositions, not otherwise admissible, does not contain any conditions as to any subsequent changes which may take place in the cause, it extends to the end of the cause, though it may be taken to the supreme court and remanded. *Hinde v. Vattier*, 1 McL., 110.

§ 471. A deposition referring to no facts relevant to the issue, and tending only to show that some of the officers of the land office and the attorney-general have expressed opinions on the questions of law arising in the case, different from those expressed in the opinion of the court, is not admissible in evidence to the jury. *Roberts v. Cooper*, 20 How., 467.

§ 472. Where a bond purports to have been executed nearly fifty years ago, when the country was new and unsettled, and the parties seem to have been illiterate men and unacquainted with business transactions, and the obligor and obligee and the subscribing witnesses are dead, as strict proof of its execution as if the transaction were of recent date is not required. *Coulson v. Walton*, 9 Pet., 62.

§ 473. The report of a reporter of the chamber of commerce held not to be evidence unless sworn to. *United States v. Cole*, 5 McL., 513.

§ 474. An original document taken and authenticated in a foreign country before a proper officer in the usual way, and admissible in evidence by the laws of that country, and containing declarations of the plaintiff's agent in relation to the business under his management, may be read in evidence in the defendant's behalf. *Blagg v. Phoenix Ins. Co.*,* 3 Wash., 5.

§ 475. Where the law requires a chattel mortgage to be under seal, a mortgage not under seal is not evidence. *Cooke v. Woodrow*, 1 Cr. C. C., 437.

§ 476. The seal of a corporation to a paper is itself *prima facie* evidence that it was affixed by proper authority. *Emma Silver Mining Co. (Limited) of London v. Emma Silver Mining Co. of New York*, 12 Fed. R., 815.

§ 477. The place of business of a corporation may be shown by its charter. *Vallette v. Whitewater Valley Canal Co.*, 4 McL., 192.

§ 478. Where a map appears from the evidence not to be original and reliable evidence of a calculation founded upon it, such calculation is not admissible. *Johnston v. Jones*, 1 Black, 210.

§ 479. A power of attorney was held to be sufficiently authenticated under the laws of Coahuila and Texas, where the paper produced was the *testimonio* of an authentic act passed before the regidor of the ayuntamiento, the handwriting of the regidor and the assisting witnesses, who were either dead or beyond the control of the court, having been also proved. (DANIEL, J., dissented.) *Spencer v. Lapsley*, 20 How., 264.

§ 480. A paper signed by one person as attorney for another is inadmissible unless the power of attorney under which the agent acted is produced. *James v. Gordon*,* 1 Wash., 333.

§ 481. The commission of a justice of the peace is conclusive evidence of his appointment. *Talbot v. Simpson*, Pet. C. C., 188.

§ 482. On the question whether a certain thing is generally known to those engaged in a particular trade, the testimony of witnesses engaged in that trade that it is not known to them, though negative in its character, tends directly to disprove the fact asserted, and is entitled to much weight. *Wilkinson v. Greely*, 1 Curt., 439.

§ 483. Whether a canal being constructed under state authority will interfere seriously with improvements being made under the authority of the United States is a question upon which the reports and statements of the government engineers are not conclusive, though entitled to weight. *United States v. City of Duluth*, 1 Dill., 469.

§ 484. In an action on a replevin bond, the defendant may prove in mitigation of damages that the plaintiff in replevin was the owner of the goods. And the plaintiff may show that the title under which plaintiff in replevin claimed was fraudulent and void. *Ringgold v. Bacon*, 3 Cr. C. C., 257.

§ 485. When a witness refreshes his memory by reference to a memorandum, he must then have a recollection of the fact or his evidence is not competent. *Patriotic Bank v. Frye*,* 2 Cr. C. C., 684.

§ 486. The declaration of a witness on his examination on the *voir dire* is not evidence for the jury. *Carne v. McLane*,* 1 Cranch, C. C., 351.

§ 487. Facts which constitute the ground of a separate action are not admissible. *Wyatt v. Harden*, Hemp., 17.

§ 488. Seal of government.—The seal of an unacknowledged government cannot prove itself. But the fact that a vessel was commissioned by such a government may be shown without producing the seal. *The Estrella*, 4 Wheat., 298.

§ 489. Persons or vessels employed in the service of a self-declared government, acknowledged to be maintaining its separate existence by war, must be permitted to prove the fact of their being actually employed in such service, by the same testimony which would be sufficient to prove that such person or vessel was employed in the service of an acknowledged state. The seal of such unacknowledged government cannot be permitted to prove itself; but may be proved by such testimony as the nature of the case admits; and the fact that such vessel or person is so employed may be proved without proving the seal. *United States v. Palmer*, 3 Wheat., 610.

§ 490. **Court reports.**— The reports of the cases in Howard's Supreme Court Reports may be referred to as expositions of the law upon the facts there disclosed, but they are no evidence of those facts in other cases. *Mackay v. Easton*, 19 Wall., 619.

§ 491. **A recital in a private statute** is evidence of the fact recited only as against the person who procured it. *Branson v. Wirth*, 17 Wall., 32.

§ 492. **Official acts.**— The president, in his message to congress, and in his correspondence with the government of Buenos Ayres, having denied the jurisdiction which that government had assumed to exercise over the Falkland Islands, the fact must be taken and acted on by the court as thus determined and maintained, and no other evidence on the subject can be gone into. *Williams v. Suffolk Ins. Co.*, 13 Pet., 415. See §§ 382, 387.

§ 493. A passport granted by the secretary of state, describing the person to whom it was granted as a citizen of the United States, is not evidence in a court of justice that he is a citizen. *Urtetiqui v. D'Arbel*, 9 Pet., 692.

§ 494. Neither the army registers compiled, issued and published to the army by the direction of the secretary of war, nor general orders of the commander-in-chief, directing that the general staff is to include the officers of the pay department, are admissible in evidence to establish the pay and emoluments of the office of paymaster, or that the paymasters are correctly classified among the officers of the general staff. *Wetmore v. United States*, 10 Pet., 647.

§ 495. Decisions of the board of property in Pennsylvania are held not to be evidence of the facts stated in them. *Holtzapple v. Phillibaum*, 4 Wash., 356.

§ 496. In a suit upon the bonds of a municipal corporation, the constitution of the state providing that no municipal corporation shall be allowed to become indebted to an amount exceeding five per centum on the value of the taxable property therein, "to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness," and there being no assessment of the property within the city separate from the other property in the county or township required by law, the taxable value of the property within the city may be shown by the official assessment for state and county taxes, embracing all taxable property within the county and township, in connection with the map of the city, the amount being readily ascertained in this manner. *Buchanan v. Litchfield*, 12 Otto, 278.

§ 497. A license signed by the pilot commissioners of the state of Oregon is *prima facie* evidence of the facts stated in it concerning the examination, qualification and licensing of the pilot to whom it purports to be granted. But if not signed by all of the commissioners it is not competent evidence of these facts, when there is no evidence, either in the recitals or averments contained therein, or in the minutes of the commissioners, that it was granted at a meeting of the board where all were present. *The California*, 1 Saw., 596.

§ 498. The official report of appraisers of goods on which duties have been levied, stating that they have examined the goods, is evidence of such examination in the absence of counter testimony. *Gibb v. Washington*, McAl., 430.

§ 499. In an action on a policy of insurance upon a vessel, which has been sold under the order of a court of admiralty at a foreign port, as not worth repairing, the report of her survey on which the sale was ordered is evidence that a survey took place, but not of the facts stated therein. *Watson v. Insurance Co. of North America*, 2 Wash., 152.

§ 500. If, in an action on a policy of insurance on a vessel, the plaintiffs read in evidence the survey and condemnation of the vessel solely for the purpose of showing that a survey and condemnation has taken place, and not as evidence of any fact stated therein, they do not thereby preclude themselves from offering evidence to impeach the credit of the survivors, whose depositions are introduced by the defendants. *Watson v. Insurance Co. of North America*, 2 Wash., 480.

§ 501. Where the persons appointed by law to certify that the requisites preliminary to the issue of county bonds have been complied with so certify, their certificate is conclusive in favor of the holder who, on the strength of such certificate, buys the bonds, for value, before maturity, and without notice of illegality or defect. In a suit on such bonds, want of authority cannot therefore be objected to the admission of the bonds in evidence, since that issue is not presented until it is shown either that the plaintiffs took the bonds after maturity, or with notice, or that they did not give value for them. *Chambers County v. Clews*, 21 Wall., 317.

§ 502. **Affidavits** which do not contain the proper title of the cause may be read in evidence notwithstanding, where it is affirmatively shown that they were made to be used in such cause. *Shook v. Rankin*, 6 Biss., 477.

§ 503. An affidavit of a seaman is not admissible in evidence in a suit by him for wages, and especially when he is present in court. *Bouysson v. Miller*, Bee, 190.

§ 504. Whether an affidavit of a party can be used in the supreme court as evidence of the allowance of a writ of error to a state court, *quære*. *Gleason v. Florida*, 9 Wall., 779.

§ 505. Where affidavits had been prepared without seeing the witnesses, and sent over the

country to be signed by those who might be found willing to sign them, the court declared this method of obtaining testimony as not worthy of encouragement. *Carrol v. Ertheiler*, 1 Fed. R., 688.

§ 506. An affidavit indorsed on a manifest a month after the latter has been filed in the custom-house, and written by a different person than the writer of the manifest, is not admissible as a part of the manifest. *United States v. Graff*,*14 Blatch., 381.

§ 507. Where, in response to a claimant's request on the treasury department for certain information, the secretary transmitted, with other papers, affidavits which were not called for, but which were part of the record to which the information required belonged, the defendants may read such affidavits in evidence if they are otherwise competent. Such affidavits were *ex parte*, and tended to show that the property in question belonged to the Confederate government. They are not competent to show that fact, but may perhaps show on what ground the officials acted in making the seizure. *Wilde's Case*,* 7 Ct. Cl., 415.

§ 508. A former affidavit, made in the cause by one now examined as a witness, cannot be admitted except for the purpose of impeachment. *Dayton v. Wyoming Nat. Bank*,* 1 Wyom. T'y, 263.

§ 509. In executing a writ of inquiry the plaintiff's own affidavit may be given in evidence to ascertain the amount of damages. *Keene v. Cooper*, 2 Cr. C. C., 215.

§ 510. **The postoffice.**—The fact that a letter is addressed to a person by name, at his known postoffice address, postage prepaid, and actually deposited in the postoffice, is evidence tending to show that such letter reached its destination, and was received by the person to whom it was addressed, though it is not conclusive, nor does it create a legal presumption. The envelope need not be produced before the witness can testify as to how it was superscribed. *United States v. Babcock*,*3 Dill., 571. See § 330.

§ 511. An entry on the post-bill is not conclusive evidence of the transmission of a letter, for it still may never have been put into the mail, or may have been stolen in its passage. *Dunlop v. Munroe*, 7 Cr., 242.

§ 512. In an action to recover of a deputy-postmaster the value of bank-notes lost in the mail, the declaration containing one count for fraud and one for negligence, the plaintiff was permitted to give in evidence the printed circular instructions given by the postmaster-general to the deputy-postmasters according to the postoffice law of March 2, 1799, to show the forms of transacting business in the office, and the duties of the defendant. *Dunlop v. Munroe*, 1 Cr. C. C., 536.

§ 513. **Actions on contracts.**—The dissolution of a contract conveying land, for the non-fulfillment of the conditions, cannot be inferred merely from the fact of a subsequent conveyance of the property by the grantor. *Anderson v. Bock*, 15 How., 323.

§ 514. In a suit on a contract, a total or partial failure of consideration, acts of nonfeasance or misfeasance, immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be given in evidence in mitigation of damages, or for the purpose of defeating the plaintiff's action in whole or in part. *Winder v. Caldwell*, 14 How., 434.

§ 515. In an action to recover an amount of money due on a written contract between the plaintiff and a third party, and collected by the defendant under a written authority from the plaintiff, the written contract is admissible in evidence to show how the money became due the plaintiff, and the amount thereof, and it is immaterial that the contract is not properly signed. *Londoner v. Stewart*,* 3 Colo. T'y, 47.

§ 516. In an action for the breach of a contract in which the defendant had contracted with the plaintiff for the manufacture of fire hose of a certain size, it was held to be competent, as bearing on the question of the amount of damages, for the plaintiff to prove that, at the time the defendant gave notice that the hose would not be received, a large amount of leather had been cut for the manufacture of the hose, that hose of the size contracted for could not be sold in the market, and that the leather would therefore have to be cut down for hose of smaller size, thus involving a loss of both leather and labor. *Chicago v. Greer*, 9 Wall., 726.

§ 517. In an action on a contract, for breach in not delivering teas of the quality contracted for, the plaintiffs cannot offer evidence tending to impute fraud to the defendant by showing that after the examination made by the purchasers of teas they may be changed, and teas of different quality imposed upon the purchaser. *Gilpin v. Consequa*, 3 Wash., 184; Pet. C. C., 85.

§ 518. In an action for breach of contract by one of several separate owners of a cargo of tea, who alleges that the tea was of inferior quality, an account sales of the whole cargo is inadmissible in behalf of the defendant, where he does not intend to impeach the account sales of the particular portion of the cargo belonging to the plaintiff. *Gilpin v. Consequa*,* Pet. C. C., 85.

§ 519. In an action by the builder upon a building contract which imposes mutual obliga-

tions, the defendants may give evidence of damages sustained by the defective manner in which the contract has been executed by the plaintiff, for which a cross-action might be maintained by the defendants. *Railroad Company v. Smith*, 21 Wall., 255.

§ 520. In a suit by the builder upon a building contract, the plaintiff having given evidence to prove that the execution of the work was delayed beyond the stipulated time on account of the defendant's making a contract with a third person for an alteration in the style and finish of the plastering, the defendant cannot be permitted to give evidence to show that the said plastering, and the style and finish thereof, were usual and proper, and necessary to the completion of the house, and that the plaintiff refused to do it, such evidence not tending to prove that this work was within the provisions of the written contract. *Van Buren v. Digges*, 11 How., 461.

§ 521. The plaintiff, having constructed for the defendant, a railroad company, a swinging drawbridge over a river, under a contract to do the work according to a submitted plan and tracings, for a stipulated price, sued the company for the price. The defendant set up part payment, and also sought to deduct, by way of recoupment, expenditures for material and labor alleged to have been incurred on account of the defective and imperfect manner in which the bridge was constructed, and also special damages sustained by the defendant on account of the detention the bridge caused to a vessel in the river. Interrogatories in a description inquiring whether the structure and arrangements of the bridge caused any injury or damage, hindrance or delay, to the company in running its trains; whether any hindrance or delay was caused by the imperfect construction of the bridge to any vessel in the navigation of the river; whether the working or structure of the bridge rendered it liable to be injured or destroyed by vessels navigating the river; and what number of hands were required to work the drawbridge, and what number would be required if it had been properly constructed, and the answers to these interrogatories, were excluded by the lower court because they related to speculative damages. It was held in the supreme court that this objection was not applicable to the first and last inquiries, and that the interrogatories were pertinent and proper in themselves. *Railroad Company v. Smith*, 21 Wall., 255.

§ 522. Where a contract for the building of a house provides that the value of any extra work shall be ascertained by a person to be chosen by the parties, the plaintiff may, in an action on a *quantum meruit*, give other evidence as to the value of the extra work, if no person has been chosen for that purpose. *Baker v. Herty*, 1 Cr. C. C., 249.

§ 523. Where a contract in writing provides for the payment of money, and that the amount of service shall be established by the certificate of another, this cannot be established by any other evidence, without showing the impracticability of obtaining the certificates. *United States v. Robeson*, 9 Pet., 319.

§ 524. In an action against the owners of a vessel for supplies furnished, the defendants may show by any competent witness that they had contracted with each other not to have the agent who contracted for the supplies for an agent any longer, nor permit him to pledge their credit for supplies. *Macy v. De Wolf*, 3 Woodb. & M., 193.

§ 525. The defendant contracted, by adding the word "agreed" to a letter written by a third person, to ship to the plaintiffs, for account of such third person, certain sugar. It was held that it could not be proved that, at the time this letter was signed by the defendant, it was the understanding between him and the third person that the latter should furnish him with funds for the purchase of the sugar before he should be under obligation to ship the same, such understanding not having been known to the plaintiffs or agreed to by them. *D'Wolf v. Rabaud*, 1 Pet., 476.

§ 526. In an action on a contract to deliver pork intended for the English market, at Madison, Indiana, to be put up in good order, which pork was shipped by way of New Orleans, and when received at Baltimore was found to be in a bad condition, the court permitted evidence to be given as to its condition at both of these latter places, from which the jury might infer whether it could have been put up in good order at Madison. *Lawrence v. White*, 5 McL., 108.

§ 527. Where the plaintiff sued on a contract under which he had constructed an appliance for saving fuel on the defendant's steamboat, to be compensated in a certain proportion to the amount of fuel saved, the manner of ascertaining such saving being specified in the contract, and this manner being also specially stated in the declaration, the plaintiff having given in evidence the experiment made in pursuance of the agreement, it was held that, in order to corroborate this proof, he might show experiments made by practical engineers on other boats, and the result thereof, with the opinion of the said engineers as to the value of the appliance. It was further held that, if this were otherwise, there being also a common count on a *quantum meruit*, the relevancy and competency of this evidence could not be doubted. *Steam Packet Company v. Sickles*, 10 How., 419.

§ 528. Where two separate contracts, made in two consecutive years, for the supply of rations for certain troops for the respective years in which the contracts were made, both stip-

ulated for certain notices as to the time and place of supplying the articles and the amount wanted, it was decided that a waiver of the notices in fulfilling the first contract was not evidence tending to establish that they were dispensed with under the second. *United States v. Jones*, 8 Pet., 399.

§ 529. In an action of replevin for certain cattle, where the defendant testified that he had purchased the cattle from the plaintiff, it was held to be competent, on his cross-examination, to ask him if his contract was in writing, and if so to identify the paper. *Gregory v. Morris*, 6 Otto, 619.

§ 530. In an action of covenant, where the covenants are dependent, and the plaintiff cannot recover without showing performance of every affirmative covenant on his part, the defendant may, under an agreement allowing him to give in evidence anything which amounts to a defense, prove a breach on the part of the plaintiff of such of the covenants as are negative. *Webster v. Warren*, 2 Wash., 456.

§ 531. In an action of covenant, where the covenants of the contract are independent, the defendant cannot, under an agreement allowing him to give in evidence anything which amounts to a defense, give in evidence the breach of independent covenants on the part of the plaintiff, either by way of bar or offset, or in mitigation. *Ibid.*

§ 532. In an action of covenant against a corporation, the deed declared on may be read to the jury as soon as any evidence of its execution, fit to be weighed by the jury, has been given by the plaintiff. *Philadelphia, Wilmington, etc., R. Co. v. Howard*, 13 How., 307.

§ 533. An agreement, prior to the sealing of a contract by a corporation, and in no way connected with that act, that it should not be the deed of the company until signed and sealed by the other party, cannot be shown, in an action on the covenant. *Ibid.*

§ 534. In an action of covenant against a corporation, in order to prove that the instrument declared on bears the seal of the corporation, evidence that, in a former action, the corporation, through its counsel, treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, is admissible. *Ibid.*

§ 535. In an action of *assumpsit* upon a written contract by the defendant to convey to the plaintiff a certain lot, a letter written by the plaintiff to the defendant, giving him notice that the lot was about to be sold under a deed of trust, was held to be admissible in evidence; also the testimony of a witness that he had examined the records for the purpose of tracing the title of the plaintiff to the lot in question, the examination being made for the purpose of enabling the plaintiff to decide what course to pursue in relation to the property. To sustain an allegation in the declaration that no conveyance had been made in accordance with the contract, a deed from the defendant to the plaintiff was also held to be properly admitted, for the purpose of showing that it was in fact no deed. The record of a suit between others was likewise admitted for the purpose of showing that the lot had been rightfully sold under the deed of trust. *Bank of the Metropolis v. Guttschlick*, 14 Pet., 19.

§ 536. In an action of *assumpsit* against a stockholder of a bankrupt corporation to recover an assessment made by order of the bankruptcy court, the books of the corporation, in which the name of the defendant is entered as a stockholder; the stock-book of the company, with a duplicate of the stock certificate issued to the defendant, showing that he is the owner of the same number of the shares of the capital stock; testimony to prove that the certificate was sent to the agents of the company to be delivered to the defendant when he paid twenty per cent. of the shares, and that he made the required payment; and the receipt signed by the defendant showing that the company has paid to him a dividend upon his stock, are admissible in evidence to show that he is a stockholder. *Turnbull v. Payson*, 5 Otto, 418.

§ 537. In an action of *assumpsit* for money paid, a deed of assignment by the defendant, reciting that the plaintiff and others had become his sureties for a debt, and paid it, and assigning property in trust to be distributed among them, is evidence from which the jury may infer a request on the part of the defendant. *King v. Riddle*, 7 Cr., 168.

§ 538. Usage.—In an action by a foreigner against a citizen of this country for imitating and using his trade-mark, evidence of a custom in this and foreign countries to imitate the trade-marks of foreigners, and that such custom is generally known to the commercial world, and not contrary to the laws of such countries, is not evidence to the jury in defense of the action. It might be competent in mitigation of vindictive damages if any were permissible in the action. Nor is it competent to show an acquiescence by the plaintiff in the use of his mark, or a dedication of it to public use, unless the neglect to prosecute was extended to the period of the statute of limitations. *Taylor v. Carpenter*, 2 Woodb. & M., 1.

§ 539. It being the understanding between the board of commissioners of a navy hospital and their secretary that he should receive compensation in the mode and according to the practice of the government in other similar cases, it was held competent to show that it was the usage of the government to make such compensation by allowing commissions on the disbursement of the money expended. *United States v. Fillebrown*, 7 Pet., 28.

§ 540. In an action for not manufacturing and furnishing goods as agreed, it is admissible to show a usage of the defendants that parties' orders should be taken up in turn and filled in proportionate amounts, and that this usage was complied with in this case — such usage having been known to the plaintiffs at the time they made their contract. *Bliven v. New England Screw Co.*, 23 How., 420.

§ 541. Invoices and bills of lading.— Upon a question of general average, the invoices and bills of lading will be received as evidence of the value of the cargo at the place of purchase and shipment, and the policies may be considered as evidence conducing to prove the worth of the ship at the port of departure, and the value of the freight lost. *Mutual Safety Ins. Co. v. Cargo of Brig George, Olc.*, 89.

§ 542. In a suit against a common carrier, where the receipt and non-delivery of the package is admitted, the rule of law is that the libellant makes out a *prima facie* case by proving the receipt of the carrier containing the words, "received in good order." But the claimant may contradict this admission, by showing that the goods were not in good order when received. *The Pacific, Deady*, 17.

§ 543. It cannot be objected to the admission in evidence of a bill of lading and invoice, in an action on a policy of insurance on goods on board a vessel, that it was given some time after the taking of the cargo instead of at the taking of the cargo, where the delay is explained by circumstances making it impossible to give it at the time of loading. *Graham v. Pennsylvania Insurance Co.*, 2 Wash., 113.

§ 544. According to the general rules of law in other cases, an invoice by itself is not admissible in evidence. But in commercial cases it is uniformly admitted, if it carries with it the proof of its fairness; it is not known to have ever been questioned. It is *prima facie* evidence of value and no more. *Ibid.*

§ 545. In an action upon an open policy on the freight of a vessel, it was held that the bill of lading was not conclusive evidence of an express contract for a specific sum for freight. *Simmes v. Marine Ins. Co. of Alexandria*, 2 Cr. C. C., 618.

§ 546. An invoice of goods, received by a consignee, retained, and not objected to, and the truth of which is in no manner disproved, is evidence that all the articles enumerated in it were received by the consignee. *Field v. Moulson*, 2 Wash., 155.

§ 547. Where the quantity of coal at the port of delivery varies from that stated in the bill of lading, evidence that such shortage is usual is admissible. *Manchester v. Milne*,* Abb. Adm., 115.

§ 548. In an action for damage to goods shipped, the protest cannot be introduced by the carrier to show that the injury was caused by the perils of the sea. It is not admissible in evidence in favor of the master or owners. *Brig May Queen, Newb.*, 464.

§ 549. In an action against common carriers upon their general undertaking, a notice thereof published by them in a public newspaper, if identified with them, is proper evidence. *Doty v. Strong*,* 1 Burn. (Wis.), 158.

§ 550. A bill of lading is evidence of interest in property insured. *Talcott v. Delaware Insurance Co.*, 2 Wash., 449.

§ 551. Bonds.— In a suit upon a collector's bond, it cannot be successfully objected to the admission of the bond in evidence that it is unauthorized by the laws of congress, if it is valid as a common law obligation. *Chadwick v. United States*, 3 Fed. R., 750.

§ 552. In an action on a collector's bond, it may be proved that money was received by the collector to await the result of an attempt to compromise, and was retained by him. *Ibid.*

§ 553. A circular of department regulations was admitted in evidence in an action against the sureties on a collector's bond, without any further proof that it had been seen by the collector, than the fact that a duplicate copy of the same was found in a book kept by him, in which large numbers of treasury circulars were pasted, and which was turned over by his deputy to his successor. *Ibid.*

§ 554. In an action on a collector's bond, in order to prove that a certain sum came into the hands of the collector as public money, and was retained by him, the deputy collector testified that a certain person came to him and said that he was charged with a criminal offense under the revenue laws which he wished to settle, and that he wished to deposit a certain sum to await the offer of compromise; that he, the witness, took the money, gave the person a receipt for it, and put it in the collector's safe with the other money; and that he handed the whole bundle of money to the collector at the hour at which he was accustomed to deposit his money. The witness gave no further account of what became of the money, nor did he state the result of the offer to compromise. On objection to this evidence as insufficient, it was held that it was admissible as tending to prove the issue, and that the question of its sufficiency was one for the jury and not the court. *Ibid.*

§ 555. Proof of the signature of one of the parties to a joint and several bond is *prima facie*

evidence of his execution of the instrument, and renders it admissible in evidence as to him. *Conard v. Atlantic Insurance Co.*, 1 Pet., 386.

§ 556. In an action on a bond given by an executor to his co-executor, conditioned to pay over to the former certain assets in his hands for the use of the legal heirs of the testator, of which there are two, a release by one of the heirs cannot be pleaded, but may be given as evidence of payment of his moiety of the debt. *Campbell v. Hamilton*, 4 Wash., 92.

§ 557. In an action against the surety on a prison-bonds bond, he cannot give evidence to prove that his principal, the debtor, was insolvent when the bond was given, and therefore the plaintiff sustained no damage by the breach of the condition of the bond. *Smoot v. Lee*, 2 Cr. C. C., 459.

§ 558. In an action against a surety on a receiver's bond, conditioned to carefully keep the goods that might be brought into court, the admission of evidence pertinent to the issues made by the pleadings, and defensive as to the imputed negligence of the receiver in keeping the goods committed to him, and as to their condition, quality and value when they were turned over to him under the order of the court, and as to their condition when he parted with them, was held not to have been erroneous. *Very v. Watkins*, 23 How., 469.

§ 559. A bond for the conveyance of a vessel by the builder is not conclusive evidence of ownership in the builder. *Simmes v. Marine Ins. Co. of Alexandria*, 2 Cr. C. C., 618.

§ 560. If the United States, having money in the treasury belonging to the surety of their debtor, which they have agreed to hold as security, bring a suit against the debtor for the benefit of the surety to give him the benefit of their priority, evidence of an equitable claim by the debtor against the surety cannot be given. *Meredith v. United States*, 13 Pet., 486.

§ 561. The date of the bond of a collector is not evidence of the time at which his predecessor ceased to hold the office, where the bond does not show when the collector entered upon the duties of his office. *United States v. Hunt*, 15 Otto, 183.

§ 562. In an action on a penal bond, it may be shown that in a former action on the same bond against other parties thereto, a certain sum was collected on execution by the government, without showing that the vouchers have been exhibited and rejected at the treasury department, or any excuse for not thus exhibiting them. *Myers v. United States*, 1 McL., 493.

§ 563. The rate of exchange between two places is a fact to be established by evidence like any other fact. *McLean v. Lafayette Bank*, 3 McL., 587.

§ 564. Where usury is charged as being covered by exchange between two cities, evidence on both sides is admissible to show the usual rate of exchange between the places at the time of the transaction. *Andrews v. Pond*, 13 Pet., 65.

§ 565. Bills and notes.—The contents of a void note cannot be given in evidence to support an action upon it. *Root v. Wallace*, 4 McL., 8. See § 260.

§ 566. If a note be void upon its face, it cannot be given in evidence in an action by an indorsee against an indorser. *Ibid.*

§ 567. If a note, the signature upon which is erased, is offered in evidence, in an action thereon, without proof of its execution, the court will not permit the note to be read without accounting for the erasure, although its execution is not denied by the pleading. *Abbe v. Rood*, 6 McL., 106.

§ 568. Although, in an action for money had and received against the indorser of a promissory note, the note and indorsement may be given in evidence, and are *prima facie* evidence of the receipt of money by the indorser from the holder, yet this presumption is destroyed by proof that he is a mere accommodation indorser, and is not, when such proof is made, sufficient to charge the defendant. *Page v. Bank of Alexandria*, 7 Wheat., 35.

§ 569. Possession of a bill of exchange, though indorsed specially by the possessor, and such indorsement is not canceled, and there is no re-indorsement or other evidence of a subsequent assignment to him, is *prima facie* evidence of ownership. *Picquet v. Curtis*, 1 Sumn., 478.

§ 570. Possession of a promissory note payable to order and indorsed in blank, or payable to bearer, is *prima facie* evidence that the holder is the proper owner and lawful possessor of the same. *Brown v. Spofford*, 5 Otto, 474.

§ 571. Possession of a bill of exchange by an accommodation acceptor, after it has been put into circulation and come back to him, is *prima facie* evidence of a right to sue the drawers thereon. *Hunter v. Kibbe*, 5 McL., 279.

§ 572. The payment of a check by the drawee is *prima facie* evidence of funds, especially where the check has been surrendered to the drawer. *Bank of United States v. Wilson*, 3 Cr. C. C., 213; *Bank of Alexandria v. McCrea*, 3 Cr. C. C., 649.

§ 573. Bank checks drawn by the plaintiff in favor of the defendant or bearer are not of themselves evidence of payment of money by the plaintiff to the defendant, though the checks were paid by the bank. *Burch v. Spaulding*, 2 Cr. C. C., 422.

§ 574. In a suit by an indorsee against the indorser of a note, the face of the note is *prima facie* evidence of the consideration paid on its negotiation. But the defendant may show an

entire want of consideration, or that only a small sum was paid. *Martin v. Kercheval*, 4 McL., 117.

§ 575. In an action against an indorser on a note, a deed from the maker was introduced in order to show the maker's insolvency. The defendant then called the maker as a witness to prove that the deed was obtained by fraud and without consideration, and thus destroy the inference. *Held*, that the evidence was competent. *Bank of Columbia v. French*, 1 Cr. C. C., 221.

§ 576. In Virginia, where, before resort can be had to the indorser of a promissory note, suit must be brought against the maker if solvent, or if insolvent this must be shown, any evidence of insolvency is admissible, and the question is to be left to the jury whether a suit brought against the maker would have produced the money. *Violett v. Patton*, 5 Cr., 142.

§ 577. When notice of the non-acceptance or non-payment of a bill is sent by mail, the testimony of the postmaster or his deputy as to the course of the mail and the usage of the office is admissible on either the question whether due notice was received or whether due diligence was used. *Dickins v. Beal*, 10 Pet., 572.

§ 578. Where the widow of the payee and holder of a note presented it to the maker for payment, and, on part payment, credited the amount on the note as having been paid to her as administratrix, and subsequently indorsed it as administratrix to one sued on it, no other evidence was held necessary to prove her right to indorse the note. *Rhodes v. Hadfield*, 2 Cr. C. C., 566.

§ 579. An agreement by an indorser of a note not to take advantage of the statute of limitations, and to authorize counsel to docket a suit upon the note, is not evidence which warrants an inference that he received due notice. *Bank of the United States v. Corcoran*, 3 Cr. C. C., 46.

§ 580. The date on a promissory note, given by the debtor to the garnishee — being only an assertion of the debtor — is not competent evidence to establish for the garnishee the existence of the note before the service of the garnishment. *Williams v. Hill*, 19 How., 246.

§ 581. To entitle an assignee of a note to judgment thereon, the assignment must be proved at the trial. *Clark v. Cropper*, Hemp., 213.

§ 582. By a statute of Illinois, the assignor of a promissory note is liable to the assignee, only in case the latter, by the exercise of due diligence, has prosecuted the maker to insolvency, or where the institution of a suit against the maker would be unavailing, or the maker is out of the jurisdiction of the court when the note falls due. In an action against an assignor, where the assignee alleged that a suit against the maker would be unavailing, proof that the maker had been adjudicated a bankrupt before a suit could have been brought was held admissible and conclusive to show the fact and the defects in the declaration in not pointing out why the suit would have been unavailing were held to be cured by the verdict. *Wills v. Claffin*, 2 Otto, 135.

§ 583. In an action against the drawer of a check, the jury cannot infer that the plaintiff used due diligence in demanding payment from the bank and giving notice to the defendant, from the fact that both the plaintiff and defendant live in the town where the bank is situated, and that the drawer is insolvent. *McKinder v. Dunlap*, 1 Cr. C. C., 584.

§ 584. In an action founded on a promise to indemnify the plaintiffs for indorsing bills of exchange, which were not accepted, and have been protested for non-payment, the bills may be admitted in evidence unaccompanied by protests for non-acceptance. *Clarke v. Russell*, 3 Dal., 415.

§ 585. In *assumpsit* against the indorser of a note, the testimony of a notary that he made demand on the third day of grace, and gave notice to the indorser on the third, and also on the next day thereafter, is competent evidence of demand and notice, although the witness cannot recollect the days of the month and year without reference to his notarial book. *Bank of United States v. Abbott*, 3 Cr. C. C., 94.

§ 586. To sustain an action on a promissory note by indorsee against indorser, it is not necessary to prove the execution of the note. *Kendall v. Freeman*, 2 McL., 189.

§ 587. The protest of an inland bill of exchange or promissory note is no evidence of any of the incidents which convert the conditional undertaking of the indorser into an absolute assumption. *Union Bank v. Hyde*, 6 Wheat., 572.

§ 588. In an action on a bill of exchange drawn in one state upon a person in another, the protest was admitted to prove demand and refusal of acceptance, the court stating that the question could be more fully examined on a motion for a new trial. *Lonsdale v. Brown*, 4 Wash., 86.

§ 589. An indorsement of a clerk of a notary on the protest of a note, that the notice was properly served, is not evidence to prove that fact; nor does the statement of the notary that it was the uniform practice to serve an indorser personally, or leave it at his residence or place of business, render it evidence, even though the clerk is now out of the state. The deposition of the clerk should be taken. *Whitehead v. Jones*,* 2 McL., 28.

§ 590. A discharge of the drawer of a bill or note, under the act of January 6, 1800, "for the relief of persons imprisoned for debt," is sufficient evidence of his insolvency, although the creditor waived the right to imprison him for thirty days after judgment. *Bank of United States v. Weisiger*, 2 Pet., 331.

§ 591. A memorandum on the back of a notice, in the handwriting of a deceased note-clerk of a bank, to the effect that he had given similar notice to another party, is admissible in evidence. *Bank of United States v. Davis*,* 4 Cr. C. C., 533.

§ 592. The notarial certificate of protest is admissible as evidence of the dishonor of a bill of exchange drawn in Kentucky and payable at New Orleans in Louisiana. *Townsley v. Sumrall*, 2 Pet., 170.

§ 593. A protest which does not state that the notary informed the indorser that a demand had been made upon the maker and payment refused is not evidence of sufficient notice to charge the indorser. *Bank of Alexandria v. Wilson*, 2 Cr. C. C., 5.

§ 594. A notary's certificate is admissible to show that a demand was made and a protest entered for non-payment. *Jones v. Heaton*, 1 McL., 317.

§ 595. A statement in the notary's protest of a note for non-payment, of demand made on the drawer, non-payment, and notice of non-payment given to the indorser, is sufficient evidence *prima facie* of such notice and that it was given in the regular manner. *Eldredge v. Chacon*, 1 Crabbe, 296.

§ 596. It was held competent to prove demand of payment of the note by a book of a notary public called a register of protests which contained an entry of demand — the notary having no recollection of the matter, but testifying that he was sure the entry was correct, that it was made at the time in his handwriting and had not been altered. *Thornton v. Stoddert*, 1 Cr. C. C., 534.

§ 597. **Partnership.**—The statute of Illinois dispensing with proof of partnership in actions by or against partners on contracts, unless a plea in abatement is interposed, or verified pleas are filed denying the execution of a writing set up, applies to a case where the declaration begins thus: A., B. and C., trading as A. & Co., complain of E., F. and G., trading as E. & Co., and afterwards refers to the parties as "plaintiffs" and "defendants," without any addition of "as copartners aforesaid." *Cooper v. Coates*, 21 Wall., 105.

§ 598. Articles of copartnership are not admissible, in favor of the partnership and against others, on the question when the copartnership was formed. *Philpot v. Gruninger*, 14 Wall., 570.

§ 599. In an action against the members of a partnership upon an indorsement in the firm name upon a promissory note by one of the partners, evidence that by the articles of copartnership this partner had no authority to bind the firm by the indorsement of negotiable paper cannot be received, where the plaintiff purchased the paper in good faith for value, and without notice of the articles of copartnership or the purpose for which the partnership name in this instance had been used. *Michigan Bank v. Eldred*, 9 Wall., 544.

§ 600. Where a bank has paid out funds of a firm upon the individual check of one of the partners, who had an account with the bank but had no funds, in an action by the firm against the bank, it may be proved that the money was drawn out by the partner for his individual use and not for partnership purposes. *Coote v. Bank of United States*, 3 Cr. C. C., 50.

§ 601. A **dedication** may be proved by verbal declarations of the owner, or by a writing signed by him; and under some circumstances it may be presumed, without proof of any act of dedication, from the acquiescence of the owner in the use and occupation of the property by the public; but to raise such a presumption the use and occupation must usually be adverse to the title of the owner. This presumption may be rebutted by exercise of acts of ownership by the person claiming to be owner. *Robertson v. Town of Wellsville*, 1 Bond, 81. See **DEDICATION**.

§ 602. A dedication of land to public uses by parol, being an exception to the rule that no interest in land shall pass without a writing, ought to be shown plainly and distinctly, and not left to be inferred from facts and circumstances, indifferent in themselves, and not inconsistent with a contrary conclusion. It should be clearly and satisfactorily proved that the dedication has received the clear assent of the owner, and was actually and deliberately made. *Chapman v. School District No. 1*, Deady, 139.

§ 603. The exhibition and publication of a map of a town, by the authorities thereof, with certain spaces marked thereon as streets and public squares, is evidence of a dedication. *Lownsdale v. City of Portland*, Deady, 39.

§ 604. Although a dedication of streets and public grounds in a town may be shown by acts and declarations in parol, they ought to be of such public and deliberate character as would make them generally known, and not of doubtful import. *Ibid*.

§ 605. That land alleged to have been dedicated for a street has not been improved or used for that purpose is evidence against the fact of dedication, but it is not conclusive. *Barclay v. Howell*, 6 Pet., 498.

§ 606. **Fraud.**—To sustain an allegation of fraud and imposition in obtaining a conveyance, the whole circumstances of the case, as well as the positive testimony and character and relations of the parties, are all proper subjects of inquiry. *Warner v. Daniels*, 1 Woodb. & M., 90. See § 244.

§ 607. In actions for fraud, large latitude is always given to the admission of evidence. The intent to defraud may be shown by any evidence that has a tendency to persuade the mind of its existence. If a motive exists prompting a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit. The defrauding in the one case may therefore be shown to prove an intent to defraud in the other. *Butler v. Watkins*, 13 Wall., 456.

§ 608. It is not competent, for the purpose of showing a fraud in a particular transaction, to show that the same party has been guilty of fraud in another separate and independent transaction, not in any manner connected with the matter in controversy. But if the transaction sought to be shown in evidence can be connected with the transaction in controversy, as evidence of a connected scheme to defraud, it is admissible. Thus, in a suit by creditors to set aside as fraudulent a judgment obtained against a debtor by default, it was permitted to be shown that in another state, in which the defendant also had a store and was engaged in the same business, on the same day, another judgment was rendered against the defendant by default, in favor of the same person, and upon a note which was a part of the same debt for which the judgment sought to be set aside was rendered. *Smith v. Schwed*, 9 Fed. R., 483.

§ 609. In an action by the purchasers of a mine against the vendors for fraud and deceit practiced in making the sale, where the plaintiffs had, in order to show a fraudulent intent on the part of the vendors, introduced evidence of statements made to them, or one of them, by various persons, unfavorable to the character and value of the mine, to meet this, evidence was held admissible on the part of the defendants, consisting of statements relative to the character and value of the mine, made to them prior to the sale, by persons whose knowledge of the property entitled them to speak with more or less weight. *The Emma Silver Mining Co. v. Park*, 14 Blatch., 411.

§ 610. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same person at or near the same time, is admissible, the inference being that the transactions proceeded from the same motive. *Lincoln v. Claffin*, 7 Wall., 132.

§ 611. In an action for damages for the breach of a contract, no evidence of fraud can be given; and if, from the evidence, the jury are disposed to infer it, it ought not to influence their verdict. *Willings v. Consequa*, Pet. C. C., 301.

§ 612. Where it is pleaded, in defense to an action on a bond, that it was procured by fraud, no evidence of fraud can be given except of fraud in the execution of the instrument. *George v. Tate*, 12 Otto, 564.

§ 613. A plaintiff in ejectment, by offering deeds in evidence for the purpose of showing the source of the defendant's title, is not precluded from showing that the deeds are fraudulent. *Remington v. Linthicum*, 14 Pet., 84; *Linthicum v. Remington*, 5 Cr. C. C., 546.

§ 614. When a case involves questions of fraud, wide latitude is allowed in the admission of evidence, as the case generally must be proved by circumstantial evidence. *Rea v. Missouri*,* 17 Wall., 543.

§ 615. In an action of ejectment the defendant was permitted to introduce evidence of fraud on the part of the person under whom the plaintiff claimed, in obtaining from the defendant's lessor the title relied on by the plaintiff. *Torrey v. Beardsley*, 4 Wash., 242.

§ 616. If the inadequacy of the consideration of a deed is so gross as to shock the conscience, it is *per se* evidence of fraud. *Surget v. Byers*, Hemp., 715.

§ 617. To hold a party guilty of fraud in the purchase from a trustee, in the absence of any direct evidence of fraud or collusion, upon an inference drawn from an alleged inadequacy of price, such inadequacy must be proved beyond question. *Carpenter v. Robinson*, 1 Holmes, 67.

§ 618. On the question whether there has been any false and fraudulent representations made by the defendant in making a sale to the plaintiff, all the negotiations of the parties are competent. And a representation made by the defendant to a third person, and communicated to the plaintiff, and which formed the basis of the sale, is not treated as *res inter alios acta*, and may be proved. *Crocker v. Lewis*, 3 Sumn., 1.

§ 619. In order to prove that a deed is fraudulent as against creditors, it is competent to show that the grantor was indebted at the time of the conveyance. And for this purpose the record of judgments against the grantor may be received in evidence, although the grantee in the deed was not a party to them. Copies of the accounts on which the judgments were rendered, which are spread upon the record, may, not having been objected to, be looked to for

the purpose of showing that the causes of action arose before the date of the deed. *Hinde v. Longworth*, 11 Wheat., 199.

§ 620. It is no evidence of fraud in a contract for the conveyance of a lot, that the owner purchased it at a tax sale for a small price, and the other party was to allow him the full value of a good title for it; that the title under the tax sale was worthless; that the owner was a shrewd, speculating man, well acquainted with tax titles, and the other person a plain and unlettered man. *Powling v. Varnum*, 2 Cr. C. C., 423.

§ 621. The plaintiff sued an administrator for work and labor done and materials furnished for the defendant's intestate, which was to be paid for by the conveyance of a lot. *Held*, that the plaintiff could not show that the intestate's title to the lot was defective, unless accompanied by evidence of fraud in the original contract respecting the work and the conveyance of the lot, or evidence showing that the plaintiff had a right to rescind the contract. *Ibid*.

§ 622. In a suit to recover damages for the fraudulent sale of a mine, the defendant was a director in the plaintiff corporation. The minutes of a meeting of the directors, held in England after the defendant had left that country, are not admissible evidence to charge the defendant with knowledge of transactions at that meeting. *The Emma Mining Co. v. Park*, 14 Blatch., 411.

§ 623. Where a deed from father to son is alleged to be in fraud of creditors, it may be shown that he had the means of paying his debts independent of the property conveyed to the son. And if the deed states the consideration to be love and affection, it may be shown that the father was indebted to the son, not for the purpose of contradicting the deed, but to rebut the presumption of fraud attempted to be raised against the deed by extrinsic circumstances. *Hinde v. Longworth*, 11 Wheat., 199.

§ 624. A license to an administrator to sell property already sold by him, and a second purchase by the same person, do not show or tend to show fraud in the first sale or any collusion between the administrator and the purchaser. *Comstock v. Crawford*, 3 Wall., 396.

§ 625. If the certificate required by the thirty-fourth section of the act of 1813, in order to the allowance of the bounty to a vessel licensed for the cod fisheries, is false, this is *prima facie* evidence of fraud and deceit on the part of the owner or his agent in procuring the bounty. *The Schooner Harriet*, 1 Story, 251.

§ 626. **Bankruptcy.**—In an action by the assignees of a bankrupt to recover property sold under a judgment alleged to have been given in fraud of the bankruptcy act, the amount realized at the sale is not conclusive as to the value of the property, and evidence to prove its value may be given. *Clarion Bank v. Jones*, 21 Wall., 325. See DEBTOR AND CREDITOR.

§ 627. In an action of trover by an assignee in bankruptcy against the bankrupt and another for the conversion of goods belonging to the estate, evidence of the receipt or collection of money by the bankrupt, after his failure, is admissible as showing the means to buy the property in question. It may also be shown that he altered his books, and entered accounts as balanced, when in fact they were not, in order to prevent the assignee from collecting them, and to enable him, the bankrupt, to collect them, although the books themselves are in court. *Carr v. Gale*, 3 Woodb. & M., 38.

§ 628. Where an alleged act of bankruptcy is of a doubtful character, evidence to show the circumstances of the transaction is admissible. Evidence of particular acts of bankruptcy, other than those specified in the petition, cannot be admitted. *Ex parte Potts*, 1 Crabbe, 469.

§ 629. In a suit by an assignee in bankruptcy for the conversion of goods belonging to the estate, where the case stood on a charge of fraudulent conveying of the goods to screen the bankrupt from his creditors, and it was therefore material to show that he had property to conceal, evidence tending to prove this fact, by showing that he had fraudulently abstracted a portion of his assets in a former failure, and two years thereafter begun business as agent, was held admissible as tending to sustain the material point in the case, and not as merely creating a prejudice against him in the minds of the jury. *Carr v. Gale*, Dav., 328.

§ 630. The decree in bankruptcy and the appointment of the assignee is *prima facie* evidence, under the law of 1841, of the right of the assignee to sue. The petition for bankruptcy need not be produced. *Ibid*.

§ 631. **Insurance.**—In an action on a fire insurance policy, where the defense is that the plaintiffs burned their own property covered by the policy, it is not necessary that the degree of proof to maintain the defense should be the same as if the plaintiffs were on trial under an indictment for wilfully burning the property to defraud the insurance companies. The rule in civil cases, that the issues are determined upon the weight or preponderance of the evidence, obtains in such a case. But the proof should be such as clearly satisfies the jury of the truth of the defendant's proposition. *Scott v. Home Insurance Company*, 1 Dill., 105.

§ 632. Preliminary proofs presented to an insurance company in compliance with the condition of the policy are, in an action on the policy, admissible as *prima facie* evidence of the

facts stated therein, against the insured and on behalf of the company. *Insurance Company v. Newton*, 22 Wall., 32.

§ 633. In a suit on an insurance policy, which by its terms will be avoided by any change in the title or possession of the property without the consent of the insurance company, a deed of the property by the owner who procured the insurance, acknowledged but not recorded, without evidence of delivery or possession under it, cannot be read in evidence to show such change of title or possession. *Humphrey v. Hartford Fire Ins. Co.*, 15 Blatch., 35.

§ 634. In an action on a life insurance policy requiring due notice and satisfactory evidence of the death of insured and of the just claim of the assured to be given to the company, it is no objection to the admission in evidence of the policy and proofs of death served on the company, that such proofs disclose the fact that the insured committed suicide, when the policy, by its terms, was to become void if the insured should "die by his own hand." *Insurance Co. v. Rodel*, 5 Otto, 232.

§ 635. Where a policy of insurance does not require that proof of the death of the person whose life was insured shall be accompanied by proof of his age at the time of his death, but proofs of his age are sent in with the proofs of his death, and they conflict with the statement as to his age in the application, it may be shown that the statement of his age in such proofs is incorrect and a mistake, although notice has not been given to the insurers before the trial that such evidence will be introduced. *Connecticut Mut. Life Ins. Co. v. Schwenk*, 4 Otto, 593.

§ 636. Where it had been stipulated by the parties in a suit on an insurance policy, the issue being whether there had been a fraudulent representation made by the applicant to the company, that all the original papers filed in the cause, and which were competent evidence for either side, should be read in evidence, the certificate of the company's medical examiner and a written statement of its agent, both made at the time of the application, and both certifying that the applicant for insurance was a first-class risk, were held to have been rightly admitted in evidence, the two papers having been appended to the proposals for insurance and declaration, and the proposals and declaration having been by name made a part of the pleas. *Insurance Company v. Mahone*, 21 Wall., 152.

§ 637. In this case, which was an action upon a policy of insurance upon goods shipped by water, to recover an average loss on account of fifteen bales of cotton, being a part of the cargo, the court held that the difference between the sound and the damaged bales at the port of delivery might be proved, without producing the invoice, as the whole cargo was valued together in the policy without any value being affixed to each bale. The court remarked, however, that the production of the invoice was the proper rule. *Bentaloe v. Pratt*, Wall. C. C., 58.

§ 638. In an action for an average loss on account of damage by sea to goods insured, the survey caused to be made by the captain at the port of delivery before breaking the bulk is not an essential piece of evidence to make out the title of the insured to his indemnity, if he can prove the loss without it. *Ibid.*

§ 639. In an action upon a policy of insurance upon a vessel, where she put into a foreign port for repairs during the voyage, a survey there directed by order of the American consul, and a report made, cannot be admitted in evidence. It might be otherwise if it were shown that there were no tribunals at that place to which an application could be regularly made for a survey and condemnation. *Cort v. Delaware Ins. Co.*, 2 Wash., 375.

§ 640. The whole record of the proceedings of an admiralty court in which the property insured has been condemned cannot be read in evidence in an action against the underwriters. The sentence is all that is necessary and proper to be read, in order to explain the ground upon which it went, where it is free from ambiguity. There are some purposes for which the record may be referred to. But the party wishing to bring himself within any of these exceptions must state the purpose for which he means to read any other part of the record and confine himself to that point. *Marshall v. Union Ins. Co.*, 2 Wash., 452.

§ 641. In an action against underwriters on a loss by capture, the captain's protest is not essential to prove the loss. It may be proved by other evidence. *Ruan v. Gardner*, 1 Wash., 145.

§ 642. In an action against underwriters on a loss by capture, the protest of one of the sailors of the captured vessel, made after his return to the United States, and delivered to the broker of the defendants, is proper evidence to prove a compliance with a provision in the policy as to proofs of loss. But the facts stated in it are not evidence to prove the loss. *Ibid.*

§ 643. In a suit on a policy of insurance, where an averment of individual interest is made, evidence of the interest of a copartnership is not admissible. *Graves v. Boston Ins. Co.*, 2 Cr., 419.

§ 644. **Assault — Mitigation of damages.**— In an action of assault and battery, the defendant may give in evidence, in mitigation of damages, facts tending to show great excitement and provocation. The circumstances causing the provocation being the correction of the de-

defendant's son by the plaintiff, who was schoolmaster to the boy, evidence of the circumstances attending the correction of the son is not admissible, since it would be neither a justification, nor a mitigation of the damages. But evidence is admissible to show the situation of the transaction, the account the boy gave of it on his father's first seeing him, and the conduct and declarations of the latter from that time to the time of the attack on the plaintiff, in order to show whether the defendant acted under sudden excitement. *Cushman v. Waddell*, 1 Bald., 57.

§ 645. **Libel and slander.**— In an action for a libel which charged the plaintiff with being a conspirator, and recorded as such on the journals of congress, the defendant was allowed, in mitigation of damages, to give in evidence the journals of congress, to show that the charge was taken from them, and that the defendant was not the author of the scandal. *Romayne v. Duane*, 3 Wash., 246.

§ 646. In an action against a newspaper for libel, the plaintiff may show the recurrence of similar libels in the same paper, adducing particular instances, in order to show general recklessness in the conduct of the paper in printing libels. Such evidence bears on the question of damages. *Gibson v. Cincinnati Enquirer*, 2 Flip., 121.

§ 647. In an action of slander for words spoken in relation to the credit of the plaintiff, the defendant may, in mitigation of damages, give evidence that the plaintiff is generally reputed not to be punctual in the payment of his debts. *Turner v. Foxall*, 2 Cr. C. C., 324.

§ 648. In an action for slander, evidence of general good character cannot be offered by the plaintiff in answer to the evidence of the defendant tending to prove the truth of the words. The defendant may offer evidence of the general bad character of the plaintiff in order to reduce the damages. After this has been done, but not until then, the plaintiff may offer evidence of his previous good character. But although no direct evidence of general bad character be offered by the defendant, if the proof he does offer in support of the plea of justification is insufficient to sustain the charge, but has a legitimate tendency to prove the general character of the plaintiff bad in the particular in question, and so to reduce the damages, the plaintiff may encounter it by proof of general good character in that particular. *Wright v. Schroeder*, 2 Curt., 548.

§ 649. In slander the defendant was allowed to give evidence in mitigation of damages of the grounds of his belief that the charge was true. *Cooke v. O'Brien*, 2 Cr. C. C., 17.

§ 650. The libelous publication itself may be submitted to the jury upon the question of malice. *White v. Nicholls*, 3 How., 266.

§ 651. **Malicious prosecution, etc.**— In an action for malicious prosecution in charging the plaintiff before an alderman with having stolen certain articles, papers taken from the person of the plaintiff by the alderman, without the request or interference of the defendant, and which were used on the trial of the charge, were permitted to be given in evidence by the defendant. *Munns v. Dupont*, 3 Wash., 31.

§ 652. In an action for maliciously holding the plaintiff to bail upon a *ne exeat*, the bill and affidavit, and order of the judge, are *prima facie* evidence of probable cause. *Zantzinger v. Weightman*, 2 Cr. C. C., 478.

§ 653. In an action for maliciously holding the plaintiff to bail, upon a *ne exeat*, for a much larger sum than was due, the plaintiff may show that his character has suffered in the public estimation in consequence of the process of *ne exeat* and the proceedings thereon, but not that it has suffered in consequence of injurious reports circulated by the defendant, although such declarations of the defendant might be given in evidence to prove malice. Nor can the plaintiff in such an action give evidence of any special damage which he has not specially averred in the declaration. *Ibid.*

§ 654. The plaintiff, having been arrested and imprisoned by certain officers of the army for alleged acts of aiding and abetting deserters, brought an action for false imprisonment. It was held that the defendants might show, in mitigation of damages, that they acted from a sense of duty, and not from malice, and that the truth of the case as it actually existed at the time of the arrest sustained the belief under which they acted, and to that end might prove acts of the plaintiff in procuring the enlistment of men and their desertion after obtaining the bounty, although such acts were not known to the defendants until after the commencement of the suit. *Beckwith v. Bean*, 8 Otto, 266.

§ 655. **In case for enticing a servant**, if the defendant, knowing that the servant had deserted the plaintiff's service, employed and harbored him, this is presumptive evidence, from which the jury may infer that he enticed the servant away. *Milburne v. Byrne*, 1 Cr. C. C., 239.

§ 656. In an action on the case for receiving the plaintiff's slave and bringing him into the District of Columbia, knowing him to be the plaintiff's slave, the *scienter* need not be proved. But in an action for enticing the slave from the service of the plaintiff, knowing him to be the plaintiff's slave, the *scienter* must be proved. *Stanback v. Waters*, 4 Cr. C. C., 2.

§ 657. **Seduction.**—In an action upon the case for the seduction of the plaintiff's daughter, whereby he lost her service, a promise of marriage on the part of the defendant may be proved as showing the means by which the seduction was accomplished. *Mudd v. Clements*, 3 Cr. C. C., 3.

§ 658. **Damages — Personal injuries.**—The omission of a known legal duty is such strong evidence of negligence and carelessness, that in every case of collision where one of the vessels did not display the signal-light prescribed by law, that vessel should be held in fault altogether, unless clear and indisputable evidence establishes the contrary. *Taylor v. Harwood*, Taney, 437.

§ 659. When a passenger is injured by the upsetting of a stage-coach, it is *prima facie* evidence of negligence on the part of the carrier. *Saltonstall v. Stockton*, Taney, 11.

§ 660. In an action against a railroad company for the burning of buildings by fire communicated from a locomotive of the defendant, the issue being whether the defendant has been guilty of negligence, evidence of the usual practice of other railroad companies in that section of the country is inadmissible. *Grand Trunk R. Co. v. Richardson*, 1 Otto, 454.

§ 661. In an action against a railroad company for damages for the burning of the plaintiff's buildings, by fire communicated by a locomotive of the defendant, the plaintiff was allowed to prove that, at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going by the buildings burned, without showing that either of those which the plaintiff claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or their management, to those claiming to have caused the fire complained of. This evidence was held to have been correctly admitted, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. *Ibid.*

§ 662. In an action by a passenger for injuries received from the overturning of the coach, the defendant cannot prove a custom on that route to carry as many passengers as were in the stage at the time. *Maury v. Talmadge*, 2 McL., 157.

§ 663. In an action to recover damages for injuries received from the upsetting of a stage, in which plaintiff was a passenger, the plaintiff, having taken his seat at an intermediate point on the route, cannot introduce evidence of a contract by the agent of the line with the passengers, at the beginning of the route, not to receive more than a certain number of passengers. *Ibid.*

§ 664. In an action by a drover against a railroad company for injuries received while traveling on a cattle-train, the casualty having been caused by changing cabooses in the night and requiring the plaintiff to ride upon top of the freight cars for a distance before reaching the second caboose, the plaintiff was allowed to prove the manner of changing cabooses after the injury, in order to show that the change might just as well have been made so as not to compel the plaintiff to ride on top of the freight cars. *Indianapolis & St. Louis R. Co. v. Horst*, 3 Otto, 291.

§ 665. In an action to recover damages alleged to have been sustained to the person of the plaintiff by falling into the defendant's cellar, evidence of the suffering caused to the plaintiff by the injury may be given. *Beardsley v. Swann*, 4 McL., 333.

§ 666. In an action by a physician to recover compensation for injuries, it is admissible to show the extent of his practice, and also that it was a time of great sickness, in order to enable the jury to ascertain the amount of damages sustained. *Nebraska City v. Campbell*, 2 Black, 590.

§ 667. **Collision.**—Whenever a collision happens between a steamboat and a sailing vessel, and it appears that there was no other look-out on board the steamboat but the helmsman, or that such look-out was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that the accident was occasioned by her fault. *The Propeller Genesee Chief v. Fitzhugh*, 12 How., 443. See MARITIME LAW.

§ 668. If exemplary damages are claimed in a case of collision, evidence may be given of acts prior to the collision. But the evidence must be confined to acts prior to and at the time of the collision. *Ralston v. State Rights*, 1 Crabbe, 22.

§ 669. In cases of collision, a chart or diagram exhibiting the relative positions of the vessels is entitled to very little consideration. *The Steamboat Narragansett, Olc.*, 246; *The Sloop Argus, Olc.*, 304.

§ 670. The protest of the captain and crew, made just after a collision, if not competent evidence of any fact stated in it, may be used to corroborate their testimony given in a suit growing out of the collision. *Fashion v. Wards*, 6 McL., 152; *The Pacific & Brig Fashion*, Newb., 8.

§ 671. **The official duties** of an officer cannot be proved by the testimony of a witness who has since held the office as to what the witness' duties were when he held the office. *Johnston v. Jones*, 1 Black, 210. See §§ 382, 387, 492.

§ 672. **Insanity.**— If a particular act is assailed for the alleged insanity of the party, regard must be had, in the absence of direct testimony on the point, to all the attending circumstances, the reasonableness of the act itself, and its approval by the family and relations of the party. *Hall v. Unger*, 4 Saw., 672.

§ 673. The testimony of witnesses to the effect that a certain person was mentally incapable of contracting at the time of making a certain contract is entitled to very little weight, where such witnesses reside in a different state and many hundred miles from such person, and had not seen her for many years preceding the contract which it is essayed to vacate, nor had any communication with her; nor had any knowledge of the contract until after its completion, nor of the state of mind or health of the person at the time when the contract was found. *Eyre v. Potter*, 15 How., 42.

§ 674. **Shipping, ship's papers, etc.**— In ordinary cases a ship's papers furnish *prima facie* a sufficient proof that the vessel is owned by the persons whose names appear upon them. But this evidence cannot be deemed satisfactory, if the trade is such that disguises and frauds are common, and it can be carried on only under certain flags with safety and success. *La Jeune Eugenie*, 2 Mason, 409. See MARITIME LAW.

§ 675. The usual evidence of property in a vessel is the registry and bill of sale, if there be such papers; and of the cargo, the invoice, bill of lading, bill of sales, etc. But this is not the only evidence which may be given, and it is not always the best. *United States v. Jones*, 3 Wash., 209.

§ 676. In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale need not be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. *The Santissima Trinidad and The St. Ander*, 7 Wheat., 283.

§ 677. Upon an incidental question not affecting the title of the parties, the enrollment of a boat pursuant to the act of congress is *prima facie* evidence of the port to which it belongs; and will be held conclusive, unless contradicted by clear evidence. Evidence of the notorious residence of the owner at a place different from that stated in the enrollment would doubtless be admissible, and might be available in contradiction of the enrollment. *The Steamboat Superior—The Steamboat Troy*, Newb., 176.

§ 678. The manifest, filed in the custom-house, of a vessel's cargo is competent evidence that certain goods were not in the manifest of the cargo. *United States v. Steamship Missouri*, 9 Blatch., 433.

§ 679. An entry of a cargo made at the custom-house, which covers only a part thereof, is *prima facie* evidence that the duties were not paid on the residue. *United States v. Certain Hogsheads of Molasses*, 1 Curt., 276.

§ 680. If a survey and condemnation of a vessel be read merely to show that a survey and condemnation has taken place, and not as evidence of any fact stated in it, the party introducing it is not thereby prevented from offering evidence to contradict the statements and impeach the credit of the surveyors whose depositions are read by the other side. *Watson v. Insurance Co. of North America*, 2 Wash., 480.

§ 681. The ease with which a stranded vessel was got off by the purchaser of such vessel is evidence in determining the necessity and good faith of the sale by her master. *The Henry*, Bl. & How., 465.

§ 682. When repairs are made by the master upon a regular survey, and upon the recommendation of the surveyors, it is *prima facie* evidence of their propriety. *The Ship Fortitude*, 3 Sumn., 228.

§ 683. On the question of the loss of a vessel, the deposition of the master describing the injury which made it necessary to put into port for repairs, and stating that no other vessel could be obtained to carry the cargo, is admissible in evidence, not to prove the proceedings on the survey and condemnation of the vessel, but that he coincided in the opinion as to the unseaworthiness of the vessel. *Catlett v. Pacific Insurance Co.*, 1 Paine, 594.

§ 684. The report of surveyors that a vessel was unsound on the 17th of November, when she put into port for repairs, is not, in the absence of all other evidence, conclusive proof that she was unsound on the 24th of October of the same year, when she started on the voyage. *Marine Insurance Co. of Alexandria v. Wilson*, 3 Cr., 187.

§ 685. On the question of the seaworthiness of a vessel at a particular time, evidence of voyages performed either before or after the time in question is admissible only so far as a fair inference may be drawn from it as to the condition of the vessel at that time. *The Vincennes*, 3 Ware, 171.

§ 686. An enrollment describing a person as master of a vessel is evidence of the fact that he was master at the time it was made, and it may be presumed that the same state of facts exists until a change is shown. *Fox v. Holt*,* 36 Conn., 558.

§ 687. The shipping articles, signed by a seaman, are *prima facie* evidence that he was on board. *Malone v. Brig Mary*, 1 Pet. Adm., 139.

§ 688. Where the plaintiff had sued the master in admiralty for his wages, the answer of the master was admitted in evidence in the suit at law. *Rambler v. Choat*,* 1 Cr. C. C., 167.

§ 689. In an action by seamen for wages, they may prove their contract by other evidence, and need not produce the shipping articles. *The Trial*, Bl. & How., 94.

§ 690. To prove that the discharge of a seaman at a foreign port was by the authority of the United States consul at that place, the certificate should present a distinct impression of a seal so that it may be identified and discriminated. *The Atlantic*, Abb. Adm., 451.

§ 691. A charge made on the shipping articles, of pay advanced to a seaman at the commencement of the voyage, is not evidence unless supported by an oath. *The David Pratt*, 1 Ware, 495.

§ 692. The testimony of experienced and credible seamen as to the condition of the weather at sea is more reliable evidence than the reports of the officers of the signal service. *The Sandringham*, 10 Fed. R., 556.

§ 693. The opinion of the master that the vessel was loaded with all she could safely carry is entitled to great weight on the question whether he received on board all that the charterers had a right to require, and very clear evidence of a mistake should be required before his act is pronounced against by the court. *Weston v. Foster*, 2 Curt., 119.

§ 694. A measurement of repairs, taken in the presence of the master, and proved by the deposition of the measurer, is entitled to more weight than an *ex parte* measurement. *Harding v. Handy*, 11 Wheat., 103.

§ 695. The act of congress permitting the seaman, in a suit for wages, to state the contents of the shipping articles, where the master, when required, does not produce them, is construed to restrict such statements to those provisions of the articles which the act of congress designates as essential to the contract; and does not permit the statements of the seaman to prove that he has performed the voyage agreed upon. *The Brig Osceola*, Olc., 450.

§ 696. There must be probable evidence that the shipping articles are in the possession of the master or owner, or in a situation to be produced by them in court on the trial, before the mariner can, under the act of congress, in a suit for wages, substitute his own statement of their contents. *Ibid.*

§ 697. The shipping articles are admitted in admiralty, in a controversy between the master and owner, as *prima facie* evidence of the terms of hire of the master and his apprentice, though they are not conclusive. It is incumbent on the owner, if he wishes to contest the verity of the shipping articles, to offer evidence of fraud, mistake or interpolation. *Willard v. Dorr*, 3 Mason, 161.

§ 698. In admiralty.—Courts of admiralty are not bound by all the rules of evidence which are applied in the courts of common law, and they may, where justice requires it, take notice of matters not strictly proved. Thus, in an action against a foreign vessel to enforce alleged liens for supplies furnished her at the port of New York, where it was set up in defense that the vessel had been discharged of the lien by reason of her subsequent condemnation and sale as unseaworthy, at St. Thomas, and the lien thereby transferred to the proceeds of that sale, it was held that copies of documents pertaining to the condemnation and sale of the vessel, certified by the British consul to be true copies of the official documents on file in his office, and which had been proved by a deposition some time before the trial, so that the opposite party was not taken by surprise, were admissible in evidence, though not made evidence by any statute, and not admissible in a common law proceeding for any purpose. *The Bark J. F. Spencer*, 3 Ben., 337. See §§ 667, 674. See MARITIME LAW.

§ 699. The rules as to the competency and incompetency of witnesses, known to the common law, are adopted in the court of admiralty in the exercise of its jurisdiction as an instance court. *The Schooner Boston and Cargo*, 1 Sumn., 329.

§ 700. Rules of evidence prescribed by state statutes do not, under the thirty-fourth section of the judiciary act of 1789, prevail in proceedings in admiralty. *The Ship William Jarvis*, 1 Spr., 485.

§ 701. The statute of Maine allowing parties to be examined as witnesses does not apply to courts of admiralty. *The Australia*, 3 Ware, 240.

§ 702. In an action by a seaman against his officer for assault and battery, it is not sufficient for the libellant to prove a rash and perhaps unnecessary blow by which no special injury was done. The same rule cannot be applied that holds in ordinary assaults. *Benton v. Whitney*, 1 Crabbe, 417.

§ 703. A bottomry bond is *prima facie* proof that the amount obtained on it has been actually furnished to the vessel. *Cohen v. The Amanda*, 1 Crabbe, 277.

§ 704. Answers to interrogatories propounded by petitioners in admiralty, though analogous to the decisory oath of the civil law, are no more evidence for one party than for the other.

and will not be conclusive for either, where the weight of the proofs in the case preponderates against the fact sworn to, or where, by self-contradiction, suspicion attaches to the fidelity of the answers. *The L. B. Goldsmith*, Newb., 123.

§ 705. The rule that the testimony for the condemnation of a vessel must be obtained directly from documents or witnesses found on board her at the time of capture was departed from where the crew, at their request, were put on shore after the capture. Witnesses from the capturing vessel were allowed to testify. *Schooner Zavalla*, Bl. Pr. Cas., 173.

§ 706. The issuing of a commission to take evidence in the enemy's country is contrary to the practice of the prize court. *The Diana*, 2 Gall., 93.

§ 707. The taking of evidence in trials in admiralty by questions and answers, instead of by way of narrative, rebuked. *The Syracuse*, 6 Blatch., 238.

§ 708. The testimony of salvors or others who are parties to a suit in admiralty ought not to be taken except under a special order of the court for the purpose, showing cause as is done in chancery proceedings, in order that the court may limit the inquiries to matters properly within the scope of the exception to the rule excluding parties. *The Schooner Boston*, 1 Sumn., 328.

§ 709. Where the answer to a libel is not full, explicit and distinct, as required by admiralty rule 27; and exceptions to the answer have not been filed, as may be done by rule 28; and testimony has been taken on the part of the claimant without such exceptions, the libelant cannot object at the hearing to the reading of the testimony on account of the insufficiency of the answer. *The Rocket*, 1 Biss., 354.

§ 710. As rule 88 dispenses with a replication or written notice in all cases except those in which the libelant intends to offer evidence in opposition to the allegations of a sworn answer, where the libel does not demand a sworn answer, the libelant may contradict it by proofs, without filing a replication to it or notice of proof. *The Infanta*, Abb. Adm., 263.

§ 711. Where a supplementary answer is filed in admiralty, the new evidence should be confined to the new articles, or to those of which no proof was offered before. *The Schooner Boston and Cargo*, 1 Sumn., 329.

§ 712. New testimony introduced in the appellate court in admiralty proceedings is always listened to with great caution, and is never, except under special circumstances, entitled to the same consideration as testimony given in the trial court. *Taylor v. Harwood*, Taney, 437.

§ 713. In cases of admiralty jurisdiction, the supreme court will grant a commission to take new evidence to be used in that court, where there is diminution of the record in not sending up the depositions of the witnesses. *Hawthorne v. United States*, 7 Cr., 107.

§ 714. Affidavits to be used as further proof in the supreme court in admiralty causes must be taken under a commission. *The London Packet*, 2 Wheat., 371.

§ 715. Depositions taken under a commission issued from the circuit court in an admiralty case, after an appeal to the supreme court, will not be admitted in the latter court, unless a sufficient excuse is shown for not taking the evidence in the usual way before the court below. *The Juniata*, 1 Otto, 366.

§ 716. A libel having been filed against a tug and a sailing vessel which it had in tow, for injuries caused by a collision, the owners of both appeared in court with their witnesses, but the owners of the tug withdrew and gave nothing in defense. This was done upon a written agreement between the owners of the tug and the owners of the sailing vessel, by which the former were to take no part in the defense, and the latter were to assume the defense for both and pay whatever damages should be awarded against either or both. Damages were decreed against both, and the decree was affirmed in the circuit court. The case being taken to the supreme court, the owners of the tug moved for a commission to take the testimony of certain witnesses named (being the same witnesses which were in court before the owners of the tug withdrew), the grounds being the fact of the agreement, and that the sureties in the bond given for the performance of the agreement had become insolvent. The owners of the tug had not appealed from the decree of the district court. The motion was denied. *The Mabey*, 13 Wall., 738.

§ 717. Value.—If the jury in their verdict do not find the value of the property in dispute to exceed \$500, the value may afterwards be proved by witnesses, in order to fix the jurisdiction of the court. *Den v. Wright*, Pet. C. C., 64.

§ 718. The judicial sale of a vessel is not a fair test of its value. *Butler v. The Barque Ferris*,* 4 Phil., 38.

§ 719. Sales at auction may, in general, afford some evidence of the value of the articles sold; but as a standard of quality, they may not always be satisfactory, much less conclusive. *Willings v. Consequa*, Pet. C. C., 172.

§ 720. In an action for the destruction of a vessel by a collision the claimants cannot overcome evidence of the market value of the vessel destroyed by proving that she was worth intrinsically less money on account of old age, insufficiency of build, or the actual state of her

timbers. These considerations afford no evidence of market value. *The Steamboat New Jersey, Olc.*, 444.

§ 721. The appraisement made at the time of levying a distress is *prima facie* evidence of the value of the goods distrained in an action of replevin for their possession. *Semmes v. Sprigg*, 4 Cr. C. C., 292.

§ 722. In an action against a sheriff for seizing property at Ogden while it was in transit to Sacramento and San Francisco, it was held that the market value of the property at these latter points was competent to be shown to prove, in connection with other testimony, the value of the property at the place of detention. *Newton v. Brown*,* 1 Utah T'y, 287.

§ 723. For purposes of general average, the valuation of the ship agreed in the policy of insurance is evidence as between the owners and the assurers. But this is at best but *prima facie*, and the party claiming recompense must establish its value by the ordinary mode of proof. *Mutual Safety Ins. Co. v. Cargo of Ship St. George, Olc.*, 157.

§ 724. In a prosecution for the false entry of a quantity of petroleum tar, it is competent to show that other tar was entered about the same time at a higher valuation than that alleged to have been imported by the defendant. *United States v. Merriam*,* 13 Int. Rev. Rec., 11.

§ 725. In order to show the market value of sugars alleged to have been invoiced below their actual market value at the port of export, other invoices of shipments of like sugars, within two or three months of the same time, may be received in evidence, but ought not ordinarily to be decisive. *Alfonso v. United States*, 2 Story, 421.

§ 726. The question being whether a certain importation of sugar was invoiced below its actual market value at the place of export, and the goods having been shipped and the invoice made out by an agent of the claimant, the court refused to affirm that there was error in admitting the evidence of appraisers that prior shipments by the same agent, not belonging to the claimant, were invoiced below their market value. *Ibid.*

§ 727. In an action to forfeit wines imported from Cadiz for undervaluation, the point to be proved is the market value at Cadiz. No evidence of any price or valuation is admissible except as it indicates that Cadiz value. The transactions entered into to conceal that value are rendered thereby transactions at Cadiz prices, and become admissible in evidence. Such other prices and valuations may be admissible on the question of fraudulent intent, where the difference between the invoice and the Cadiz market values has been established. Where as to part of the wine there is no direct evidence of the market value, because there is no home market for it, evidence of cost and of manufacturer's profits is admissible. The record of the appraisement and reappraisement of the wines in this country is evidence on the question of market value at Cadiz, but is not conclusive. Prices put on the wines in good faith by the manufacturers as their export prices are evidence of market value at Cadiz. *1209 Quarter Casks of Sherry Wine*, 2 Ben., 249.

§ 728. The appraisement in court of the goods, for the purpose of bonding, is not evidence of market value. The evidence of isolated transactions in similar wines in New York is not admissible to show the market value. Letters of other manufacturers, concerning the market value of their wines, are admissible if the wines are substantially of the same quality. *3109 Cases of Champagne*, 1 Ben., 242.

§ 729. On a libel for the forfeiture of wines imported from France, because they were not invoiced at their actual market value at the time and place when and where the same were procured or manufactured, a price-current, furnished to the witness at Paris by the agent of the owner of the wines, being prepared and used by the party who furnished it in the ordinary course of his business, was held to be admissible as evidence of the value of the wines stated in it. A price-current, furnished him by another manufacturer's agent in Paris, was also admitted in evidence for the same purpose. *Cliquot's Champagne*, 3 Wall., 115.

§ 730. Adjustments of salvage claims on the spot, by parties who suppose they are acting for their own interest, though not binding upon third parties, are regarded by maritime courts as affording a safer rule of valuation than can be gathered from the *ex parte* depositions of witnesses. *The Narragansett*, 1 Blatch., 216.

§ 731. In an information for the forfeiture of goods, on account of fraudulent undervaluation, it was held admissible to show that the claimant's agents had sold goods for him at prices one hundred and twenty per cent. above invoice prices. *Buckley v. United States*, 4 How., 251.

§ 732. **Actions by United States against officers.**—Section 4 of the act of congress of March 3, 1797, providing that, in suits between the United States and any individual, no claim for credit shall be received in evidence, unless it shall have been presented to the accounting officers of the treasury and disallowed by them, applies to an action on the bond of a battalion quarter-master, conditioned that he shall faithfully expend all public moneys and honestly account for all public property that shall come into his hands as such officer, since he is bound to account to the treasury department. *United States v. Lent*, 1 Paine, 417.

§ 733. In a suit, by the United States, to recover of the defendant a balance stated by the accounting officers of the treasury department to be due from him as a purser in the navy, evidence of equitable claims by him against the United States, which have been rejected at the treasury department, may be given. *United States v. Fitzgerald*, 4 Cr. C. C., 203.

§ 734. In an action against a public agent of the United States, in a French port, to recover the proceeds of captured property which came into his hands as such agent, his contemporary correspondence with the United States government on the subject, the certificate of the governor of the island who acted in place of a court of admiralty in ordering the property to be sold, and the resolutions of congress passed with reference to the matter, are admissible in evidence to show the capacity in which the agent received the property. *Bingham v. Cabbot*, 3 Dall., 19.

§ 735. It was the intention of the act of March 3, 1825, to substitute as evidence, in actions against deputy postmasters, a statement of the settled account certified under the seal of the postoffice department, instead of the copies of accounts current which the act of April 30, 1810, required. *Postmaster-General v. Rice*, Gilp., 554.

§ 736. **Actions under revenue laws.**—The appointment of an internal revenue collector is a matter of public record, and the evidence of it is the commission signed by the president and duly sealed. *United States v. Jackson*, 14 Otto, 41. See § 248.

§ 737. The United States may take a bond of a manufacturer of matches for payment for the internal revenue stamps advanced to him, though differing from the one authorized by statute. And in an action on such a bond, its admission in evidence cannot be objected to because its condition differs from the condition of the one authorized by statute. *Jessup v. United States*, 16 Otto, 147.

§ 738. The United States brought suit on a bond conditioned that a manufacturer of matches would account and pay for certain internal revenue stamps to be used in his business. Upon the trial the plaintiffs offered in evidence a certified copy of the bond and certified copies of the receipts of the manufacturer, both from the treasury department, and a treasury transcript of the account of the manufacturer, showing a certain balance against him. The suit was in issue, and the copies and transcript from the treasury bore date more than two years before the Revised Statutes were enacted, but their enactment was prior to the trial. This evidence was held admissible under the second section of the act of congress of March 3, 1797. *Bechtel v. United States*, 11 Otto, 597.

§ 739. Where the penalty of a match manufacturer's bond is payable directly to the United States, and the condition is that he will pay to the treasurer of the United States, for the use of the United States, all and every such sum or sums as he may owe the United States for adhesive stamps, the bond being valid, though not in accordance with the one authorized by statute, any evidence which tends to show that the manufacturer is indebted to the United States for adhesive stamps is competent; and it is immaterial that the evidence shows stamps furnished by the assistant treasurer instead of the commissioner of internal revenue, as contemplated by the statute authorizing a bond. *Jessup v. United States*, 16 Otto, 147.

§ 740. In a proceeding *in rem* to forfeit property for a violation of the internal revenue laws, it is not necessary that the charges should be proved beyond a reasonable doubt. *Lilienthal's Tobacco v. United States*, 7 Otto, 237.

§ 741. Private books, letters and memoranda, found in the private office of and belonging to the lessee and operator of a distillery proceeded against for a forfeiture, and relating to the business of the distillery, may be received in evidence. And likewise may bills of lading found in the same place, addressed to the operator of the distillery, and tending to prove a shipment of wines by him. *Dobbin's Distillery v. United States*, 6 Otto, 395.

§ 742. The facts alleged in the claims, filed by the owners of a vessel which has been libeled for violation of the revenue laws, are not evidence. *The Thomas and Henry*,* 1 Marsh., 367.

§ 743. In an action by the United States against a distiller for defrauding the government of taxes, evidence offered by the government to show the profits made by the distiller were larger than he could honestly have made is inadmissible. *United States v. Chaffee*,* 2 Bond, 111.

§ 744. In an action by the United States to recover certain penalties for violation of the revenue laws in the importation of merchandise, the invoices of defendant are admissible against him. The act of congress of 1868 for the "protection of persons making disclosures as parties, or testifying as witnesses," does not apply to invoices. *United States v. Hughes*,* 12 Blatch., 553.

§ 745. A defect in the certainty of statement of the offense in an information in admiralty for the forfeiture of a vessel and cargo for violation of the non-intercourse law is not cured by evidence showing that in point of fact the vessel and cargo are liable to forfeiture. *Schooner Hoppet v. United States*, 7 Cr., 389.

§ 746. Upon proceedings for the forfeiture of goods alleged to have been imported in fraud of the revenue laws, other fraudulent importations by the same person, subsequent as well as prior,

may be proved in order to establish the fraud charged in connection with the goods seized. *Wood v. United States*, 16 Pet., 342.

§ 747. In a proceeding by the United States to enforce the forfeiture of goods imported in violation of the collection laws, a bill of lading, entry and owner's oath, of goods imported by the claimants at another time, are admissible, in connection with other evidence, for the purpose of showing a scheme on the part of the claimants to defraud the United States. *Taylor v. United States*, 3 How., 197.

§ 748. Where, in an action for the forfeiture of goods alleged to have been illegally imported, witnesses for the claimants testify as to a usage allowing a certain per cent. for measurement, other invoices of the claimants may be offered to show the absence of any such usage. *Ibid.*

§ 749. In a proceeding for the forfeiture of goods alleged to have been imported in violation of the collection laws, an invoice of other goods imported by the claimants, marked with the same mark as the goods in controversy, may be offered to strengthen the evidence of the ownership of goods with this mark. *Ibid.*

§ 750. In a suit for the condemnation of certain liquors alleged to have been found in the possession, control and custody of the claimants, for the purpose of being sold by them in violation of the internal revenue laws, other acts occurring a month before and a month after the seizure in question, indicating an intent to sell and dispose of spirits, distilled by the claimants, in fraud of the United States, and without the payment of the tax thereon, may be admitted in evidence. *United States v. Eighteen Barrels of High Wines*, 8 Blatch., 475.

§ 751. In a proceeding for the forfeiture of certain goods imported from abroad, alleged to have been unladen and delivered from the vessel without a license or permit, and concealed without the payment of duties thereon, it being contended that the permit was obtained by the claimant by a fraudulent conspiracy with and bribery of the deputy collector of the port, and by false and fraudulent invoices produced by the claimant, evidence tending to prove the conspiracy and fraud and collusion of the claimant and the deputy collector, in respect to certain packages of which the goods secured were a part, was held to be proper. Evidence tending to prove that goods imported in another vessel called the *Roscoe* were imported and landed in perpetration of a similar fraud between the same parties was also held admissible. And to strengthen the inference of conspiracy, fraud and collusion, it was held competent to show that, in other cases of the importation of similar goods by other importers, the deputy collector did not select the highest cost packages, as he did in the case of the claimant. Evidence with regard to the importation of other goods of the same character, cost and value as those imported by the claimant in the *Roscoe* was held to be admissible because it tended to prove that the claimant was the owner of those shipments, and that the costs of the goods shipped by the *Roscoe*, as entered by the claimant, were knowingly and fraudulently set forth in the entry. *Bottomley v. United States*, 1 Story, 135.

§ 752. In the construction of laws relating to trade and commerce, such as acts laying duties on imports, the testimony of merchants as to the names of the articles imported is preferred to that of mechanics. *United States v. Sarchet, Gilp.*, 273.

§ 753. In a proceeding for the forfeiture of imports for a false valuation in the invoice, where the district attorney moves, under section 15 of the act of September 24, 1789, for an order on the claimants to produce the original invoice of the goods mentioned in the information, the affidavit of a party, interested in the condemnation, being entitled to share in the forfeiture, taken *ex parte* without cross-examination, is competent and sufficient evidence of the possession of the paper. *United States v. Twenty-eight Packages, Gilp.*, 306.

§ 754. In a proceeding for the forfeiture of goods imported for being entered at less than their real quantities, and probable cause for the seizure is shown, the claimant, to entitle him to a restoration of the property, is not bound to make out his excuse or defense by any clearer evidence than is required in any other matter. *United States v. Nine Packages of Linen*, 1 Paine, 129.

§ 755. Upon the question whether an entry of goods at the custom-house was fraudulent, the court ought to be liberal in the admission of evidence which has a bearing even in a remote degree upon the point to be made out. Generally the fraud is to be made out by the circumstances, but such circumstances must be of a character fairly and reasonably tending to make out the matter of fraud; if irrelevant, or relating to matter immaterial to the question of inquiry, it should not be received. *United States v. Four Cases of Printed Merinoes*, 2 Paine, 200.

§ 756. It has been held, in respect to the importation of goods at the custom-house, that a fraudulent intent in respect to a particular importation of goods may be legitimately inferred by a jury from previous fraudulent intent and acts, shown in respect to property previously imported through the custom-house. And this is a class of evidence that may be resorted to in actions under the internal revenue laws. *United States v. A Quantity of Tobacco*, 5 Ben., 112.

§ 757. As, under the forty-eighth section of the act of congress of 1864, as amended by the act of 1866, providing for the forfeiture of goods "on which taxes are imposed by the provisions of the law, which shall be found in the possession or custody or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws," the *corpus delicti*, and the only one, is the possession of the specified property, with the specified fraudulent purpose or design, without the doing of any overt act with respect to it, there is no reason why the general principle, that intent may be proved by proving manifestations at prior times of like fraudulent intent in respect of kindred matters, should not be applied to the proving of the fraudulent purpose or design mentioned in this section. *United States v. A Quantity of Tobacco*, 6 Ben., 68.

§ 758. An important piece of evidence upon the question whether a man believes that the tax has been paid upon spirits which he buys is the price he pays for them. If the price paid was less than the tax, it is sufficient evidence that the purchaser could not have honestly supposed the tax to have been paid, unless he explains the reason. *A Quantity of Distilled Spirits*, 3 Ben., 70.

§ 759. In an action for selling liquor without a license, a receipt for the license tax, not being retroactive, cannot be admitted in evidence to meet sales made before the payment of the tax. *United States v. Angell*, 11 Fed. R., 34.

§ 760. Upon an information for the forfeiture of goods subject to *ad valorem* duty, on the ground that the invoice and packages have been made up with intent, by a false valuation, to defraud the revenue laws, the appraisement required by the act of congress of March 1, 1823, as a preparatory step or proceeding in the course of forfeiture, is *prima facie* evidence, and as such admissible. *United States v. Fourteen Packages*, Gilp., 235.

§ 761. Upon an information founded on section 5 of the act of March, 1809, chapter 91, for an alleged importation into the United States of rum grown, produced and manufactured in Great Britain, the United States are not bound to prove the British origin of the rum beyond all possibility of a doubt. When the United States make out a *prima facie* case, the presumption arising from it will prevail, unless the claimant completely relieves the case from the difficulty. *Ten Hogsheads of Rum*, 1 Gall., 187.

§ 762. A box of sardines being unstamped when sold, the legal presumption is that it never was stamped. But it may be proved that the box was in fact stamped, and the stamp has been removed by accident, or other cause not involving any intention or design to remove it by the person having the goods in possession at the time. *United States v. Brown, Deady*, 566.

§ 763. **Forfeiture.**—In a libel for the forfeiture of a vessel for violating the slave trade acts, a wide range of evidence is allowed, for the reason that the purpose of the voyage is directly involved in the issue. Positive proofs are not generally to be expected, and for that reason the law allows a resort to circumstances as the means of ascertaining the truth. And these circumstances, though inconclusive if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, constitute conclusive proof. *The Slavers (Reindeer)*, 2 Wall., 383. See §§ 248, 736.

§ 764. In a proceeding to forfeit a vessel for a violation of the coasting act of 1793, where the claimants are *bona fide* purchasers for a valuable consideration without notice, at a considerable distance of time, and after many intermediate voyages, since the asserted offenses were perpetrated, it is usual to require stronger evidence to inflict the forfeiture, than in cases where the original owners are before the court; since the latter have it in their power to explain many doubtful circumstances which the former may be presumed to be in ignorance of, and which therefore weigh less hardly against the former. *The Schooner Ruby*, 5 Mason, 534.

§ 765. A vessel proceeded against for violating the embargo laws, in leaving the United States and proceeding to a foreign port, was at the port of Camden in North Carolina in December, 1807, and in January, 1808, when both the acts were passed. She was in the port of Norfolk on the 8th of April, 1808, while they were in force. It was held that the report and manifest of her cargo, with the affidavit of the master, taken before the collector of the port at Norfolk, were admissible in evidence, and sufficient, in the absence of all exculpatory testimony, to prove that the vessel had been to a foreign port, as they formed one entire transaction requiring nothing for its completion; and, also, that it could not be objected that as declarations of the master they could not affect the ship. *United States v. Schooner Little Charles*, 1 Marsh., 347.

§ 766. In a proceeding for the forfeiture of a vessel under the passenger acts for taking on board a greater number of passengers than she was allowed to by those acts, a measurement of the vessel and a statement of the number that she is entitled to transport, placed on the files of the custom-house, a copy of which has been given to the master, and conformed to by him on several preceding voyages, is not conclusive upon the government. *United States v. The Anna*, Taney, 549.

§ 767. **Trover.**—In an action of trover for slaves sold by the defendant to the plaintiff, the

plaintiff may give evidence of damage incurred by him upon the faith of the sale, such as the charter of a vessel to carry them south. *Nevett v. Berry*, 5 Cr. C. C., 291.

§ 768. It is evidence of a conversion, in an action of trover, if the defendant, when demand was made upon him for the goods, stated that he would retain them and that a suit would be brought. *Allen v. Ogden*, 1 Wash., 174.

III. PRIMARY AND SECONDARY.

SUMMARY — *Rule as to copies; copy in handwriting of one who holds the original*, § 769. — *If paper is admitted, appellate court presumes it an original*, § 770. — *Grants under great seal*, § 771. — *Testimonio under Spanish Mexican law*, § 772. — *Record of judgment destroyed*, § 773. — *No evidence which presumes better is admissible*, § 774. — *General rule applies in civil and criminal cases*, § 775. — *Proof of loss*, § 776. — *Instruments executed in counterpart; loss; proof by subscribing witnesses*, §§ 777, 778. — *Due diligence in searching for original*, §§ 779-781. — *Loss of deposition*, § 782. — *Account books beyond reach of process*, § 783.

§ 769. The contents of a written instrument cannot be proved by a copy, if the original is in the possession of the adverse party, until due notice to produce the original has been given him. When, however, the copy is in the handwriting of the party who has the original, and was delivered by him to the other party, and the execution of it is not denied, it is not competent for the party who made the copy to insist that it does not or may not contain all the verity and certainty of the original. Such a document is rather an original than a copy. *Carroll v. Peake*, §§ 784-89.

§ 770. If a paper is received in evidence in a trial court to prove the contents of a contract in writing, and on writ of error it is objected that the paper so received is a copy and not an original, and that no notice was given the adverse party to produce the original, the party raising this objection must show that the paper could not have been an original; otherwise the appellate court will presume it to have been an original, on the principle that every presumption will be made in favor of the validity of the proceedings of the lower court. *Ibid.*

§ 771. An exemplification of a grant, under the great seal of a state, is *per se* evidence of as high a nature as the original grant, and may be used without showing that the original is lost or destroyed. *Patterson v. Winn*, §§ 790-91.

§ 772. The "*testimonio*," under the Spanish Mexican law, is a second original of the protocol. It is, therefore, "properly recorded" under the statutes of Texas relating to land titles, and is *prima facie* evidence of the protocol without other proof. An offer to produce a witness who has photographic copies of the protocol-book, in which the protocol appears to have one signature less than the *testimonio*, is not competent evidence to prove that signature in the *testimonio* to be a forgery. *McPhaul v. Lapsley*, §§ 792-97.

§ 773. When the record of a judgment is destroyed, a copy of a certified copy of the judgment may be admitted in evidence to prove the judgment, upon proof that the certified copy is lost. In the federal courts, when a writing is lost, the rule is that the best evidence of its contents which the party has it in his power to produce must be given. These courts have not followed the English courts in saying that there are no degrees in secondary evidence. *Cornett v. Williams*, §§ 798-803.

§ 774. As to degrees of secondary evidence, when the non-production of the original is accounted for, the rule is not that the strongest possible evidence is required, but that no evidence shall be given which, from its nature, shows there is better evidence attainable. *Ibid.*

§ 775. When the non-production of a written instrument is properly accounted for, secondary evidence of its contents is admissible, both in civil and criminal proceedings. *United States v. Reyburn*, §§ 804-806.

§ 776. Proof that one acting under a commission had the commission on board his vessel, and that he had been diligently searched for and not found, is sufficient proof to let in secondary evidence of the contents of the commission. *Ibid.*

§ 777. If an instrument is executed in counterpart by two parties, and one suing the other upon it makes affidavit that his impression is that he tore up his counterpart, but if not, that it is lost, and gives notice to the defendant to produce his, but the defendant says he has lost his, the plaintiff may prove the contents by the subscribing witness. *Riggs v. Tayloe*, §§ 807-10.

§ 778. But he must be able to prove substantially the contract as alleged. If his memory is vague and uncertain, and he recollects only part of the contract, and that different from the contract alleged, it will not support the action. *Tayloe v. Riggs*, §§ 811-16.

§ 779. If a party, wishing to introduce secondary evidence of the contents of a deed, shows that he has applied to the person in whose possession the law presumes the deed to be, and was

handed a bundle of deeds relating to adjoining lands, and was told that was all the party applied to had, this is sufficiently diligent search, in absence of all grounds of suspicion, to allow secondary evidence to be introduced. *Minor v. Tillotson*, §§ 817-20.

§ 780. As to what proof of loss of a written instrument will let in secondary evidence of its contents, the rule is that if any suspicion hangs over the instrument, as that it is designedly withheld, a more rigid inquiry should be made into the reasons for its non-production; but where there is no such suspicion, reasonable diligence to obtain the original is all that is required. *Ibid.*

§ 781. A court is not authorized to allow secondary evidence of the contents of letters unless it is shown that they were lost or destroyed. If it appears that the non-production of the letters is due to the negligence of the party offering the secondary evidence and his attorney, the secondary evidence will not be admitted. *Simpson v. Dall*, §§ 821-24.

§ 782. If the deposition of a witness is lost after being properly filed in court, a compared copy is admissible as secondary evidence. *Burton v. Driggs*, §§ 825-29.

§ 783. Account books which are beyond reach of the process of court may be proved by the testimony of those who have examined them, especially when the facts to be proved are the results of the examination of many books and papers which could not conveniently be made in court. *Ibid.*

[NOTES.— See §§ 830-1039.]

CARROLL *v.* PEAKE.

(1 Peters, 18-24. 1828.)

Opinion by MR. JUSTICE TRIMBLE.

STATEMENT OF FACTS.— This is a writ of error to a judgment of the circuit court for the District of Columbia, held in the county of Washington.

Joshua Peake brought this action on the case in that court, upon a special agreement, against Daniel Carroll, who pleaded the general issue; and, upon the trial, a verdict and judgment were rendered for the plaintiff therein. A bill of exceptions was taken by the defendant in the court below, which states that the plaintiff, to support the issue on his part, offered to read in evidence to the jury the following copy of a paper (the execution of the original of which was admitted), signed by Joshua Peake, which copy is admitted to be wholly in the handwriting of the defendant, to wit:

“I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary’s county, for which I oblige myself to pay, on the 1st day of January, 1821, for one year, from the 1st day of January, 1820, six hundred dollars (\$600), and to pay all taxes on the same, independent of the above rent; and also oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises.

“Witness my hand, this 11th day of December, 1819.

“It is agreed that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same, on the tax bill, receipted, out of the rent.

“JOSHUA PEAKE.

“Witness, WILLIAM DUDLEY DIGGES.”

Which paper was so offered in evidence, in connection with three letters from defendant to the plaintiff, as a component part of the sum of evidence relied on to prove the contract as laid in the declaration; which letters are in these words and figures following, etc. [The letters were mislaid.]

To the reading of which paper the defendant, by his counsel, objected, as not being competent and legal evidence to charge the defendant in this case; but the court permitted the said paper to be read in evidence to the jury, etc., to which opinion of the court the defendant, by his counsel, excepted, etc. The plaintiff then, further to support the issue on his part, offered in evidence

to the jury the said letters from defendant to plaintiff, and admitted to be in the handwriting of the defendant, as component parts, in connection with the said paper before admitted, of the evidence of the agreement on which this action is founded; to the admission of said letters as part of said agreement, the defendant, by his counsel, objected; but the court overruled said objection, and permitted said letters to be read to the jury as part of said agreement; to which opinion of the court the defendant, by his counsel, excepted. It is insisted by the counsel for the plaintiff in error that these opinions are erroneous; and that the judgment of the circuit court should, for that cause, be reversed.

§ 784. *A copy cannot be given in evidence if the original is in the possession of the adverse party, unless he has been duly notified to produce it.*

The bill of exceptions does not put the objection to the paper offered in evidence distinctly upon the ground that, being a copy, it could not be used without timely notice to produce the original. Although some doubt exists whether the objection ought not to have been placed on that ground in the court below, in order to make it available here, yet, as the whole argument in this court has proceeded upon the assumption that the question is sufficiently raised upon the bill of exceptions, we will so consider it. The principle relied upon is that a copy cannot be given in evidence if the original be in the possession of the adverse party, unless timely previous notice has been given him to produce it at the trial. This is certainly true as a general rule.

§ 785. — *a notice to produce the original is unnecessary where its execution is admitted, and the copy was made by the adverse party.*

But in examining the numerous adjudged cases to be found in the books, in which this general rule has been asserted and applied, we have been able to find no case like this. They are all cases where the copy offered had not been made by the party against whom it was attempted to be used. This is a case in which the execution of the original is distinctly admitted; and the paper called a copy is admitted to be wholly in the defendant's handwriting. From the nature of the transaction he was entitled to and must be presumed to have the custody of the original. The copy, made out by himself, must be presumed to have come to the plaintiff's possession by the defendant's own act; and, by making and delivering it to the plaintiff, the defendant consents that it shall be considered genuine and true. We think that under such circumstances this case forms a just exception to the general rule, and that it is not competent for the defendant below to allege against his own acts and admissions that this paper does not nor may not contain all the verity and certainty of the original. So far we have considered this paper as if it ought to be regarded, in the light of a copy. But we think that is not its true character, as it was presented to the court and jury. We think that, under the circumstances, and to the purposes for which it was offered, it may fairly be regarded as an original.

§ 786. *Every presumption is in favor of the correctness of decisions of lower courts, until the contrary appears. If a paper which was received in evidence in the lower court might have been, for all that appears, an original, it will be presumed to have been so, and not to have been a copy.*

As relates to Peake's contract to pay rent, etc., it was a copy; but was it a copy as respects Carroll's agreement to let the farm? If so, it was a copy without an original; for the original paper was not signed by Carroll, and contained no contract on his part. The paper was offered in evidence, in con-

nection with the three letters from the defendant to the plaintiff, as a component part of the evidence, to prove the defendant's agreement to let the farm to the plaintiff, and the terms of that agreement. The clerk certifies that the letters referred to are not on file in the cause, and they are not transcribed into the record. In their absence, if there be a supposable case, in which they, and the paper called a copy, were legitimate evidence, regarding that paper as an original, and not as a mere copy, it must be so regarded. We are bound to presume everything in favor of the correctness of the decision of the court below, until the contrary appears.

§ 787. *Evidence of contract; letters in defendant's handwriting admissible.*

If the letters, which are admitted to be in the defendant's handwriting, were relevant to the matter in controversy, and in their absence that must be presumed, no doubt can exist of their being competent and legitimate evidence to prove the contract sued on, so far as they spoke on that subject. It has been already remarked that the paper called a copy was admitted to be in the defendant's handwriting, and that it must have come to the plaintiff's hands by the defendant's act. Let it be supposed, then, that having copied, in his own hand, Peake's agreement to pay rent, etc., he had inclosed that paper in one of those letters, and referred to it. The letter here stated that he (Carroll) agreed to let and lease the farm to Peake, upon terms expressed in the inclosed paper. It is plain that, in the case supposed, the inclosed paper, although it might be a mere copy, as respected Peake's part of the contract, yet, as respected the contract on Carroll's part, would be truly an original document, by adoption and incorporation with the letter, as much as the letter itself. It would be a part of the letter. We do not say the paper was thus inclosed and referred to in the letters, or either of them; but it might have been for aught that appears, and that is enough.

Upon the principle assumed as correct, that the opinion of the court below must be regarded as sound until its incorrectness is made to appear, the plaintiff in error cannot prevail, unless he can show, in the absence of the letters, that no case could have existed, they being present, in which the paper objected to could be considered in the light of an original document. The case first shows that such a case might have existed, and have been proved upon the trial. It is by no means a strange supposition to presume that such was the aspect of the case; for it is perfectly consistent with a known and familiar manner of transacting business, where the parties reside at a distance, or where, for other causes, the mode of contracting by correspondence is resorted to.

§ 788. *Surplusage in pleading does not vitiate after verdict.*

It is objected that the declaration shows no cause of action, and it is insisted the judgment shall be reversed for that cause. The declaration is very loosely drawn, and a great deal of matter is crowded into it which is impertinent, or, at most, only in aggravation of damages. But surplusage in pleadings does not vitiate in any case after verdict; and wholly disregarding the impertinent and irrelevant matter, the declaration contains enough to support the action.

§ 789. *Action for breach of agreement to lease. Declaration containing general averments of readiness and request on the day, sufficient.*

The declaration in substance alleges that the defendant below agreed to rent, and to farm-let to the plaintiff, the farm, for the year from the 1st of January, 1820, and agreed to remove the former tenant, and that the plaintiff should have the possession and occupancy of the farm from the 1st of January aforesaid, free from the let, hindrance or disturbance of any one. The

declaration then proceeds to aver that on the said 1st of January, 1820, at the county aforesaid, the plaintiff was ready and willing, and offered to the said Daniel (the defendant), to take possession of the said land and farm, and to rent and occupy the same, etc., and afterwards assign breaches (*inter alia*) in this, that although specially requested so to do, on the said 1st day of January, 1820, the defendant refused and neglected to turn out the tenant who then was and had been in the possession and occupancy of the said land and farm, and to deliver the possession thereof to the said Joshua.

The specific objections urged in argument are, that the plaintiff should have averred his readiness, and offered his request; not on the 1st day of January generally, but at the last convenient hour of that day; and that instead of charging a personal demand, it ought to have been averred to have been made on the land. It must occur to every one that an offer and request upon the land, in the absence of the defendant, would be a very idle and useless ceremony, and that an offer and request to him personally was much better calculated to enable him to perform his duty and fulfill his agreement.

We cannot admit that it was necessary the offer and request should be made at the last convenient hour of the day. The strict doctrines contended for have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons; but there is no analogy between them and this case. In declarations, general averments of readiness and request on the day have always been held sufficient, especially after verdict.

We are of opinion there is no error in the judgment and proceedings of the circuit court, and the same is affirmed, with damages and costs.

PATTERSON v. WINN.

(5 Peters, 233-247. 1831.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This case comes before the court by a writ of error from the circuit court for the district of Georgia. The original action was an ejectment brought by the plaintiff in error against the defendants; and at the trial in November term, 1829, a bill of exceptions was taken, which raises the only questions which are now before us for consideration.

The bill of exceptions states that the plaintiff offered in evidence, in support of his title, an exemplification, under the seal of the state of Georgia, of a grant or patent to Basil Jones, of a tract of seven thousand three hundred acres of land, dated the 24th of May, 1787, and registered the 5th of June of the same year, in the registry of grants in the secretary of state's office. The defendants objected that the exemplification could not be received until the original patent was proved to be lost or destroyed, or the non-production thereof otherwise legally explained or accounted for; which objection the court sustained, and rejected the evidence. The plaintiff then exhibited a notice served on the opposite party to produce the original grant, and also an original power of attorney from Basil Jones to Thomas Smyth, Jr., dated the 6th of August, 1793, to sell and convey (among other tracts) the tract in question. And also offered an affidavit, duly sworn to by the plaintiff, in October, 1821, that he had not in his possession, power or custody the said original grant, or power of attorney, and knew not where they were; and that he had made diligent search among his papers for the said grant and power, and they

could not be found. He further offered depositions to prove that search had been made for the papers of Thomas Smyth, by whom, as attorney in fact of Jones, the land had been conveyed to Patterson, and that no papers could be found. He further proved that he had made search for the original grant or patent in the office of the secretary of state, and the book or register of surveys in the office of the surveyor-general of Georgia, and that the same could not be there found. And he further proved, by a witness, that the exemplification was a true copy from the register of grants and plots in the said offices. He further proved that search had been made among the papers of Basil Jones, in the possession of his widow; and among the papers of George Walker, deceased, who, as counsel for the plaintiff, had once had the muniments of his, the plaintiff's, title in his possession; and also in the office of the clerk of Richmond superior court, where the power of attorney was recorded, but without success. He also proved that he had, by public advertisement in two gazettes of the state of Georgia, offered a reward for the production of the said grant or patent, but no discovery had been made; and that he had searched the executive office of Georgia for the same, and had examined the list of grants or patents, to which the great seal of the state had been refused to be annexed, but the grant to Jones was not found noted upon that list as one of that description. And the plaintiff then moved the court to admit the said exemplification in evidence, the loss or destruction of the original having been sufficiently proved, which the court refused. The plaintiff excepted to the ruling of the court upon both points.

§ 790. *An exemplification of a grant under the great seal of a state is evidence per se, without accounting for the original grant.*

The first exception presents the question whether the exemplification under the great seal of the state was, *per se*, evidence, without producing or accounting for the non-production of the original; and we are of opinion that it was. The common law is the law of Georgia, and the rules of evidence belonging to it are in force there, unless so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage. Upon the present question it does not appear that Georgia has ever established any rules at variance with the common law; though it is not improbable that there may have been, from the peculiar organization of her judicial department, some diversity in the application of them in the different circuits of that state, acting, as they do, independent of each other, and without any common appellate court to supervise their decisions.

We think it clear that by the common law, as held for a long period, an exemplification of a public grant under the great seal is admissible in evidence, as being record proof of as high a nature as the original. It is a recognition, in the most solemn form, by the government itself, of the validity of its own grant, under its own seal; and imports absolute verity as matter of record.

The authorities cited at the bar fully sustain this doctrine. There was in former times a technical distinction existing on this subject which deserves notice. As evidence, such exemplifications of letters patent seem to have been generally deemed admissible. But where, in pleading, a profert was made of the letters patent, there, upon the principles of pleading, the original under the great seal was required to be produced; for a profert could not be of any copy or exemplification. It was to cure this difficulty that the statutes of 3 Edw. VI., c. 4, and 13 Eliz., c. 6, were passed, by which patentees, and all

claiming under them, were enabled to make title in pleading by showing forth an exemplification of the letters patent, as if the original were pleaded and set forth. These statutes being passed before the emigration of our ancestors, being applicable to our situation and in amendment of the law, constitute a part of our common law. A similar effect was given by the statute of 10 Anne, c. 18, to copies of deeds of bargain and sale, enrolled under the statute of Henry VIII., when offered by way of proof in pleading; and since that period, a copy of the enrollment of a bargain and sale is held as good evidence as the original itself. 1 Phillips on Ev., c. 5, § 2, pp. 208 to 302; c. 8, § 2, pp. 352 to 356, 408 to 411; Bac. Abridg., title Ev., F., pp. 610, 644, 646; Com. Dig., Ev., A., 2; 1 Starkie on Evid., § 33, p. 152; 2 Saund. on Pl. and Ev., 638; Page's Case, 5 Co. R., 53; 12 Viner's Abridg., title Ev., A. b., 25, p. 97; A. b., 33, p. 114; 1 Saund., 189, note 2.

Such, then, being the rule of evidence of the common law, in respect to exemplifications under the great seal of public grants, the application of it to the case now at bar will be at once perceived; since, by the laws of Georgia, all public grants are required to be recorded in the proper state department.

The question presented by the other exception is whether, under all the circumstances of the case (even supposing the exemplification of the grant had not been admissible in evidence, upon the principles already stated), there was not sufficient proof of the loss of the original to let in the secondary evidence by a copy of the grant. It is understood that the court decided this point wholly upon the ground that the affidavit of Patterson did not conform to a rule made by the court in December, 1823. That rule is in the following words: "Whenever a party wishes to introduce the copy of a deed or grant in evidence, the oath of the party stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody, shall be indispensable in aid of such evidence as he may adduce to prove the loss." Patterson's affidavit was made before the making of this rule (in 1821); and the defect in it is that it does not contain any declaration of his belief as to the loss or destruction of the original.

§ 791. *Rules of court will not be permitted to control the rights of parties in matters of evidence.*

It might not be important to decide this point, if it were not understood that the same objection applied to the copy of the power of attorney in the case, as to the copy of the grant. We think that the affidavit and other circumstances of the case were sufficient to let in the secondary evidence. The grant and power of attorney were of an ancient date; the former being more than forty years old, and the latter but a little short of that period since the execution. Some presumption of loss might naturally arise under such circumstances from the mere lapse of time. There appeared also to have been a very diligent search in all the proper places, and among all the proper persons, connected with the transactions, to obtain information of the existence or loss of the papers. The affidavit of Patterson explicitly denied any knowledge where they were; and declared that they were not in his possession, power or custody. We think that, according to the rules of evidence at the common law, this preliminary proof afforded a sufficient presumption of the loss or destruction of the originals to let in the secondary proof; and that it was not competent for the court to exclude it by its own rule. However convenient the rule might be to regulate the general practice of the courts, we think that it could

not control the rights of the parties in matters of evidence, admissible by the general principles of law.

The judgment must, therefore, be reversed, and the cause remanded to the circuit court, with directions to award a *venire facias de novo*.

MR. JUSTICE JOHNSON dissented.

McPHAUL v. LAPSLEY.

(20 Wallace, 264-288. 1873.)

ERROR to U. S. Circuit Court, Western District of Texas.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The action was ejectment. Lapsley was the plaintiff. The plaintiffs in error were the original defendants. In the progress of the cause the plaintiff dismissed the action as to all of them except N. A. McPhaul, and judgment was rendered against him for their costs. He recovered against McPhaul, and this writ of error is prosecuted to reverse the judgment. The writ should have been in the name of McPhaul alone as the plaintiff in error. But as the defect is clearly amendable under the third section of the act of June 1, 1872, it is unimportant. There are numerous assignments of error. Except those involving points which we deem material to be considered, we shall pass them by without remark.

The affidavit of Mussina was properly stricken from the files. The law of Texas provides as follows: "Every instrument in writing (properly recorded) shall be admitted as evidence without the *necessity of proving its execution, provided*, that the party who wishes to give it in evidence shall file the same among the papers of the suit three days before the trial and give notice to the opposite party of such filing, and *unless such opposite party, or some other person for him, shall within one day after such notice* file an affidavit stating that he believes such instrument to be forged."

The affidavit was filed by Mussina, as the attorney of De la Vega. It set forth that the instrument of writing purporting to be a testimonio or second original of a power of attorney from Thomas de la Vega, by the name of Thomas Vega, to Samuel M. Williams, dated May 5, 1832, was, as affiant verily believed, a forgery. The testimonio was one of the plaintiff's files in the case for the purposes of evidence upon the trial. The object of the affidavit was to throw the burden of proof upon the plaintiff.

He had given the proper notice to the defendants on the 16th of January, 1872. The affidavit was filed, not within one day thereafter, as the statute required, but on the 5th of February following, while the trial was in progress. De la Vega, in whose behalf it was filed, was not a party to the record. It is insisted that the testimonio was improperly admitted to record, and that it was not properly admitted in evidence. These objections present questions of local law. The instrument is as follows:

It bears date on the 5th day of May, 1832, and sets forth that Thomas Vega, Rafael Aguerre, and José Ma. Aguerre, of the city of Leona Vicaria, appeared before Juan Gonzales, regidor of that city, and declared that they conceded to Samuel May Williams, a resident of the city of Austin, full power, "in order that in the names of the appearers" he might proceed to sell the lands therein described. "And to confirm all that may be granted and executed, the appearers bind themselves, their persons, and their property present and to come."

It concludes: "Thus have they granted and signed it in presence of these witnesses, Antonio Espinosa, Rafael de Leon, and Francisco de la Fuentes, Gonzales, residents of this city.

"I attest: Juan Gonzales. Thomas Vega, José Ma. Aguerre, Rafael Aguerre."

The following memorandum was affixed:

"Copy from the original, with which it agrees, the day of its execution; given on two 'useful' pages of paper, of the second stamp, conformable to law. All of which I, the undersigned judge, officiating with those assisting me according to law, hereby attest.

JUAN GONZALES.

"Witness:

"JOSE NAZO ORTIZ.

"J. M. MORAL."

Affidavits are annexed upon which it was recorded, in McLennan county, September 7, 1856, and again, September 22, 1858; in Falls county, October 6, 1859, and in Williamson county, October 15, 1859. The affidavits were all sworn to in Texas. Among them are, one proving the handwriting of Gonzales and the attesting witnesses — Moral and Ortiz — and that, if living, they are residents of Saltillo, in the state of Coahuila; one by Gonzales, made July 13, 1857, proving that the testimonio was executed by him at the personal request of the grantors named therein and in their presence, and that his signature thereto, and those of Moral and Ortiz, are all genuine; that Thomas de la Vega executed a certain other power of attorney before him to S. M. Williams on the 28th of April, 1832, and that "the said Thomas de la Vega, who executed this testimonio, is one and the same person."

§ 792. *A testimonio under Spanish (Mexican) law is not a copy but a "second original."*

The testimonio here in question being a copy from the protocol, or original instrument, made by the officer by whom the protocol was executed, was, in the eye of the Spanish law and of the law of Texas, "a second original," and of equal validity and effect with the prior one. 1 Partidas, 222; Owings v. Hull, 9 Pet., 625; Mitchel v. United States, id., 732; Smith v. Townsend, Dallah's Digest, 570; Herndon v. Casiano, 7 Tex., 332.

§ 793. *Power and functions of a "regidor."*

That Gonzales had authority adequate to the function he performed, and that the testimony was valid, was held by this court in Spencer v. Lapsley, 20 How., 274.

§ 794. *A testimonio duly recorded under the statutes of Texas is properly received in evidence.*

In relation to the recording of the instrument, our attention has been called to the following statutes of Texas: The act of the 20th of December, 1836, sections 35 and 40; the act of May 10, 1838; the act of January 19, 1839; and the act of May 12, 1846, sections 4, 5, 7, 8 and 9. A careful examination of these statutes has satisfied us that the registration was authorized by law. If there could be any doubt upon the subject it is removed by the Texas adjudications (Guilbeau v. Mays, 15 Tex., 414; Henderson v. Pilgrim, 22 id., 476; Secrest v. Jones, 21 id., 133; Paschal v. Perez, 7 id., 348; Edwards v. James, id., 377) upon the subject, referred to in the argument of the learned counsel for the defendant in error. A certified copy from the office where the testimonio was recorded would, therefore, have been competent evidence. The original, with the recorder's indorsement, would, as a consequence, also

have been admissible. In such cases it would be a solecism to receive the copy and reject the original.

In this case the plaintiff offered the testimonio in evidence, and it was properly received. It would have been admissible without recording. In *Martin v. Parker*, 26 Tex., 260, it was objected that an act of sale of real estate, not having been signed by the instrumental witnesses, was inadmissible without proof of its execution. The court replied: "We do not think the objection well taken. In *McKissick v. Colquhoun*, 18 Tex., 151, Chief Justice Hemphill said: 'The signature of a judge or alcalde acting in place of a notary, authenticated by two assisting witnesses, has all the force and effect of the signature and seal, or rubric, of a notary.'"

§ 795. *By Spanish (Mexican) law a testimonio is full proof unless contradicted by the "instrumental witnesses."*

The defendant offered to prove by T. I. Walker, a witness present, that in the year 1868 he went from Austin, Texas, to Saltillo, formerly Leona Vicaria, in Coahuila, Mexico, and there examined the books of protocols in the office of the secretary of the ayuntamiento; that he found in the book of protocols for the years 1832 and 1833, among others a protocol of a power of attorney, in the Spanish language, of the date of May 5, 1832, from José Maria Aguerre to Samuel M. Williams, giving Williams the power to sell the land granted by the government to Thomas la Vega and Rafael and José Maria Aguerre, to wit, eleven leagues each; that said protocol had to it no signatures but those of Gonzales and José Maria Aguerre, and that it had no signatures of witnesses; that in said protocol-book, and of the date of April 28, 1832, he found an original protocol of a power of attorney signed by José Maria de Aguirre, or Aguerre, and Thomas de la Vega and Juan Gonzales, with attesting witnesses Ortiz and Moral; that this power was to Samuel M. Williams; and that in said book, from the power of attorney of the 28th of April, 1832, to the power of the 5th of May, 1832, inclusive, there were seven leaves and no visible evidence of any mutilation of the book; that there are no protocols of any power of attorney from either Maria de Aguirre, or Aguerre, or Thomas de la Vega, to any one in said seven leaves except the two named above; and that the witness had in his hands then in court photographic copies of said seven leaves, showing exactly the facts above mentioned as to the protocol-book and the said two powers of attorney as of record therein.

The plaintiff objected to the admission of the evidence. The court sustained the objection and the defendant excepted.

§ 796. *In a federal court the authenticity of a "testimonio" cannot be attacked by a witness who offers to produce two photographic copies of several pages of the protocol-book, in which a different instrument is shown from the "testimonio."*

It has been shown that the testimonio is "a second original," and of the same effect with the protocol. *Mitchel v. United States*, 9 Pet., 732; *Herdon v. Casiano*, 7 Tex., 332. According to an eminent Spanish authority it is full proof, unless the instrumental witnesses contradict it. 4 Sala, 127, 130, 136. Here neither Vega, either of the Aguerres, Gonzales, Moral nor Ortiz was produced; nor was their absence accounted for. The bill of exceptions states that the witness had the photographic copies in his hands in court — not that they were offered in evidence. But perhaps it is only fair to construe the bill of exceptions so as to give it that effect. Conceding this, the only testimony offered was that of Walker and the two photographic copies. It does not

appear to have been suggested that this was to be followed by any further testimony. The copies had been in the possession of Walker more than three years; yet it is not shown that the plaintiff had any notice of them until they were suddenly produced by the witness in the midst of the trial. It is also significant that the agent who went on the visit of exploration to Saltillo did not claim to have discovered anything whatever adverse to the testimonio, except the state of the protocol as it appeared of record. Nor did the defendant, enlightened as he must have been by Walker, invoke the testimony of the keeper of the archives, or of any other person residing in the locality where they were kept. The plaintiff's petition was filed in 1863. Walker's discovery was made in 1868. The trial was in 1872. There was time between the two periods last mentioned to procure ample testimony from Saltillo and elsewhere touching the fraud and forgery charged, if they were believed to exist. The defendant was silent. The record is a blank as to any such testimony given, offered or suggested, except the isolated circumstances offered to be proved by Walker and the two photographic copies. These are pregnant facts. Copies of the photographs are not given in the bill of exceptions; nor are the contents of the power to Williams, of the 28th of April, given in whole or part. That is stated to have had upon it the names of José Maria Aguerre and Thomas de la Vega as grantors, and of Gonzales with those of Moral and Ortiz as assisting witnesses. It is possible that the testimonio may, by the mistake of the copyist, have the date of the latter instead of the earlier instrument, or that if the fuller and better evidence, which the defendant was bound to give, had been produced, the apparent discrepancies between the two documents in question might have been explained in a manner consistent with the integrity of all concerned and the validity of the testimonio. It should at least have been shown by some one officially connected with the office, that the book seen by the witness was the book, and the only book there, wherein the instrument could have been properly recorded, and that there was no such protocol *anywhere* in that book, or elsewhere in the office. It is also possible it was known in the office that the missing signatures had been removed by some dishonest hand.

§ 797. *A party is not permitted to give secondary evidence where it presupposes better evidence within his reach, which he fails to produce.*

The testimony proposed to be elicited from Walker fell far short of the requisite standard. A party is not permitted to give secondary evidence where it presupposes better evidence within his reach, which he fails to produce. In *Renner v. Bank of Columbia*, 9 Wheat., 581 (BILLS AND NOTES, §§ 754-59), this court, speaking of such evidence, said: "Every case must depend in a great measure upon its own circumstances. The rule of evidence must be so applied as to promote the ends of justice, and guard against fraud and imposition."

It appears incidentally by the record that there has been a great amount of litigation, extending through a long period of time, touching the lands to which this testimonio relates. The protocol and testimonio bear date more than forty years ago. The record does not show that during this long period either of the Aguerres ever questioned the validity of the latter, or that La Vega ever assailed it by his own sworn testimony. Large and diversified interests must have grown up on the faith in its genuineness. In this case the attack upon the instrument is not made by either of the grantors, but vicariously by the defendant, who claimed under a distinct and hostile title which

he wholly failed to establish. Under all the circumstances, we think the testimony of Walker was properly excluded.

In our judgment the court was correct as to the instructions given and those refused, to which the exceptions touching that subject relate. We direct, *sua sponte*, the writ of error to be amended by striking from it the names of all the plaintiffs except McPhaul; and the judgment of the circuit court is affirmed.

CORNETT *v.* WILLIAMS.

(20 Wallace, 226-251. 1873.)

ERROR to U. S. Circuit Court, Western District of Texas.

STATEMENT OF FACTS.—In 1850 Henry Williams recovered a judgment against his brother, Samuel Williams, of Texas, for \$26,736, which was afterward renewed (July, 1858) for \$43,936. These judgments were rendered in the United States courts of Texas, the records of which were destroyed during the civil war. In 1859 Samuel Williams died, and Henry Williams, under the advice of counsel, obtained a certified copy of the judgment wherewith to make the proof of his debt as required by law. This certified copy was lost, but a copy of it was preserved and made a part of the proof in this case.

After the war broke out, J. H. Williams, a son of Henry Williams, went from Maryland to Texas and formed a business connection with H. H. Williams, his cousin, son of Samuel Williams, and bought out with him the interest of the other heirs of Samuel Williams to a league of land in Bastrop county, Texas (the property in question), and on it erected a factory to make cloth for the Confederate government. In October, 1863, Cornett moved to Texas, with a number of slaves, from Missouri, and sold them to J. H. and H. H. Williams, who mortgaged the land to secure the purchase money of the slaves. In 1865 Henry Williams made his son J. H. his agent to look after his judgment against Samuel Williams' estate, and such steps were taken by him that the land was sold by order of the probate court and bought in by J. H. as attorney in fact for his father, Henry Williams. At the March term, 1866, of the probate court the sale was confirmed. Cornett had foreclosed his mortgage and bought the land under it, and in 1867 (December 7) brought suit in a state court against the two cousins, who were still in possession of the land, and obtained judgment, but not till after Henry Williams, in February, 1868, had begun this suit against Cornett, in which two depositions of the plaintiff, who resided in Baltimore, were received in evidence, against the objection of the defendant. The copy of the judgment before described was also admitted against the defendant's objection.

The judgment was for the plaintiff, and the case taken to the supreme court on error.

§ 798. *Under the act of July 2, 1864, it is competent for a party to give testimony in his own behalf, and he may give a second deposition if he chooses.*

Opinion by MR. JUSTICE SWAYNE.

There was no error in admitting in evidence the two depositions of H. H. Williams. The objections that he was a party to the record, and interested in the event of the suit, were obviated by the third section of the act of July 2, 1864. 13 Stat. at Large, 351. He was thus placed upon a footing of equality with all other witnesses, and it was competent for him to testify in the case orally or by deposition. The depositions were taken and certified in conformity to the thirtieth section of the act of 1789. 1 Stat. at Large, 89. If

the deponent was not satisfied with his first deposition, he had the right to give a second one. No order of the court was necessary in either case. The only objections insisted upon are that the statute does not authorize a party to testify by deposition if he can orally, and that if he can by deposition, the right was exhausted by the first one, and that the second one was taken without authority of law. Both objections are without foundation. The statute is remedial and to be construed liberally. We are aware of no case in which it has been held that where a witness has given one deposition in an action at law, he cannot for that reason give another without the sanction of the court. Such a proposition has the support of neither principle nor authority.

The instruction given to the jury touching the trust deeds executed by W. H. and J. H. Williams to Wildbahn, the notes they were given to secure, and the sale by Cornett of the slaves, which was in part the consideration of the notes, was well warranted by the state of the evidence, and was correct. It was objected to only upon the ground that the evidence did not tend to prove that the slaves were removed from Missouri to Texas for the purpose of selling them in the latter state, and that hence the instruction, even if correct as matter of law, was, with reference to the case, an abstraction, and must necessarily have had the effect of confusing and misleading the minds of the jury. An examination of the record has satisfied us that the evidence was abundantly sufficient to raise the question of intent in the removal of the slaves, and to make it the duty of the court to say to the jury what was said upon the subject. It is not objected that the rule of law was not correctly stated.

§ 799. *Unless a person claiming land becomes a party to litigation concerning it, such litigation is as to him res inter alios acta.*

What was done in the suit between Cornett and J. H. and W. H. Williams in no wise affected the rights of H. H. Williams in this action. The marshal seized the premises, and Cornett gave a replevin bond pursuant to the statute of Texas. While the property was in the hands of the marshal it was in the custody of the law. When Cornett gave the bond the premises passed from the custody of the law into his possession, and they were in his possession when this suit was instituted. The bond was given to enable him to effect that result, and it was accomplished. The bond took the place of the property and represented it. The premises were as much in his possession as if no litigation was pending and he had acquired possession in some other way. The defendant in error, having declined to become a party to that suit, everything done in it was, so far as he was concerned, *res inter alios acta*.

§ 800. *The rule as to secondary evidence is that it must be the best the party has it in his power to produce.*

The secondary proof of the judgment in favor of H. H. Williams, against Samuel M. Williams, was properly admitted. The original record was destroyed by fire in the year 1862. The proof in question consisted of a copy of a copy of the judgment, the latter duly certified by the clerk of the court by whom the judgment was rendered. It was proved that the certified copy had been destroyed. The judgment in question was recovered upon a prior judgment in favor of the same plaintiff against the same defendant. There was evidence tending to show that a certified copy of the latter existed, but it was not positive. There was no proof of the existence of such a copy of the judgment sought to be proved. There was a discrepancy as to a single word in the copy offered in evidence. It set forth that the clerk had assessed

the damages at "forty-three thousand nine hundred and *sixty*-six dollars and thirty-four cents, and that it was, therefore, considered by the court that the plaintiff recover of the defendant the sum of forty-three thousand nine hundred and *thirty*-six dollars and thirty-four cents," etc. It was satisfactorily proved *aliunde* that *thirty*, instead of *sixty*, was correct, the latter being a mistake of the copyist.

The principle established by this court as to secondary evidence in cases like this is, that it must be the best the party has it in his power to produce. The rule is to be so applied as to promote the ends of justice and guard against fraud, surprise and imposition. *Renner v. The Bank of Columbia*, 9 Wheat., 597 (BILLS AND NOTES, §§ 754-59); 1 Greenl. Ev., § 84 and note. The copy here in question was properly admitted. *Winn v. Patterson*, 9 Pet., 676. This court has not yet gone the length of the English adjudications, which hold, without qualification, that there are no degrees in secondary evidence. *Doe d. Gilbert v. Ross*, 7 Mees. & W., 106.

The act of congress of March 3, 1871 (16 Stat. at Large, 474, ch. CXI), provides for putting in a permanent form proof of the contents of judicial records lost or destroyed, such proof to take the place of the original records for all purposes. The statute of Texas upon the subject of proof in cases of lost records (Paschal's Digest, art. 4969) has also been referred to in this connection. There is nothing in either the act of congress or the statute in conflict with the action of the court we have been considering.

§ 801. *An order of a probate court for the sale of lands cannot be collaterally impeached if the court had jurisdiction to make the order.*

The most important question in the case relates to the proceedings of the county court of Galveston county, touching the sale and conveyance of the premises in controversy by the administrator of Samuel M. Williams to H. H. Williams. The plaintiffs in error insist that those proceedings were *coram non judice* and void. The defendant in error maintains that they were regular and valid, and that if there be any error or defect, the court having had jurisdiction, its proceedings could not be collaterally assailed upon the trial of this cause in the court below. This renders it necessary to examine the case in this aspect. The record shows the following facts: On the 28th of June, 1850, H. H. Williams recovered in the district court of the United States held at Galveston, against Samuel M. Williams, then living, a judgment for \$26,736. And on the 12th of July, 1858, another judgment for the sum of \$43,936.34. The second judgment was founded upon the first one, and was for the principal and interest due upon the latter. At the January term, 1866, of the Galveston county court, H. H. Williams, by his counsel, applied for an order that the administrator of Samuel M. Williams be cited to appear and show cause why "he should not make application to the court for an order to sell enough of the property of said estate to pay a judgment obtained by the said Henry Williams against the said Samuel M. Williams, to the amount of \$40,000; which said judgment was allowed and approved as a valid claim against said estate, in October, 1859, with eight per cent. interest per annum," etc.

The administrator appeared at the same term, and answered that the plaintiff recovered the judgment first hereinbefore mentioned; that it was presented for allowance against the estate with the usual affidavit, and allowed; that he could not say whether it was approved by the chief justice of Galveston county; that it had never been paid, and that the reason he had taken no measures to pay it was that the plaintiff had told him that, being against his

brother, he did not intend to enforce it. The court thereupon, at the same term, made an order as follows:

"On this day came on to be heard in this cause the motion of Henry Williams, by his agent, J. H. Williams, asking that the administrator be required to sell sufficient property of the estate to pay a certain judgment obtained by the said Henry in the United States district court, on the 28th day of June, A. D. 1850, for the sum of \$26,736, with interest from date of rendition; and it appearing to the court *that this claim has been duly allowed*, and that the administrator has no funds in hand whatever to pay the same, it is ordered that he make sale of sufficient property in pursuance of the prayer of the motion. And the administrator having designated the following piece of property, it is ordered that he shall make public sale of one league of land, situated," etc.

The premises in controversy were then described, the mode and time of advertising, and the place and terms of the sale were prescribed, and the administrator was directed "to make due report of his action in the premises to the court." On the 15th of March, 1866, the administrator reported that, pursuant to the order of the court, after due notice according to law, he had offered the premises for sale at public auction, at the time and place required by law, and that they were struck off and sold to Henry H. Williams, for the sum of \$60,000, on a credit of twelve months, secured by a vendor's lien; that Williams was the highest and best bidder, and that the price was a reasonable one.

At the March term the court confirmed the report and ordered the administrator to make a deed to the purchaser, upon his complying with the terms of the sale. On the 15th of April, 1866, the administrator gave a receipt to the purchaser for \$60,600, being the amount of the purchase money with ten per cent. interest, and by the same instrument released his vendor's lien. On the same day the administrator executed a deed of conveyance to the said H. H. Williams. It recites all the proceedings touching the sale upon which it was founded. On the 2d of January, 1868, the administrator executed to Henry Williams another deed for the same premises. It recites more fully the proceedings relative to the sale, and sets out that there were certain clerical errors of dates in the former deed, and that this deed was made to correct them.

The titles adverse to the plaintiff developed upon the trial in the court below were all derived from heirs-at-law of Samuel Williams. The premises were liable under a paramount lien for the debts of the ancestor. Paschal's Digest, art. 1373. The plaintiff's claim was of that character. Hence, if the sale and conveyance to him by the administrator were valid, they were conclusive in his favor. He could recover, however, only upon the strength of his own title. The weakness of the title of his adversaries could not avail him.

Most of the objections to the sale by the administrator taken in the brief of the plaintiffs in error were not insisted upon in the argument at the bar, and are of such a character as to require no observations from the court. One was pressed upon our attention with earnestness and ability, and to that one our remarks will be confined.

A statute of Texas requires all claims against the estate of a decedent to be presented to his legal representative, and to be *allowed* by such representative, and to be *approved* by the probate judge. Until so *allowed* and *approved*, they have no legal validity, and cannot be recognized as debts against the

estate. If disallowed or not approved, they must be sued upon within three months. If sued without a refusal to allow or approve, there can be no recovery. The absence of such fact is fatal to the action. Paschal's Digest, arts. 1309, 1311; *Danzey v. Swinney*, 7 Tex., 625; *Martin v. Harrison*, 2 Tex., 456. The order of sale sets forth that the claim had been allowed by the administrator, but is silent as to its approval by the judge. The plaintiffs in error argued that this omission rendered the order a nullity.

§ 802. *What constitutes jurisdiction. When jurisdiction has attached every intendment is in favor of the validity of the proceeding.*

The application of the judgment creditor and the answer of the administrator gave the judge jurisdiction over the parties and the real estate of the deceased. Paschal's Digest, art. 1305. Jurisdiction is the power to hear and determine. To make the order of sale required the exercise of this power. It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. The question always arises in such proceedings — and must be determined — whether, upon the case as presented, affirmative or negative action is proper. The power to review and reverse the decision so made is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is, that, jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud, no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The county court had the power to make it, and did make it. It is presumed to have been properly made, and the question of its propriety was not open to examination upon the trial in the circuit court. These propositions are sustained by a long and unbroken line of adjudications in this court. The last one was the case of *McNitt v. Turner*, 16 Wall., 366. They are not in conflict with the adjudications of Texas upon the subject.

The statute of Texas does not require the evidence upon which the judgment of the court proceeded to be set forth in the record. Such a statement can do no good, and its omission does no harm.

§ 803. *The rule of presumptions as to acts of public officers.*

As regards public officers, "acts done which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter." *Bank of the United States v. Dandridge*, 12 Wheat., 70 (Corp., §§ 843-54). "Facts presumed are as effectually established as facts proved, where no presumption is allowed." In the case of *Ward's Lessee v. Barrows*, 2 Ohio St., 247, a sale for taxes came under examination. It was held that certain acts of the county auditor were presumptive proofs that he had administered to the collector the oath prescribed by law touching the delinquent list. The sale was sustained. Here the judge who made the order of sale was the judge to approve the claim. The order was presumptive proof of the requisite approval. Such approval was necessarily implied, and what is implied in a record, pleading, will, deed

or contract is as effectual as what is expressed. *United States v. Babbit*, 1 Black, 61.

The proceedings touching the sale were properly admitted in evidence, and the instruction given to the jury upon the subject was correct.

The last assignment of error relates to fraud in obtaining the order of sale. It seems to us that the evidence disclosed in the record was hardly sufficient to raise any question upon that subject. However that may be, the instruction given to the jury was unexceptionable, and the plaintiffs in error have no right to complain.

Judgment affirmed

UNITED STATES *v.* REYBURN.

(6 Peters, 352-368. 1832.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This case comes up from the circuit court for the district of Maryland, on a certificate of division of opinion, touching the admission of testimony offered on the part of the United States in support of the prosecution.

The indictment against the prisoner contains several counts. The first charges him with having on the 1st day of July, 1828, at the district of Maryland, within the territory and jurisdiction of the United States, issued a commission for a certain vessel called *The Jane*, otherwise *The Congresso*, to the intent that such vessel might be employed in the service of a foreign people, that is to say, in the service of the United Provinces of Rio de la Plata, to cruise and commit hostilities against the subjects and property of a foreign prince, that is to say, his imperial majesty the constitutional emperor and perpetual defender of Brazil, with whom the United States were at peace, against the form of the act of congress in such case made and provided.

The second count charges him with having delivered a commission for *The Jane* with the like intent. The third charges him with having delivered a commission to one John Chase for *The Jane*, for the like purpose and with the like intent. The fourth charges him with having issued a commission to John Chase for *The Jane*, for the like purpose and with the like intent. There are some other counts, laying the offense in different ways, which are unimportant for the present question.

In support of the prosecution it was proved that the privateer referred to in the indictment was built and fitted out in the port of Baltimore, for a certain John Chase. That *The Jane* sailed from the port of Baltimore for the West Indies, and at St. Eustatia she hoisted Buenos Ayrean colors, changed her name to that of *The Congresso*, and performed a cruise under the command of John Chase, exercising therein acts of hostility against the subjects and government of Brazil.

It was also given in evidence on the part of the United States, that the said Chase stood indicted in that court for a misdemeanor for accepting, in the district of Maryland, a commission to cruise, and with cruising with the said privateer against the subjects and government of Brazil. That a bench warrant had been repeatedly issued out against the said Chase, but that he could not be found, and the process was always returned *non est inventus*. Whereupon the counsel for the United States proceeded to inquire of a competent witness, whether he saw a commission on board the said privateer. But the traverser, by his counsel, objected to the admissibility of any evidence relative to the

character or contents of the said commission, because the commission was not produced by the United States, or obtained from any witness, nor a copy procured from the public archives of Buenos Ayres, nor its destruction proved, nor any efforts to procure it shown by the United States. Upon the admissibility of the said evidence the judges were opposed in opinion, and the question comes here for decision.

The objections to the admissibility of the evidence have been submitted to the court under the following heads: 1. Because the evidence so offered was of a secondary character. 2. Because the facts proved did not present a proper case for the admission of secondary evidence. 3. Because the evidence offered was not the next best evidence of which the nature of the case admitted.

It is undoubtedly true that the evidence offered was of a secondary character. The primary evidence would have been the commission itself. The word commission, *ex vi termini*, imports a written authority; and the offense under this part of the act of congress (3 Stats. at Large, 448; 6 vol. Laws U. S., 321, § 3) consists in issuing or delivering a commission for any ship or vessel with intent that she may be employed, etc.; and there is no doubt it must be shown to have been a commission emanating from the government of the United Provinces of Rio de la Plata, as alleged in the indictment, and it must at least purport to be a valid, subsisting commission and intended as the authority under which the vessel was to cruise. But all these inquiries relate to the sufficiency of the evidence to establish these facts, not to its competency. The former belongs to the jury to decide; the latter to the court. Whether it could have been shown that the commission about which the inquiry was made was a document coming with the indictment, and necessary to be proved in order to establish the offense, does not come within the question sent up to this court. The argument, however, against the admissibility of the evidence goes the length of contending that nothing short of the commission itself will furnish the necessary evidence.

§ 804. *Where non-production of written instrument properly accounted for, secondary evidence of its existence and contents admissible in both criminal and civil proceedings.*

We think the objection in this respect not well founded; but that the case falls within the rule that, when the non-production of the written instrument is satisfactorily accounted for, secondary evidence of its existence and contents may be shown. This is a general rule of evidence applicable to criminal as well as civil suits. And there can be no reason why it should not apply to cases like the present. And indeed, a contrary rule not only might, but probably would, render the law entirely nugatory, for the offender would only have to destroy the commission, and his escape from punishment would be certain.

Under this head of the objection it has been argued that the commission should have been set out or recited in the indictment, or the reason for the omission should appear on the face of the indictment. If there is any ground whatever for this objection (which we are far from intimating), the point cannot be made here under the question sent up from the circuit court. If well founded it must be presented in some other form. We are now confined to the question on which the opinions of the judges were opposed, and the sufficiency of the indictment forms no part of that question. The objection went to the admissibility of any evidence relative to the character or contents of the commission, because it was not produced or its non-production sufficiently

accounted for; and this brings us to the second head of inquiry, namely, whether the acts proved presented a proper case for the admission of secondary evidence.

§ 805. — *proof that a commission was in possession of one on board and commanding vessel cruising under it, in violation of act of 1818, and indicted therefor, but not found, sufficient to admit such secondary evidence.*

The facts which had been proved were that the privateer was built and fitted out in the port of Baltimore for John Chase. The crew was shipped at Baltimore by Franklin Chase, the brother of John Chase. That she sailed from the port of Baltimore for the West Indies under the name of The Jane, and at St. Eustatia she hoisted Buenos Ayrean colors, and changed her name to that of The Congresso, and performed a cruise under the command of the said John Chase, exercising therein acts of hostility against the subjects and government of Brazil. That Chase stood indicted in the same court for a misdemeanor for accepting a commission and cruising with the said privateer against the government and subjects of Brazil; and that a bench warrant had been repeatedly issued against him but he could not be found.

This evidence established very clearly that this vessel was fitted out and cruising in violation of the law of the United States, and that she was under the command of John Chase. It is reasonable, therefore, to presume that the commission on board the privateer was the authority under which Chase acted. He was the person most interested in retaining the possession of the commission; and the law will presume it to be in his custody when there is no proof to the contrary; and to him, therefore, application should be made for it. The law points to him as the depository of this document, and search for it in any other place would not amount to that due diligence to procure the primary evidence which would be necessary in order to let in the secondary evidence. But if all reasonable diligence has been used to find it at the place where the law presumes it to be, no more can be required for the purpose of letting in the secondary evidence.

Has that been done? The person whom the law charges with the custody of the paper stands indicted for an offense against the same law; process has been repeatedly issued against him to have him apprehended, without effect. This was all the effort to find him that could reasonably be required. A subpoena to compel his attendance as a witness would have availed nothing, and the law does not require the performance of an act perfectly nugatory. But suppose Chase had been within the reach of a subpoena, and had actually attended the court, he could not have been compelled to produce the commission, and thereby furnish evidence against himself. All the means, therefore, that could have been used to produce the commission itself were exhausted.

§ 806. — *any secondary evidence is admissible to prove the contents of a lost writing if it is such as does not in its nature imply the existence of better evidence; and it is not necessary to apply to a foreign government for the copy of the record of such commission, particularly if such record is not first established.*

But it has, in the third place, been argued that, admitting enough had been shown to lay the foundation for the admission of secondary evidence, that which was offered was not the best evidence of which the nature of the case admitted. The rule of evidence does not require the strongest possible evidence of the matter in dispute, but only that no evidence shall be given which, from the nature of the transaction, supposes there is better evidence of the fact attainable by the party. It is said in the books that the ground of

the rule is a suspicion of fraud, and if there is better evidence of the fact which is withheld, a presumption arises that the party has some secret or sinister motive in not producing it. Rules of evidence are adopted for practical purposes in the administration of justice; and must be so applied as to promote the ends for which they are designed. It has been said that, according to this rule, recourse should have been had to the records of the Buenos Ayrean government for a copy of the commission. If it should be admitted that a record is there to be found of this instrument, and that on application a copy of it might have been procured, it would be carrying the rule to pretty extravagant lengths to require the application to be made. But there is nothing in this case showing that any such record exists. Nor can this court presume, as matter of law, that a record of such commission as filled up would be found there. And, indeed, from the nature of the transaction, the contrary is the reasonable presumption. It is not unlikely that the Buenos Ayrean government may have some record of the names of persons to whom commissions had been issued. But the course of the transaction almost necessarily implies that the commissions issued here were sent out in blank, as to the names of persons and vessels, and the mere formal parts of the commissions would have furnished no evidence whatever. So that there is no reasonable ground to conclude that a record of this commission existed, from which a copy might have been made. But if that should be admitted, it does not bring the case within the rule. The evidence must be attainable or within the power of the party who is called upon to produce it; and from the nature of this transaction, there is no reason to conclude that such was the case here; but the contrary is fairly to be inferred. It must have been a voluntary act on the part of the foreign government to have permitted a copy to be taken; and it is unreasonable to suppose that such permission would have been given. It would have been voluntarily furnishing evidence against its own agents, employed to violate our laws; and no comity of nations could have required this.

We are accordingly of opinion that the evidence offered was admissible, and direct it to be so certified to the circuit court.

RIGGS v. TAYLOE.

(9 Wheaton, 483-488. 1824.)

Opinion by MR. JUSTICE TODD.

STATEMENT OF FACTS.—This was an action on the case, brought by the plaintiff against the defendant, in the circuit court of the District of Columbia, upon a contract in writing entered into between the plaintiff and defendant, for the sale of bank stock of the Central Bank of Georgetown. At the time that this contract was entered into, each party had a counterpart of the contract, and the plaintiff, alleging the loss of his, gave notice to the defendant to produce, upon the trial, the one which he, the defendant, had; but the defendant declined producing it, stating that he had lost his also. In consequence of these losses, the plaintiff, upon the trial of the cause, offered to prove, by a person who was a witness to the contract, and had subscribed it as such, the contents of the contract, and, to entitle himself to give this testimony, made the following affidavit: "The plaintiff in this cause makes oath, in relation to the memorandum of agreement between the defendant and himself, relative to the stock in the declaration mentioned, that his impression is

that he tore up the same, after the transfer of the stock, believing that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. He is not certain that he did tear it up, and does not recollect doing so, but such is his impression. If he did not tear it up, it has become lost or mislaid; and that he has searched for it among his papers repeatedly, and cannot find it." The defendant objected to this testimony, and insisted that no evidence ought to be given of the contents of the said contract. The court sustained the objection; whereupon a verdict and judgment were given for the defendant. The plaintiff filed a bill of exceptions to the opinion of the court excluding the evidence aforesaid from going to the jury, and the cause is brought up to this court by a writ of error.

The only question to be decided by this court is whether the circuit court erred in rejecting the said evidence. Whether the plaintiff in the cause was a competent witness to prove the loss or destruction of the written agreement referred to in the bill of exceptions need not be inquired into, as it was not objected to in the court below and the question was waived by the defendant's counsel in this court. The admissibility of evidence of the loss of a deed or other written instrument is addressed to the court, and not to the jury.

§ 807. *If a writing is in possession of the opposite party, who after proper notice refuses to produce it, or if it be lost or destroyed, it may be proved by the best secondary evidence which the nature of the case admits.*

The general rule of evidence is, if a party intend to use a deed or any other instrument in evidence, he ought to produce the original if he has it in his possession; but if the instrument is in the possession of the other party, who refuses to produce it after a reasonable notice, or if the original is lost or destroyed, secondary evidence, which is the best that the nature of the case allows, will in that case be admitted. Phillips on Evid., 399. The party, after proving any of those circumstances to account for the absence of the original, may read a counterpart, or if there is no counterpart an examined copy, or if there should not be an examined copy, he may give parol evidence of the contents.

§ 808. — *an affidavit of belief, made by the person in whose possession a written instrument is proved or presumed to be, that such instrument was torn up, or if not, was lost or mislaid, and after diligent search was not found, held sufficient to admit secondary evidence.*

It is contended by the defendant's counsel that the affidavit is defective, not being sufficiently certain or positive as to the loss of the original writing. The affiant only states his impression that he tore it up; and if he did not tear it up, it has become lost or mislaid; that this is in the alternative and not certain or positive. We do not concur in this reasoning. An impression is an image fixed in the mind — it is belief; and believing the paper in question was destroyed has been deemed sufficient to let in the secondary evidence. Phillips on Ev., 399; 7 East, 66; 8 East, 284. The alternative alluded to is, "if he did not tear it up, it has become lost or mislaid." Now if he tore it up it was destroyed; if it was not destroyed it was lost or mislaid; in either event it was not in the power or possession of the affiant, which we think is sufficiently certain and positive to let in the secondary evidence.

§ 809. *Secondary evidence is admissible to prove the contents of a writing destroyed by mistake or accident.*

It is further contended that it appears from the plaintiff's own showing the destruction or loss of the writing was voluntary and by his default; in which case he ought not to be permitted to prove its contents. It will be admitted

that where a writing has been voluntarily destroyed, with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such cases the secondary proof ought not to be received; but in cases where the destruction or loss (although voluntary) happens through mistake or accident, the party cannot be charged with default. In this case the affiant states that if he tore up the paper it was from a belief that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. In this he was mistaken. If a party should receive the amount of a promissory note in bills, and destroy the note, and it was presently discovered that the bills were forgeries, can it be said that the voluntary destruction of the note would prevent the introduction of evidence to prove the contents thereof; or if a party should destroy one paper believing it to be a different one, will this deprive him of his rights growing out of the destroyed paper? We think not. Cases of voluntary destruction of papers, arising from mistake as well as from accident, might be multiplied *ad infinitum*.

§ 810. *When a writing is proved to be lost or destroyed, the testimony of a subscribing witness may be admitted to prove the contents.*

In this case the evidence offered was that of the subscribing witness to the writing; it was the best evidence that the nature of the case admitted, which was in the possession or power of the party. This court is therefore of opinion the circuit court erred in refusing to let the said evidence go to the jury.

It was further contended by the defendant's counsel that the declaration is radically defective, stating no cause of action whatever. If there had been a single count only in the declaration on the written contract, it might be necessary to go into an examination of this point; but as there is a count for money had and received, and money paid and advanced, which, if the evidence had been permitted to go to the jury, and they had found their verdict on this count, it would have been clearly good, we deem it immaterial to decide it. Judgment reversed and a *venire facias de novo* awarded.

TAYLOE v. RIGGS.

(1 Peters, 591-603. 1828.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This action was brought in the circuit court for the District of Columbia, by Elisha Riggs, the defendant in error, to recover back a sum of money paid on a contract for the purchase of stock.

The declaration contained two counts; the first on the contract, which was in writing; the second for money had and received by the defendant to the use of the plaintiff. At the trial, the plaintiff in the circuit court offered testimony to prove the contents of the contract, having first given notice to the defendant to produce the duplicate copy, which had been delivered to him when it was executed, and made an affidavit that the copy which had been retained by him was either destroyed or lost. The secondary evidence was admitted, the defendant in the circuit court reserving all objections, both to its admissibility and competency.

The first count in the declaration states a conversation between the parties, on the 15th of May, 1818, concerning the sale of the stock which the said John Tayloe held in the Central Bank of Georgetown; and alleges that it was then and there agreed that the said John should sell to the said Elisha

the stock which he held in the said bank, amounting to seven thousand six hundred and forty-two shares, at par; and, further, that the said John represented that a dividend of four per cent. would be made on the said stock, at the ensuing first Monday in July, and insisted that the said Elisha should advance to him, in addition to the par value, so much of the said dividend as the said stock had already earned, which, according to a calculation then made, amounted to three per cent. The declaration further alleges that the said Elisha, confiding in the representations of the said John, did agree to advance the supposed earnings of the said stock. The agreement was then reduced to writing, and signed by the parties. It was further agreed that the said Elisha might confirm or annul the contract in ——— days. The declaration further states that, confiding entirely to the representations of the said John, the said Elisha did agree to confirm the said agreement, and did agree to buy the said stock, at par price, and to advance to the defendant the profits which the stock was supposed to have earned.

The declaration then charges that the stock was transferred, its par value paid, and the additional sum of three per cent., its supposed earnings, amounting to \$1,902, paid. The declaration further charges that, at the time of the contract, the bank had made no profit on which a dividend could be declared; and that it was not competent for the said bank, on the said first Monday in July, then next following, to declare any dividend; and that in fact the bank did not declare any dividend on the said stock, of which the said defendant had notice, by means whereof he became liable and bound to refund the money so advanced for the supposed earnings of the said stock, and, being so liable, he in consideration thereof assumed, etc.

William Hebb, a witness produced by the plaintiff below, deposed that he came into a room in which the parties were sitting, when the said Tayloe informed him that the said Riggs was about to purchase his stock; and he requested the witness to take a seat and be an evidence to the contract. The said Riggs then asked the said Tayloe what were his terms? He answered that he would take par, with the dividend which would be declared at the next periodical term, which he thought would be four per cent. Mr. Riggs said, he supposed Mr. Tayloe meant only the interest which had accrued at that time, to which Mr. Tayloe assented; a calculation was then made, and the supposed profit estimated at three per cent. The plaintiff asked time to consult his friends, and said he would take the stock on the terms offered. The plaintiff, at the request of the defendant, drew up a memorandum of the agreement, which was read over hastily in the presence and hearing of the witness. It was copied, signed and attested by the witness, and each party took one.

He understood, a day or two afterwards, that the contract was affirmed. On being cross-examined, the witness said that he did not recollect whether the written contract expressed that par was to be paid for the stock, nor that any advance upon the stock was specified; nor does he recollect how the contract was expressed. But his impression and belief is, that the understanding of the parties was, that three per cent. was to be paid upon a contingency that the next dividend amounted to four per cent., and that the written contract was to the same effect. The counsel for the defendant below objected both to the admissibility and competency of this testimony; but the court overruled his objections, and permitted it to go to the jury. To this opinion he excepted. The first question to be considered is, whether parol testimony could, in this case, be let in to prove the written contract.

§ 811. *The best evidence must be given; a written contract cannot be proved by parol unless it is lost or destroyed.*

The rule of law is, that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power. The withholding of that better evidence raises a presumption that, if produced, it might not operate in his favor. For this reason a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents.

When, therefore, the plaintiff below offered to prove the contents of the written contract, on which this suit was instituted, the defendant might very properly require the contract itself. It was itself superior evidence of its contents to anything depending on the memory of a witness. It was once in his possession, and the presumption was that it was still so. It was necessary to do away this presumption, or the secondary evidence must be excluded. How is it to be done away? If the loss or destruction of the paper can be proved by a disinterested witness, the difficulty is at once removed.

§ 812. *The plaintiff is competent to make an affidavit of loss, if he has had the instrument in his possession; but his affidavit is not conclusive.*

But papers of this description generally remain in possession of the party himself, and their loss can be known in most instances only to himself. If his own affidavit cannot be received, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, would amount to a complete loss of his rights, at least in a court of law. The objection to receiving the affidavit of the party is, that no man can be a witness in his own cause. This is undoubtedly a sound rule, which ought never to be violated. But many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the party. An affidavit to the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take his deposition, or an affidavit of his inability to attend, is usually made by the party, and received without objection. So, affidavits to support a motion for a new trial are often received. These cases, and others of the same character which might be adduced, show that on many incidental questions which are addressed to the court, and do not affect the issue to be tried by the jury, the affidavit of the party is received.

The testimony which establishes the loss of a paper is addressed to the court and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause. As this fact is generally known only to the party himself, there would seem to be a necessity for receiving his affidavit in support of it.

In the courts of common law of England, we find some cases in which the affidavit of a party has been received respecting collateral facts which occur in the progress of a cause; and in courts of equity it is usual, when a bill is filed to set up a written instrument which is lost, to annex an affidavit to the bill that the instrument is lost. In *Forbes v. Wale*, 1 Sir W. Black., 532, the plaintiff offered a bond in evidence, attested by two witnesses, on proving the death of one of them; but being himself examined, acknowledged the other to be living. He was nonsuited. It cannot be doubted that had he sworn the

other subscribing witness was dead, he would have been allowed to prove the bond. In *Morrow v. Sanders*, 3 Moore, 671, the plaintiff was permitted to have access to a paper in the possession of the opposite party, on his own affidavit that there was no copy or counterpart in his possession, nor had there ever been one between the parties except that in possession of the defendant. In *Jackson v. Frier*, 16 Johns., 193, the supreme court of New York indicated the opinion that secondary evidence might be admitted to prove the contents of a paper on the affidavit of the party to its loss. Mr. Chief Justice Spencer, in delivering the opinion of the court, quoted *Godbolt*, 193, in which the court refused to permit the depositions of witnesses taken in a suit between the same parties to be read, unless affidavit be made that the witnesses were dead; and also *Godbolt*, 326, in which the court said that if the party cannot find a witness, he is, as it were, dead unto him; and his deposition in an English court, in a cause between the same parties, may be allowed to be read to the jury, so as the party make oath that he did his endeavor to find the witness, but that he could not. In the former decisions in this cause (9 Wheat., 483; §§ 807-10, *supra*), this question was, we think, substantially, though not expressly, determined.

When we compare the mischief to be apprehended from the admission of secondary proof, on the affidavit of the party, where there is reason to believe that other testimony to that fact cannot be adduced, with the mischief to arise from the absolute exclusion of such an affidavit, we think the views of justice will be best promoted by allowing the affidavit, not as conclusive evidence, but as submitted to the consideration of the court, to be weighed with the other circumstances of the case.' In the case before the court, it is not probable that any other testimony of the loss of the paper was attainable; and we think the affidavit of the party laid a proper foundation for the admission of secondary evidence. Secondary evidence having been properly admitted, and the transfer of the stock and the payment of the purchase money proved, the next inquiry is into its competency, to establish the contract stated in the declaration.

§ 813. *Secondary evidence, offered to prove the contents of a written contract, must prove it substantially as alleged.*

This not being an action for deceit and imposition, but on a written contract, the right of the plaintiff to recover is measured precisely by that contract, and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper been produced, neither party could have been permitted to show his inducements to make it, or to substitute his understanding of it for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this.

Discarding the representation made by the vendor of the profits of his stock, we are to inquire what was the actual agreement. The declaration states a parol agreement to sell and purchase the stock at par. But this agreement appears not to have been definitive, since a sale of the stock would pass it in its then condition, comprehending the dividends to be thereafter declared upon it. The parties therefore proceed to a consideration of that part of the subject which respects the profits; and, after concurring in the opinion that the

stock was worth par, independent of the next ensuing dividend, which they supposed would be four per cent., calculate how much of this sum was already earned. They found that three per cent. was the proportion of this estimated profit, which had accrued at the date of the sale. The whole contract, thus completed, was reduced to writing and signed by the parties. It is a contract to sell all the bank stock of the vendor, rating the stock itself at par, and the dividends which had already accrued thereon, at three per cent. No stipulation was made to return this sum of three per cent., or a part of it, if no dividend or a less dividend than four per cent. should be declared; nor to add to the sum, if a larger dividend should be declared than was estimated by the parties.

Does the testimony offered by the plaintiff in the circuit court prove this contract? A conversation was in its progress between the parties respecting the sale and purchase of the stock, when the witness came into the room, and was requested to notice their agreement. Mr. Riggs then asked Mr. Tayloe what were his terms? Mr. Tayloe answered that he would take par, with the dividends which would be declared at the next periodical term, which he supposed would be four per cent. Four per cent. was assumed as the dividend which would be declared, and three per cent. was estimated as the portion of that dividend which had already accrued. This proposition was accepted, and the agreement reduced to writing.

If the declaration counts on one entire contract for the sale of the stock, including the dividend upon an estimate of the stock at par, and the approaching dividend at four per cent., the testimony supports it; if the declaration counts on two distinct contracts, entirely independent of each other, this part of the testimony does not support it. The witness describes a single contract, consisting, it is true, of two distinct items, but both are comprehended in the same agreement.

On being cross-examined, the witness shows a very imperfect recollection of the contract he is endeavoring to describe. He does not recollect that par was to be paid, nor that any advance on the stock was specified in the contract. But his impression and belief is that three per cent. was to be paid, upon a contingency that the next dividend amounted to four per cent., and that the written contract was to the same effect.

This part of the testimony shows that what the witness had previously said was founded on his recollection of the conversation between the parties which formed the verbal agreement, not on his recollection of the writing itself. He does not remember the terms in which the written contract was expressed, nor that par was to be paid for the stock, nor that any advance was specified. He believes that the written contract conformed to the verbal agreement, and on this belief is founded his impression that the three per cent. was to be paid on a contingency that the next dividend should amount to four per cent. Yet, when we refer to his description of the conversation which constituted the verbal agreement, no part of the consideration money is stipulated to be paid on a contingency.

The declaration does not state a contingent contract; nor is any inference to be drawn that it was contingent, from any part of the declaration, unless it be from the use of the word "advance," which word, or any other equivalent to it, the witness does not remember.

§ 814. *Parol evidence of a written contract is not sufficient unless its substance is satisfactorily proved.*

When a written contract is to be proved, not by itself, but by parol testi-

mony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement.

A part of the testimony came out on the cross-examination, which serves to show on what uncertain ground the belief of the witness was founded, that the three per cent. depended on the contingency that the next dividend should amount to four per cent. He was asked whether the writing was, as deposed by another witness, in these terms, or in terms to this effect: "I bind myself to receive, at any time within three days, three per cent. advance upon my stock in the Central Bank of Georgetown and Washington." He answered that the writing, as recollected by him, was the reverse of the terms above propounded, inasmuch as the writing described by him bound the defendant to transfer the stock. This answer would indicate that the written contract bound the vendor to transfer his stock, at any time within three days, at three per cent. advance. Upon the most attentive comparison we can make of the testimony given by Hebb, with the contract stated in the declaration, we think that his evidence does not support the contract as laid, and was therefore not competent to sustain the first count.

The second count, for money had and received, is not supported by any express promise to refund the money supposed to be advanced on account of the dividend, if less than four per cent. should be declared, or if no dividend should be made. It rests on the promise which the law implies where the consideration totally fails. If the written contract comprehended the dividend, with the stock itself, so that an advance of three per cent. was given for the whole, the circumstance that this entire agreement was founded on a calculation of the separate value of the distinct parts which were the subject of it, would not entitle the purchaser to recover upon this count, because the consideration would not totally fail. Could the contract for the dividends be considered as entirely distinct from that for the stock itself? The court is not prepared to say that a mere speculative bargain, where the parties know that they are treating for a thing of uncertain value, which depends on unknown contingencies, and may greatly exceed their estimate, or may be nothing; where the purchaser knows that he buys a chance, as a lottery ticket, is a bargain on which the law will raise a promise to refund the purchase money if the consideration should fail. It is, therefore, the opinion of the court that the testimony does not show a contract which supports the second count.

§ 815. *It is error for the court to express an opinion to the jury on the effect of evidence laid before it.*

The defendant in the circuit court then gave evidence to the jury tending to prove that the contract was a mere purchase of stock, at an advance of three per cent., and then moved the court to instruct the jury "that the evidence given by the plaintiff, either taken by itself or in connection with that of the defendant, is not competent and sufficient to be left to the jury as evidence that the said written contract continued to be executory after the transfer of the stock by the defendant to the plaintiff, and the payment therefor

by the plaintiff, as stated by the plaintiff's evidence, nor that it contained any stipulation or condition that the three per cent. advance on the said stock was paid or agreed to be paid by the plaintiff, on a contingency that the next dividend amounted to four per cent.; or that the defendant should refund to the plaintiff the three per cent. advance upon the par value of the stock paid by the plaintiff, as aforesaid, in the event of there being no dividend declared upon such stock at the then next ensuing regular period for declaring such dividend." The court refused to give this instruction, as prayed, being of opinion that so much of the said contract as relates to the advance of the three per cent. portion of the dividend is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said three per cent. advance, in the event of there being no dividend on the said dividend day.

It is probable that the circuit court might not have intended to express an opinion respecting the effect of the testimony laid before the jury, but we think such an opinion is expressed. The court declares that so much of the said contract as relates to the advance of the three per cent. portion of the dividend is executory, in so far as it regarded the implied *assumpsit* of the defendant to refund, etc. These words, we think, determine that the testimony established this implied *assumpsit*. On the question whether such a contract was proved as did raise this *assumpsit*, there was undoubtedly much conflicting testimony, and the court erred, as we think, in declaring that opinion to the jury.

§ 816. *In an action of assumpsit an instruction as to the effect of false representations of the defendant is erroneous.*

After several proceedings in court, which it is unnecessary to mention, as they do not materially affect the merits of the cause, the plaintiff prayed the court to instruct the jury that if, from the whole evidence, the jury should be of opinion that the defendant, in his written contract, did agree to sell his stock at par, and to take the earnings which the said stock had made in lieu of the dividend, which he stated and represented would be declared at the next dividend day; and if the jury should be further of the opinion that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief created by the defendant that such dividend would be made, that then the plaintiff would be entitled to recover back the money so paid under such mistaken impression, if the jury should find from the evidence that there was no such dividend declared; and that the said stock had not, at the time of the said contract, earned any such supposed interest or dividend.

This instruction was ultimately given by the court. In discussing its correctness, it is necessary to recollect that this is an action on a written contract, not for deceit or misrepresentation in making that contract. The inquiry then is, what was the contract? Not how it was obtained. The representation, then, of the seller, respecting the next dividend, and the belief of the purchaser, may be discarded from the case; and our attention must be confined to the contract as stated in the prayer of counsel. The jury were instructed to find for the plaintiff, if they were satisfied from the evidence that the defendant, in his written contract, agreed to sell his stock at par; and to take the earnings which the said stock had made, in lieu of the dividend to be declared at the next dividend day; and if they should also be satisfied that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief that such dividend would be made.

This instruction, when given on the naked contract, stripped of that alleged misrepresentation which forms no part of it, cannot, we think, be supported.

We are therefore of opinion that there is error in the proceedings of the circuit court, and that the judgment ought to be reversed, and the cause remanded to the circuit court, with directions to set aside the verdict and award a *venire facias de novo*.

MINOR v. TILLOTSON.

(7 Peters, 99-102. 1833.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—On the trial of this cause, in the district court of the United States for the eastern district of Louisiana, a bill of exceptions was taken to the ruling of the court in rejecting certain evidence offered by the plaintiff in support of the title set up by him, and the case is brought here by writ of error.

The bill of exceptions states that the plaintiff, having set up title to the premises in dispute by virtue of a sale from General Wade Hampton, dated the 5th of April, 1819, then offered in evidence another paper purporting to be a copy of the grant, under which said Hampton claimed, which copy had been duly presented and registered by the land commissioners of this district, in the year 1806, having first proved that many of the ordinances of the Spanish governors of Louisiana had been deposited in the notarial office of Pedro Pedescoux, the notary who certified the said paper under his hand and notarial seal, and who is now dead; and also having first proved that the original grant was once in the possession of General Wade Hampton, but that he had, by his attorney, applied to said Wade Hampton for it, who gave him a bundle of papers, saying they were all the titles of his Houmas lands in his possession, but which bundle did not contain the original of the paper sought after; the plaintiff also offered in evidence the translation of said document, published by congress in the book called the Land Laws of the United States, pp. 954, 955, 956, published in the year 1828. These papers were objected to on the ground that they were not the best evidence, and that due diligence had not been used to procure the originals. And the court sustained the objection.

§ 817. *On the admission of secondary evidence, the rule is that if any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reasons for its non-production; but where there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original.*

The document offered and rejected by the court is to be considered as secondary evidence; and there can be no doubt that the plaintiff was bound to account for the non-production of the original. This is a document which the law does not presume to be in the possession of the plaintiff; it is the grant under which Wade Hampton claimed; a small part of which only was in question in this suit. The presumption of law therefore is that the original deed was in the possession of Wade Hampton, and the plaintiff could not be bound to search for it elsewhere; there being no law in Louisiana requiring deeds to be recorded. And it was proved, as matter of fact, that it was once in his possession; at what time, however, is not stated; and the question is whether such search was made for it as to justify the admission of secondary evidence.

The rules of evidence are adopted for practical purposes in the administration of justice; and although it is laid down in the books as a general rule that the best evidence the nature of the case will admit of must be given, yet it is not understood that this rule requires the strongest possible assurance of the matter in question. The extent to which the rule is to be pushed in a case like the present is governed in some measure by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reasons for its non-production. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original. Has that been shown in this case?

§ 818. *An application to the person in whose possession the law presumes a deed to be, if unsuccessful, is sufficient to let in secondary evidence of the contents of the deed.*

The exception states that it was proved to have been in the possession of Wade Hampton, and that on application to him, by the plaintiff's attorney, for it, he gave him a bundle of papers, saying they were all the titles to his Houmas lands (the premises in question being a part of that tract); but which bundle, on examination, did not contain the original deed in question.

§ 819. — *the oath of such person that the deed is lost is not necessary.*

There was no other place to which the law pointed where search could be made; and nothing more could be required, unless it was necessary to have the oath of Wade Hampton that the deed was not in his possession. But this we do not think, under the circumstances of this case, was necessary. There do not appear any grounds for supposing the deed was designedly withheld; and the circumstances under which the search was made were equivalent to the witness having had free access to all Wade Hampton's papers, and proving that the deed could not be found among them. The examination was made by the witness under all the advantages and prospect of finding the deed that could have been afforded to Hampton himself. He was, for this purpose, in the possession of all his papers; and not finding it, the inference was very strong that it was lost. And the antiquity of the deed, being dated in the year 1777, rendered its loss the more probable.

The case of *Caufman v. Congregation of Cedar Spring*, 6 Binn., 59, decided in the supreme court of Pennsylvania, goes very fully to establish that it was not necessary to have the testimony of Wade Hampton, under the circumstances of this case. In that case a written agreement was placed in the hands of a common friend, who, upon his removal to another place, had put the paper into the hands of his father, who died. After proofs of these facts, a witness swore that, after the father's death, he, together with the son-in-law, to whom all his papers came, made diligent search among the father's papers, but could not find the writing. It was held that this was sufficient proof of the loss to lay the foundation for proving the contents of the paper, without the oath of the son-in-law himself, as to the search and not finding the paper.

§ 820. *Secondary evidence admissible after proof of loss of original deed has been made.*

We think the proof of the loss of the original deed was sufficient to let in the secondary evidence. We forbear, however, expressing any opinion upon the legal effect and operation of that deed.

The judgment of the court below must be reversed, and the cause sent back with directions to award a *venire de novo*. There were several other exceptions taken to the ruling of the court, in relation to the admission of testimony,

which we do not notice. They are so imperfectly stated that it is difficult to understand what the real point of objection is; and no opinion can be expressed that will aid the court below on another trial. Judgment reversed.

SIMPSON v. DALL.

(3 Wallace, 460-478. 1865.)

STATEMENT OF FACTS.—Simpson, Duff & Co., of Rogersville, Tenn., were indebted to Dunham & Kearfoot, of Baltimore, Md. The latter firm were embarrassed, and among other debts owed Dall, Gibbon & Co., of the same city, a considerable sum. Dall, Gibbon & Co., having learned that Simpson, Duff & Co. were in debt to their debtor, wrote to Jones, an attorney at Rogersville, asking him to attach or otherwise secure the debt due by the Rogersville firm to Dunham, Kearfoot & Co. The letter came into the possession of Mr. Duff in Jones' absence, who, being an intimate friend of Jones, opened it, and immediately took measures to pay, and did pay, Dunham, Kearfoot & Co. the debt due to them from Simpson, Duff & Co., before any attachment or other process was served at the instance of Jones or his clients. Dunham, Kearfoot & Co. having failed, Dall, Gibbon & Co. sued Simpson, Duff & Co., in the federal court of Tennessee, for having caused them to lose their debt against Dunham, Kearfoot & Co., by opening and reading their letter to Jones. The verdict was for the plaintiff. Defendants moved for a new trial, which was refused, and took exceptions to several rulings of the judge. The bill of exceptions contained these words: "To all which action of the court the defendants except and tender their bill of exceptions." The case went to the supreme court on error.

§ 821. *A bill of exceptions may be properly drawn out and signed after the trial is over, if it appears that the rulings were excepted to in the proper time, when the cause was on trial.*

Opinion by MR. JUSTICE DAVIS.

It is contended by the defendants in error that the rulings of the circuit court, which are alleged to be erroneous, were not saved during the progress of the trial, and cannot, therefore, be investigated here. If this was so, it would be fatal; but we do not *thus* interpret the record. It is well settled that bills of exception are restricted to matter which occurred during the progress of the trial; but it is not necessary, neither is it the practice, to reduce to form every exception as it is taken, and before the trial is at an end. It will do for the judge to note them as they occur, and after the trial is over, if it is desirable to preserve them, they can be properly embodied in a bill of exceptions. In this case the bill of exceptions is unskillfully drawn, and is justly subject to criticism; but it clearly enough appears that the rulings of the circuit court, which are sought to be reviewed here, were excepted to in proper time, and when the cause was on trial, and not afterwards.

If this is so, we cannot allow a valuable right to be defeated, because the judge carelessly used a word in the present tense, when the true expression of his meaning required the use of a word in the past tense. It is a fair inference from the bill of exceptions that the defendants excepted to the introduction of secondary evidence of the contents of certain letters, when the court decided to admit it; and it is an equal inference that they also excepted, before the jury retired from the bar, to each of the series of instructions which the court gave to the jury. The bill of exceptions is, therefore, valid, and

brings to our notice the proceedings of the circuit court, which, it is asserted, are erroneous.

The theory of this action is, that the defendants in error, who resided in Baltimore, Maryland, in March, 1858, addressed two letters to Jones, an attorney-at-law, in Rogersville, Tennessee, which, in his absence, were opened and read by Duff, one of the plaintiffs in error, and their contents communicated to his copartners, and then were detained for the purpose of obstructing the defendants in error in the prosecution of an attachment suit against the indebtedness which the plaintiffs in error owed to Dunham & Kearfoot, a mercantile firm, also resident in Baltimore. These letters were not produced on the trial, and the court permitted Jones to testify as to his recollection of their contents. This action of the court was excepted to, because no sufficient evidence of their loss had been made to justify it.

§ 822. *Secondary evidence of the contents of papers will not be admitted when the non-production of the originals was the result of negligence.*

The best evidence in the power of the parties must always be furnished, and the court was not authorized to allow secondary evidence of the contents of these letters to go to the jury, unless it was shown that they were either lost or destroyed. The well-settled rules of evidence require this, and the danger of departing from them is well illustrated in this case; for on the important point of the dates and amount of the notes, the testimony of the witness was imperfect, and wanting in clearness and precision. In order to show the loss of the letters, it was necessary to prove that a diligent search had been made for them where they were most likely to be found. There is no general rule as to the degree of diligence in making the search; but the party alleging the loss is expected to show "that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." 1 Greenl. Ev., § 558. In the case before us this plain rule of evidence was palpably violated; for there was no diligence whatever used to obtain the letters, and no such search as would justify the court in inferring that they were lost.

J. R. Cocke, the attorney, went to the place of trial, under the belief that Jones, who was to be a witness, had the letters and would bring them. Jones was in the same category. Neither had made any special search for them, for each rested in the conviction that the other was the custodian of them. It was a case of pure negligence, and should have been so treated by the court. To approve the ruling of the court would justify the admission of secondary evidence on the merest pretense, and would do away entirely with the necessity of producing primary evidence. We cannot countenance a practice so loose, and such a manifest departure from the plainest legal principles.

The decision on this point remits the cause to the circuit court; but as it may be tried again, we are called upon to go further and decide the merits of this controversy, as they are involved in the instructions which the court gave to the jury. Among other things, the court substantially charged the jury, that if Simpson, Duff & Co. were about to remove their property beyond the limits of the state, Dall, Gibbon & Co. would have the right to attach it, and that they could not pay their debt to Dunham & Kearfoot, who were insolvent, so as to defeat the measures which Dall, Gibbon & Co. had in contemplation to prevent it. Such a doctrine as this would effectually destroy credit and commerce.

§ 823. *A debtor has a right to pay his debt to his creditor although he may be aware of an intention to attach it.*

If Simpson, Duff & Co. were indebted to Dunham & Kearfoot, they surely had a right to pay them, and the court will not inquire into the motive which prompted the payment. But the motive was meritorious, for the law does not favor a partial appropriation of an insolvent debtor's effects, but prefers an equal and general distribution. When the debt was contracted in Baltimore, both parties contemplated that, in the usual course of dealing, remittances or negotiable securities would be sent from Tennessee to discharge it, and it would be singular if the fact that *Simpson, Duff & Co.* were about to remove *their* property from Tennessee, in order to comply with their agreement, should authorize the issue of an attachment.

The mere statement of the proposition is enough to show its fallacy. Dall, Gibbon & Co. had no claim against Simpson, Duff & Co. The relation of debtor and creditor did not subsist between them, and we cannot see why it was necessary for these last to procure the consent of Dall, Gibbon & Co. before they could send money and negotiable notes to pay in good faith an honest debt, due to a mercantile firm residing in Baltimore, which was contracted there, and in the usual course of trade must be paid there.

But it is necessary to discuss the evidence in the case, as the charge of the court assumed that there was a cause of action. Duff and Jones were intimate friends, and to a degree not often seen, for Duff was permitted to open and read certain letters written by Jones, which are not generally read by third persons. Duff had for years been authorized to take the letters of Jones out of the postoffice at Rogersville, and to forward them when he was absent, and the postmaster always put them into the box of Simpson, Duff & Co. Jones and J. K. Simpson (the active member of the firm) were connected by marriage; and Cocke, who wrote the letters from Baltimore, was also his relative, and a member of the firm of G. W. Howard & Co., whose name was stamped on the envelopes. This fact Duff knew, and as his house had no dealings with Howard & Co., it was very natural for him to suppose that the letters were on business requiring prompt attention, which, as an act of kindness, he ought to give to it during the absence of Jones.

Cannot Duff's authority to open these letters be fairly inferred from these circumstances, and who can say that he erred in doing so? It is true that he committed an error in not informing Jones that he had opened them, but no harm resulted from that omission. The *right* to open them cannot be affected by what occurred afterwards. These letters were not detained, but were immediately resealed and forwarded to Florence, Alabama, where Jones lived. There is absolutely no evidence raising a presumption even that they were withheld. Duff was probably to blame for telling Simpson the purpose for which they were written; but he could hardly have refrained from doing so; and if he obtained the information rightfully, what principle of law or morals prevented Simpson, Duff & Co. from paying their Baltimore creditors, who had indulged them, and were then pressing them for payment? If they had acted otherwise, they would have been justly censurable. Their obligation was to Dunham & Kearfoot, not to Dall, Gibbon & Co., and the information obtained simply hastened the payment of an overdue debt, which they had for some time been endeavoring to procure exchange to discharge.

§ 824. *A party has no cause of action against another, who, being under no obligations to the first, acts upon information improperly obtained and pays his own debt to his own creditor.*

But if Duff had not opened the letters, is it not manifest that Jones, on his arrival in Rogersville, would have communicated their contents to Simpson? Jones swears that he would, on account of their intimacy, and because Cocke had directed him to do so. And if Dall, Gibbon & Co. authorized their attorney to consult Simpson, and give him the same information which Duff did, how can they complain of the *manner* in which the information was obtained?

The procurement of Cocke, who had nothing to do with the matter, to select an attorney in Tennessee, who was his relative and also a relative of one of the Simpsons, was a contrivance to obtain more surely and easily the information on which the proceedings in attachment could be founded. The scheme was a failure, and Dall, Gibbon & Co. have no just right to complain. They are in no proper sense the losers by the conduct of Duff. The result would have been the same if Jones had got the letters unopened, for he would have told Simpson what he wanted; and it is easy to see that, instead of responding to his request, the firm would, in obedience to a plain sense of duty, have paid their just debts to their own creditors.

On what basis, then, can this claim be sustained? The examination of the record discloses none, and we are unable to supply the omission. The judgment of the circuit court is reversed, and a new *venire* awarded.

BURTON v. DRIGGS.

(20 Wallace, 125-137. 1873.)

ERROR to U. S. Circuit Court, District of Vermont.

STATEMENT OF FACTS.—Burton sold Driggs a claim on the Tioga Bank for \$7,060.18. He transferred to his vendee a sealed instrument signed by himself and other parties, reciting that he had advanced money to the bank to that amount in an emergency and that the bank owed it to him. Upon inquiry at the bank Driggs ascertained that the bank denied that any such transaction had taken place, and that it owed Burton anything. Driggs sued Burton in *assumpsit* to recover back the money he had paid. In the course of the trial the plaintiff, after proving that the deposition of one De Pue had been properly taken by him on the ground that the witness lived out of the state and more than one hundred miles from the place of trial, and that the deposition had been lost by the clerk of the court, offered a certified copy. The defendants objected that the original only was admissible. The objection was overruled and the defendants excepted. The plaintiff then proved that the officials of the Tioga Bank refused to let the bank books be taken out of their bank, and then offered the depositions of two former cashiers of the bank, during the period of Burton's alleged loans, to show that his name was not on the bank's books in any way. The defendants objected that the contents of the bank's books should be proved by the books. The objection was overruled and the defendants excepted.

§ 825. *A party objecting to testimony must state the specific grounds of his objection, and upon error is confined to those specific grounds.*

Opinion by MR. JUSTICE SWAYNE.

The first assignment of error relates to the admission in evidence of a copy

of the deposition of Vine De Pue. The bill of exceptions sets forth that the original deposition was regularly taken, sealed up and transmitted to the clerk of the court where the cause was pending, and by him properly opened and filed; and that thereafter it was lost and could not be found; and that the copy offered was a true copy, taken under the direction of the clerk, and by him compared and certified. The exception is as follows: "The defendant objected to the copy on the ground that it was not the original. The court overruled the exception and admitted the deposition, to which decision the defendant excepted."

It is a rule of law that, where a party excepts to the admission of testimony, he is bound to state his objection specifically, and in a proceeding for error he is confined to the objection so taken. If he assign no ground of exception, the mere objection cannot avail him. *Camden v. Doremus*, 3 How., 515 (BILLS AND NOTES, §§ 585-88); *Hinde v. Longworth*, 11 Wheat., 199. In *Hinde's Lessee v. Longworth* this court said: "As a general rule, we think the party ought to be confined, in examining the admissibility of evidence, to the specific objection taken to it. The attention of the court is called to the testimony in that point of view only." Here the objection was that the copy was not the original. This, as a fact, was self-evident; but as a ground of objection it was wholly indefinite. It does not appear to have been suggested that the place of the lost deposition could only be supplied by another one of the same witness retaken, and that secondary evidence was inadmissible to prove the contents of the former. If the contents of the one lost could be proved at all by such evidence, that offered was certainly admissible for that purpose. But the objection was presented in the argument before us in the latter shape, and we shall consider it accordingly.

§ 826. *When a witness lives beyond the jurisdiction of the court, and his deposition has been lost, a copy of it is admissible evidence.*

It is an axiom in the law of evidence that the contents of any written instrument lost or destroyed may be proved by competent evidence. Judicial records and all other documents of a kindred character are within the rule. *Renner v. The Bank of Columbia*, 9 Wheat., 581 (BILLS AND NOTES, §§ 754-59); *Riggs v. Tayloe*, id., 483 (§§ 807-10, *supra*); 1 Greenl. Ev., § 509. But it is said a different rule as to depositions, unless the witness be dead, obtains in Vermont, and the cases of *Follett v. Murray*, 17 Vt., 530, and *Low v. Peters*, 36 id., 177, are referred to as supporting the exception.

Those cases are unlike the one before us. In *Follett v. Murray* the witness resided within the state, and, there being no copy of the caption, it did not appear that the deposition had been regularly taken. In the other case the witness was dead, and no question was raised as to any defect in the lost original. The copy was therefore admitted as of course. If a deposition be not properly taken it is not made admissible by the death of the witness. *Johnson v. Clark*, 1 Tyler, 449. In *Harper v. Cook*, 1 Carr. & P., 139, it was held that the contents of a lost affidavit might be shown by secondary evidence. The necessity of retaking it was not suggested. In the present case the witness lived in another state, and more than one hundred miles from the place of trial. The process of the court could not reach him; for all jurisdictional purposes he was as if he were dead. It is well settled that, if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary.

Shepard v. Giddings, 22 Conn., 282; Brown v. Wood, 19 Mo., 475; Teall v. Van Wyck, 10 Barb., 376. See, also, Boone v. Dykes, 3 Monroe, 532; Eaton v. Campbell, 7 Pick., 10; Bailey v. Johnson, 9 Cow., 115; Mauri v. Heffernan, 13 Johns., 58. Here there was nothing to prevent the operation of the general rule as to proof touching writings lost or destroyed. The deposition was one of the files in the case. The plaintiff was entitled to the benefit of the contents of that document. Having been lost without his fault, he was not bound to supply its place by another and a different deposition, which might, or might not, be the same in effect with the prior one. There was no error in admitting in evidence the copy to which this exception relates.

§ 827. *Where a bank is beyond the jurisdiction of the court, secondary evidence of the contents of its books is competent.*

The next assignment of error is the admission in evidence "of such parts of the depositions of A. L. Turner and C. P. Steers as refer to what appeared or did not appear on the books of the Tioga County Bank." It was shown by the plaintiff in this connection that the books in question were in the village of Tioga, Pennsylvania; that the plaintiff had endeavored to obtain them for use on this trial, and that those having the custody of them refused to permit them to go. The testimony of Turner was, in substance, that he was the cashier; that he had examined the books and papers in the bank relating to its affairs from its organization down to July, 1859, and that he found no evidence of any kind that the defendant ever had any connection or transaction with the bank, or any interest in it whatever; and that subsequently, at the request of the plaintiff and for the purposes of this suit, he repeated the examination with the same result. Steers testified that he was cashier of the bank from about the 15th of September, 1858, to about the 29th of April, 1859, and that during that time the defendant, Burton, did not furnish to the bank \$7,060.18, or any other sum of money; that his name was never on the books of the bank, nor did the bank owe him anything on any account during that period, and that the witness did not think his name appeared on the books of the bank as a stockholder during that time. The books being out of the state and beyond the jurisdiction of the court, secondary evidence to prove their contents was admissible.

§ 828. *The results of voluminous facts, or of the examination of many books and papers, may be proved by parol evidence.*

When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. 1 Greenl. Ev., § 93. Here the object was to prove, not that the books did, but that they did not, show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, *a multo fortiori* must it be so to prove the latter.

§ 829. *When a judge has fully instructed the jury on all material points, he is not bound to add further instructions at the request of either party.*

The last assignment relates to the charge of the court. The examination of this subject renders it necessary to refer briefly to the cause of action. The defendant Burton, and three others, executed an instrument, under seal, bearing date October 20, 1858, whereby it was recited and agreed as follows: That the parties had severally furnished to the Tioga Bank, to enable it to redeem its bills promptly, certain sums of money, to wit, O. A. Burton, \$7,060.18, etc.; that the bank was to refund said moneys as soon as it was in

a condition to do so, and that it would lend to said parties not exceeding \$10,000 at any one time, on paper payable in New York, with interest at the rate of five per cent. per annum; that the Tioga Bank had advanced, to be paid in on the stock of the Pittston Bank of Pennsylvania, \$9,870, which money belonged to the four parties to the instrument, and it was agreed that each of the parties owned one-fourth part thereof, less cost and expenses. To this paper was annexed a further instrument, under seal, dated April 29, 1859, whereby the defendant assigned to the plaintiff, for the consideration of \$7,060.18, his interest in that amount paid by him to the Tioga Bank, according to the instrument first mentioned, with all the privileges relating thereto which the assignor would have had if the assignment had not been made. The declaration contained several counts, setting out the instrument as inducement, and averring the utter falsity of its recitals. The common money counts were added. The defendant admitted the receipt of the \$7,060.18 stated in the assignment as the consideration for making it, but gave no evidence tending to prove that the recitals in the instrument to which the assignment related were true. Both parties submitted prayers for instructions. Both sets were refused. Those of the defendant sought to defeat the action because it had not been brought upon the written instrument and the assignment. The court instructed the jury, in effect, with full and proper explanations, that if the transaction on the part of the defendant had been a fraud, and there had been an entire failure of consideration, the plaintiff was entitled to recover.

The defendant excepted to these instructions and to the refusal to give those which he had asked to be given. The former were correct in point of law. *Weaver v. Bentley*, 1 Caines, 47; *Gillet v. Maynard*, 5 Johns., 85; *D'Utrick v. Melchor*, 1 Dall., 428; *Wilson v. Jordan*, 3 Stewart & Porter, 92; *Eames v. Savage*, 14 Mass., 425; *Lyon v. Annable*, 4 Conn., 350; *Pipkin v. James*, 1 Humph., 325; 1 Swift's Digest, 400. The instructions given covered the whole case. It was not, therefore, the duty of the learned judge to give others suggested by either party. If wrong, they were inadmissible, and if otherwise, unnecessary. *Laber v. Cooper*, 7 Wall., 565 (APPEALS, §§ 1761-65). We are satisfied with the charge as it appears in the record.

Judgment affirmed.

§ 830. **General rule — Proof of loss.**—A copy of a paper cannot be received in evidence unless it is shown that the original is lost or destroyed, or beyond the power of the party to produce it. *Halderman v. Halderman*, Hemp., 559.

§ 831. Evidence to lay the foundation for the introduction of secondary evidence of the contents of a writing, by proving its loss, or that it is in the possession of the opposite party, who has had notice to produce it, is addressed to the court and not the jury, and is weighed under liberal views rather than technical scruples, and in connection with all the other evidence and circumstances bearing on the point. This proof may be made by the affidavit of the party, and be disproved by like affidavits of his opponent, and pertinent interrogatories may, in the discretion of the court, be put to each other by the parties. *Allen v. Blunt*, 2 Woodb. & M., 121.

§ 832. The affidavit of a party to the suit is competent and admissible, for the purpose of proving the loss of a paper, in order to let in secondary evidence of its contents. *Boyle v. Arledge*, Hemp., 620.

§ 833. Proof of the loss of a paper, in order to let in secondary evidence of its contents, is addressed to the court and cannot go to the jury. Its sufficiency is a question for the court. Evidence of the contents of the paper is for the jury. *Ibid.*

§ 834. In an indictment for forgery, where the original instrument has been destroyed by the prisoner, the contents may be shown by parol evidence, if there is not an examined copy, which in such case is the next best evidence. *United States v. Britton*, 2 Mason, 464.

§ 835. The law, in all departments of its administration in courts of justice, always requires

the best evidence to be produced of any fact. Thus in a prosecution, under the acts of May 28, 1830, and March 3, 1833, for the forfeiture of goods imported from abroad, for fraudulent undervaluation of their actual market value at the time when and place where they were manufactured, a series of sales, or even a single sale, in the ordinary course of trade, is one of the best evidences of market value. Likewise *bona fide* offers to sell by merchants or manufacturers, made in the ordinary course of trade, are among the best evidences of market value abroad. And it is only when such evidence is wanting, that inferior evidence may be resorted to, such as the cost with the manufacturer's profit added. *Six Cases of Silk Ribbons*, 3 Ben., 536.

§ 836. Secondary evidence of an instrument not admissible without proof that the instrument once existed, and that the party cannot produce it. *Maye v. Carbery*,* 2 Cr. C. C., 336.

§ 837. Where a paper is offered and received in evidence as the original, and it is afterwards discovered to have been only a copy, a new trial will be granted. *Savage v. D'Wolf*,* 1 Blatch., 343.

§ 838. The court held that if a writing is proved to be mislaid, this does not admit other evidence of its contents, but is ground for a continuance for further search. But the case having gone to the supreme court and judgment reversed on this ruling, on the next trial the court admitted such evidence. *Riggs v. Tayloe*,* 2 Cr. C. C., 687.

§ 839. The affidavit of the party as to the loss of papers is sufficient to admit secondary evidence. *Nicholls v. White*,* 1 Cr. C. C., 58.

§ 840. It was objected to the admission of a deposition relating to the contents of certain papers used on a former trial of the same cause, that the loss of the papers was not proven; but the court, being of opinion that such loss was proved by the affidavit of the defendant made to procure the new trial, admitted the deposition. *Ibid.*

§ 841. It is not sufficient search to make for a missing paper to examine a desk where it was last seen, but to which several people had had access and from which some papers were proved to have been taken, and nowhere else among the papers of the person in whose custody it had been left. *Hobson v. Porter*,* 2 Colo. T'y, 28.

§ 842. That a paper is beyond the jurisdiction of the court does not authorize the admission of secondary evidence of its contents, no effort having been made to obtain the instrument. *Londoner v. Stewart*,* 3 Colo. T'y, 47.

§ 843. Evidence of the existence and loss of a document must be given before secondary evidence of the contents of the writing can be received. But this is not necessary on a hearing before a master. *In re Pitman*, 1 Curt., 186.

§ 844. The rule of law which requires the best evidence within the power or control of the party to be produced does not exact that the loss or destruction of the document of evidence should be proved beyond all possibility of mistake. It only demands that moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the best evidence within the power or ability of the litigant. *United States v. Sutter*, 21 How., 170.

§ 845. Where a witness resided more than one hundred miles from the place of trial, and his deposition was taken *ex parte*, and he produced a copy of a paper in his possession, saying it was a correct copy, and the copy was attached to the deposition, *held*, that the evidence was not admissible. *Comstock v. Carnley*,* 4 Blatch., 58.

§ 846. It was no higher than parol evidence of a written instrument, the original of which was in existence. The original should have been produced and proved before the officer, and he should have annexed a true copy, in returning the depositions. *Ibid.*

§ 847. The testimony of a witness, who had had possession of a deed, to the effect that he either lost it in crossing a river or left it with one of the purchasers, was held not to be sufficient proof of its loss to authorize the admission of parol evidence of its contents. *Ransdale v. Grove*, 4 McL., 282.

§ 848. A certified copy of a copy of an original document may be received in evidence in the federal courts, when the original document is shown to have been mutilated and the first copy lost. *United States v. Delespine*,* 12 Pet., 654.

§ 849. Accounts.—A copy of an account, taken from an account book, is not admissible in evidence. *Lombard v. McLean*,* 4 Cr. C. C., 623. See § 286.

§ 850. A copy of the account cannot be given in evidence, where plaintiff proves that he showed the ledger account to defendant, and he acknowledged it to be correct. *Thorp v. Orr*,* 2 Cr. C. C., 335.

§ 851. A party will not be admitted as a witness to support items of an account which, from their character, may be proved by vouchers or other legal evidence. *Harding v. Handy*, 11 Wheat., 103.

§ 852. A witness may testify to the amounts of certain sales and receipts, although the information is derived from accounts and letters, where he does not state the contents of the

writings but only results or general impressions drawn from them. *Taylor v. Carpenter*, 2 Woodb. & M., 1.

§ 853. Parol evidence is not admissible to prove a statement of an account by a commissioner in another court. *Sutton v. Mandevill*,* 1 Cr. C. C., 2.

§ 854. In *indebitatus assumpsit* against a corporation, the plaintiff was allowed to read in evidence an account stated, proved to be in the handwriting of the treasurer, without producing said treasurer as a witness. *Davis v. Georgetown Bridge Co.*, 1 Cr. C. C., 147.

§ 855. Books.—Parol evidence is inadmissible to show that certain books which have been lost did not contain certain entries, when there is an abstract of these books in existence. *Polk v. Windel*,* 2 Overt. (Tenn.), 433.

§ 856. If notice is given to a party to produce books in his possession, and he does not produce them unconditionally, parol evidence of their contents may be received. *Carr v. Gale*, 3 Woodb. & M., 38.

§ 857. The testimony of a person who has been in charge of the books of an estate assigned for the benefit of creditors, to the effect that when persons called on him and said they were indebted to the estate he looked at the ledger and found the accounts balanced, may be received in evidence without producing the books, since this is not testimony as to the contents of the books. But if he states that, on examination of the day-book, he found no corresponding entries, this fact may be disproved or verified by an inspection of the books, and for this purpose they ought to be produced. *Carr v. Gale*, Dav., 328.

§ 858. Where the books and vouchers of a disbursing agent have been destroyed by fire, secondary evidence of payments made by him, and of the contents and effect of such vouchers, is admissible. *United States v. Laub*,* 12 Pet., 6.

§ 859. Where a manufacturer of fermented liquors was assessed by the commissioner of internal revenue, under the act of December 24, 1872, for liquors sold and removed without the proper stamps, and he brought an action to recover back the tax, the act of congress of July 13, 1866, then in force, requiring that the tax should not be refunded unless he proved that his list, statement or return was not false or fraudulent, and did not contain any understatement or undervaluation, it was held that his books, required by the acts of June 6, 1872, and December 24, 1872, to be kept by him, furnished the best evidence of this fact; and that other evidence could not be received, until it was shown that they could not be produced, or that they did not contain the information required. *Bergdoll v. Pollock*, 5 Otto, 337.

§ 860. Bankruptcy cannot be proved by parol. *Moore v. Voss*,* 1 Cr. C. C., 179. See § 626.

§ 861. Official certificates.—Where the law does not require a justice of the peace to describe his official character in his certificate of acknowledgment of a deed, parol evidence may be received to show that he was authorized to take the acknowledgment, and it is then presumed to have been done by him in his official capacity. *Van Ness v. Bank of the United States*, 13 Pet., 17. See § 387.

§ 862. It may be shown by parol evidence that persons who took the acknowledgment of a deed were justices of the peace. It is not necessary that the certificate should show the fact. *Bank of United States v. Benning*, 4 Cr. C. C., 81.

§ 863. In an action on a shipmaster's bond given for the return of the crew, he may show by parol the contents of a certificate of a consul authorizing the discharge of one of the crew, if he first proves by satisfactory evidence that such certificate has been lost. *United States v. Parsons*, 1 Low., 107.

§ 864. The captain's certificate that wages are due to the seamen is the best evidence of the debt, no shipping articles being produced. *Minors v. Ship Mary, Bee*, 119.

§ 865. Where the master is unable to write, the certificate required by the act of July 29, 1819, to be produced before the allowance of the fishing bounty mentioned in the act, may, it seems, be supplied by reliable evidence from other sources of the times of sailing and returning. *Noble v. United States*,* Dev., 86.

§ 866. Papers certified by the secretary of the treasury to be "copies of a part of the archives of the late so-called Confederate government" were held inadmissible unless the originals were proved to be genuine, and also because they were not the best evidence, and the originals should have been produced. *Schaben's Case*,* 6 Ct. Cl., 230.

§ 867. Bills of lading.—An invoice is presumed to go with every consignment of goods. Secondary evidence of its contents is not admissible until it is shown that notice to produce it has been given to the consignee, if he is a party to the suit, or that efforts have been made to obtain it, if he is not. *Turner v. Yates*, 16 How., 26 (§§ 62-68). See § 541.

§ 868. The fact that libelants have but one copy of a given bill of lading, and that they do not wish to expose that to the perils of a voyage before they can judge where the principal claim growing out of it can be enforced, does not excuse them from producing the original. *The Alice*,* 12 Fed. R., 923.

§ 869. The testimony of the persons who loaded the goods is the best evidence of the amount when it is sought to charge the carrier for a deficiency. *Cafiero v. Welsh*,* 8 Phil., 130.

§ 870. **Contracts.**—Where a party claims title under a contract proved to be in writing, in the form of a bill of sale, purporting to sell and assign and convey the property to the party with a warranty title, the written contract is not only admissible in a suit to recover the property, but is the best evidence. *Bonesteel v. Gardner*,* 1 Dak. T'y, 372. See § 513.

§ 871. When a written contract calls for a valuation of work and material, and this is done by valuers in writing, oral evidence of the contents of the writing is not admissible, except upon proof of the loss of the writing. *Evans v. Blakeney*,* 1 Cr. C. C., 126.

§ 872. Where a written contract is not produced on the ground that it has been lost, some proof that it ever existed is necessary before secondary evidence is admissible. The quartermaster's department is the only one charged with the duty of erecting military barracks, and vouchers given by an engineer officer are not competent evidence of a claim for materials furnished for such purpose. *Travers' Case*,* 5 Ct. Cl., 329.

§ 873. The court cannot presume that there was satisfactory preliminary proof of the absence, death or incapacity of the subscribing witness to a sealed instrument, so as to let in secondary proof of its execution, from the language of the bill of exceptions that the party gave testimony "conducting to prove" the instrument. *Clarke v. Courtney*, 5 Pet., 319.

§ 874. If an indictment alleges a contract which appears from the evidence to have been in writing, it must either be produced or shown that it cannot be produced. *United States v. Porter*,* 3 Day (Conn.), 283.

§ 875. Parol evidence that the *empresario* contract of Martin De Leon was amended by order of the government of Mexico so as to include the littoral leagues along the coast of the Mexican gulf was admitted, proof having been first made that many of the documents of the *empresa* had been destroyed by the Texas army during the revolutionary struggle. *White v. Burnley*, 20 How., 235.

§ 876. An authenticated copy of an antenuptial contract between a widow and the man with whom she was about to intermarry was admitted in evidence, where the three children of the widow, and the husbands of two of them, deposed that they never possessed or saw the original, although they had made diligent inquiry for it, and that they believed it to have been lost or destroyed; and her son further stated that he had made inquiry for it, first of his guardian, who informed him that it had never been in his possession, and that he did not know where it was; and that he had made inquiry for it at the office of mesne conveyances and at the office of the secretary of state, and that he believed the instrument to have been destroyed by the husband, since deceased, or at the burning of the county court-house; and further that he believed that the subscribing witnesses were dead. *De Lane v. Moore*, 14 How., 253.

§ 877. **Infringement of copyright.**—It is not an allowable question, in an action for infringement of copyright, to ask whether one book is similar to another, without producing both the books, nor to ask the witness to repeat parts of one that are similar to the other, nor to attempt to show by the statements of the witness that the book in question was imitated. The court or jury are to judge of the resemblance after inspection of the documents. *Boucicault v. Fox*, 5 Blatch., 87.

§ 878. **Organization of corporation.**—Where it is alleged in a bill in equity that a corporation, represented by the respondents to have been organized, was not duly organized, the proper evidence of due organization is the record of the fact, and not the oath of one of the officers. The record is also the suitable evidence of the authority of the corporation to do certain acts. *Warner v. Daniels*, 1 Woodb. & M., 90.

§ 879. **Records.**—Lost records may be proved by secondary evidence, but their former existence and loss must be first established by competent proof. Evidence merely showing that they do not exist is not sufficient to establish either of these requirements. *Improvement Company v. Munson*, 14 Wall., 442. See § 362.

§ 880. Proof of loss or destruction of records cannot supply record evidence unless it is first proved that the instrument relied on was recorded in that part of the record which was lost or destroyed. *United States v. Neleigh*, 1 Black, 298.

§ 881. Where proof of unavailing search for the record of a proceeding in an ecclesiastical court has been offered and secondary evidence of the proceeding has been filed, the record, if discovered, is admissible to contradict the secondary evidence offered. *Gaines v. Relf*,* 12 How., 472.

§ 882. Upon an indictment for highway robbery it was held that no evidence but the record could be allowed to show that the road was a highway. *United States v. King*, 1 Cr. C. C., 444.

§ 883. When a matter of record forms the gist of the action, and issue is joined upon *nul tiel record*, the record itself must be brought into court, or an exemplification of it under the act of congress. *Lincoln v. Tower*, 2 McL., 473.

§ 884. If a part of a record be produced to prove a fact, and is deficient, it cannot be helped out by evidence *dehors* the record, but the whole record must be produced. *James v. Stookey*, 1 Wash., 330.

§ 885. The record copy of a deed and its acknowledgment from the land records of the county of Washington in the District of Columbia is admissible in evidence as proof of title, although the non-production of such deed is not accounted for, and no other proof of its execution is offered than the record. *Peltz v. Clark*,* 2 Cr. C. C., 703.

§ 886. The record book of division and allotments of a square in the city of Washington is admissible in evidence without producing or accounting for the original certificate of division and allotment. *Ibid.*

§ 887. Where an original temporary record book of a county has been transcribed into a book which has since been recognized as a part of the public records, and the original has been destroyed, the existing book may be used as evidence. *Belk v. Meagher*, 14 Otto, 279.

§ 888. When the laws of a state do not require powers of attorney to convey land to be recorded, and a power of attorney was recorded, but in a county other than that where the land lay, a certified copy of the record is admissible in evidence. *Winn v. Patterson*,* 9 Pet., 663.

§ 889. Proceedings before magistrates in cases of insolvent debtors are matters *in pais* and may be proved by parol testimony. *Turner v. Fendall*, 1 Cr., 116.

§ 890. Deeds.—If a deed is proved to have been destroyed by accident, its contents may be proved by copies. *Lewis v. Baird*, 3 McL., 56.

§ 891. When a deed has been destroyed or lost without the fault of the party seeking to use it in evidence, parol evidence of its contents may be given. But where the deed has not been recorded, the testimony should be very clear and convincing to justify the jury in acting on it and setting aside a valid record title. *Sacket v. McDonnell*, 8 Biss., 394.

§ 892. In an action on a covenant of seizin parol testimony is not admissible to prove prior claims on the land. *Pollard v. Dwight*, 4 Cr., 421.

§ 893. Where in ejectment it appears that the original deed under which the plaintiffs claim was presumed to be in the hands of their ancestor for twenty years before his death, it was held that its non-production was a circumstance which the jury might consider, there being no evidence of its loss, to raise some doubt whether the deed was delivered to the grantee. *Buckley v. Carlton*,* 6 McL., 125.

§ 894. Statements of witnesses relating to the execution and contents of a lost deed, especially after the lapse of many years from the date of the transaction, should be received with great caution. The fact that the instrument was never recorded, and has never been seen by those whom it is probable would have known of it when it was executed, or those into whose official custody it would have come, must also be considered in receiving such evidence. *Robertson v. Town of Wellsville*, 1 Bond, 81.

§ 895. It is admissible to receive the original record of a conveyance of land; production of a certified copy is not essential. *Eyster v. Gaff*,* 2 Colo. T'y, 228.

§ 896. A copy of a recorded deed is not admissible in evidence without accounting for the original, when the original is presumed to be in the possession of the party offering the copy. *Longworth v. Close*, 1 McL., 282.

§ 897. Where the original is in the power of the party, the record books are not admissible to prove a deed, although it is required by law to be recorded. *Brooks v. Marbury*, 11 Wheat., 78.

§ 898. Plats.—If a township plat is lost or destroyed, a copy is admissible as secondary evidence. The fact that the copy does not correspond in every particular with the original in respect to the memoranda written upon it does not detract from its admissibility when such memoranda are sufficiently explained. *Hendrick v. Hughes*, 15 Wall., 123.

§ 899. Where it is claimed that other lands have been selected and entered in lieu of "section 16" of each township, for school purposes, under the act of congress of 1820, omitting Missouri, and the act of 1823 granting to that state certain lands, and the leaf of the register's book, which would have contained the entry of such selection, is missing, and the original township plat, which would have probably indicated the fact, is lost, this proof may be supplied by evidence *aliunde*, such as that the lands in question had been publicly treated and disposed of by the county authorities as school lands, near the time when the selection should have been made, and that the original township plat in the register's office contained a memorandum marking the section in question with the words "for school purposes." *Ibid.*

§ 900. Patents, grants, etc.—Where the law does not require that a patent of lands from the United States be recorded by the recorder of the county, a certified copy of such a patent by such recorder is inadmissible in evidence. *Lyell v. Maynard*,* 6 McL., 15.

§ 901. Parol and extrinsic evidence cannot be received for the purpose of impeaching the validity of a grant; no kind of evidence except an entry being admissible for this purpose. *Polk v. Hill*,* 2 Overt. (Tenn.), 118.

§ 902. Parol evidence cannot be received to show that public records which have been lost

or destroyed did not contain certain entries, where the object is to destroy the validity of a state grant or patent. *Polk v. Windel*,* 2 Overt. (Tenn.), 433.

§ 903. Parol evidence of the contents of a warrant cannot be given unless the proof be full that it is lost. *United States v. Wary*, 1 Cr. C. C., 312.

§ 904. Parol evidence admitted to prove the contents of a lost warrant. *United States v. Lambell*,* 1 Cr. C. C., 312; *United States v. Wary*,* 1 Cr. C. C., 312.

§ 905. The contents of a warrant cannot be proved by parol. *United States v. Chenault*,* 2 Cr. C. C., 70.

§ 906. The recital in a warrant to one other than a party to the suit, of the issuance of a previous warrant to the same person, is not evidence between the parties; yet, taken in connection with corroborating circumstances, such as the antiquity of the marks on the line and corner trees, etc., and the burning of the surveyor-general's house, which accounted for the non-production of the papers, the warrant was admitted in evidence. *James v. Stookey*,* 2 Wash., 140.

§ 907. Spanish grants.—The record of alcalde grants of the pueblo lands of San Francisco, kept by the alcalde in accordance with the requirements of the Mexican laws before the incorporation of the city of San Francisco by the state of California, in the custody of the city and county recorder, and known as one of the books of the former alcalde's office turned over to the county recorder's office, pursuant to the statutes of California, is primary evidence of the recorded grants. *Palmer v. Low*, 8 Otto, 1.

§ 908. Certified copies of Spanish land grants and the certificates of possession, made by the Spanish commandant from the protocol, though dated long after the protocol, would be received in evidence in the courts of Spain, as possessing equal claims to credit as the originals, because they are certified by the same officer whose attestation gives authenticity to the original; and our courts will receive them as having the same authority. Where the evidence of the loss or destruction of the protocol is sufficient, the copies are admissible as secondary evidence on general principles. *United States v. Davenport*, 15 How., 1.

§ 909. Where the originals of a petition for land in Florida, and of a decree granting the same, could not be found in the archives of St. Augustine, certified copies by the secretary of the government are admissible in evidence, and are *prima facie* proof of the grant. *United States v. Acosta*, 1 How., 24.

§ 910. Insurance.—Secondary evidence that an insurance was made is not admissible, without proving the loss of the policy. *Hutchinson v. Peyton*,* 2 Cr. C. C., 365. See § 631.

§ 911. The transfer of a policy of insurance in writing cannot be proved by parol without accounting for the non-production of the writing. *Wilson v. Young*,* 2 Cr. C. C., 33.

§ 912. The acknowledgment in a policy of insurance that the premium has been paid is not the best evidence of that fact. *Millick v. Peterson*,* 2 Wash., 31.

§ 913. In an action against an insurance company for value of stock in trade destroyed by fire, evidence of a memorandum made on the fly leaf of a ledger of the firm, said memorandum stating an abstract of an inventory of the stock in trade, made in the usual course of business, is admissible as secondary evidence to prove the contents of the inventory upon proof of the destruction of the original inventory by fire. *Insurance Co. v. Weide*, 9 Wall., 680 (§§ 46-48).

§ 914. Judicial records.—There is no ground upon which a party can be permitted to testify orally as to the contents or purport of an indictment, or verdict or judgment; for the best evidence is the original paper or a certified copy. *Gass v. Stinson*, 2 Sumn., 605. See §§ 362, 879, 2584.

§ 915. The solemn adjudication of the court is the best evidence on the question whether it has changed its practice. *Duncan v. United States*, 7 Pet., 435.

§ 916. Where partition between devisees is a judicial act and becomes a record, its proper proof is the record; and the burning of the records of the court is itself no evidence that a record of partition ever existed. It only lays the foundation for inferior evidence of the fact. Nor can the mere fact of burning raise any presumption of the existence of the record. *Weatherhead v. Baskerville*, 11 How., 329.

§ 917. Where by statute a sheriff held an inquest upon notice of a claim of property by a third party in goods levied on, in execution, and the verdict was in writing, oral evidence of the verdict is not admissible until the writing is accounted for. *Lawrence v. Sherman*,* 2 McL., 488.

§ 918. Where a warrant of survey was issued by a court of admiralty, and a survey and report were made, under which the vessel was condemned and sold as unseaworthy, *held*, the proceeding being judicial, the condition of the vessel could not be proved by parol. That the warrant and report must be produced, but that it was admissible to prove their contents by other evidence. *Robinson v. Clifford*,* 2 Wash., 2.

§ 919. *Held*, also, that the loss of the warrant could not be proved by a certificate from the

register of the vice-court of admiralty where the proceedings were had; that it should have been established under a commission in the usual manner. *Ibid.*

§ 920. **Laws.**—The rate of interest being regulated by law in the several states, to prove the rate of interest in any state the law must be produced. *Jaffray v. Dennis*, 2 Wash., 253. See § 491.

§ 921. The presumption is that the legal rate of interest and the damages on protested bills of exchange are regulated by written law of the state; and the law itself, if of another state, must be produced, parol evidence on the subject being inadmissible. *Lonsdale v. Brown*, 3 Wash., 404.

§ 922. **Letters.**—Secondary proof of the contents of a pretended letter cannot be given without first accounting for the non-production of the original. *United States v. Boyd*, 5 How., 29. See 330.

§ 923. The contents of letters written to a witness cannot be shown by his oral testimony. *Tastett v. Crousillat*, 2 Wash., 132.

§ 924. The court will not allow secondary evidence of the contents of a letter when no notice has been given to produce the original. *Underwood v. Huddleston*,* 2 Cr. C. C., 76.

§ 925. A copy of a letter written to the plaintiff cannot be given in evidence where no notice has been given to produce the original. *Chicago v. Greer*, 9 Wall., 726.

§ 926. A deposition proving the contents of a certain letter, which is neither produced nor its non-production accounted for, is secondary evidence, and inadmissible. *Dwyer v. Dunbar*, 5 Wall., 325.

§ 927. Neither a letter written by a witness who is on the stand nor a copy of it can be read in evidence, the evidence being inferior to that of the witness himself. *Vasse v. Mifflin*, 4 Wash., 519.

§ 928. If, on notice to produce a certain letter at the trial, the party swears that he has not such letter in his possession, and after diligent search cannot find it, secondary evidence of its contents cannot be received. *Ibid.*

§ 929. If a surety on a collector's bond writes a letter to the commissioner, asking to be relieved as surety, in an action on the bond, the defendants cannot prove the contents of the letter by parol, where the plaintiffs have failed to produce it on notice given. Its contents can only be proved by a copy of the same duly certified from the treasury department. *Chadwick v. United States*, 3 Fed. R., 750.

§ 930. Where a letter is in court, in possession of the opposite party, the notice to produce it may be given at the trial, and, if so given, is in season to allow parol evidence of its contents. *Ibid.*

§ 931. In a prosecution for stealing a letter from the mail, the most satisfactory evidence that the letter was put into the mail for transmission is that of the person who deposited it in the postoffice; and the best evidence of its loss is that of the person to whom it was addressed. *United States v. Crow*, 1 Bond, 51.

§ 932. Evidence of what the defendant stated to the witness to be the contents of a letter written by him may be received, without notice to produce the letter. *Paige v. Loring*, 1 Holmes, 275.

§ 933. It is not competent for the defendant to prove by a witness the contents of a letter and other papers said to have been transmitted to the plaintiff, without first giving evidence of their loss, or of their being actually in the possession of the plaintiff, and notice given to produce them. *Allen v. Blunt*, 2 Woodb. & M., 121.

§ 934. **License.**—The pilot commissioners of the state of Oregon being required by law to employ a secretary, and keep a record of their proceedings, the examination and licensing of a pilot by them cannot be shown by parol, without producing the minute book, or a certified copy thereof. *The California*, 1 Saw., 596.

§ 935. Where on an American vessel, seized by this government for intercourse with the enemy, important documents disappeared from the possession of the prize-master, in such a way as to indicate that they were fraudulently abstracted with the concurrence of the master of the vessel,—and such papers had been the cause of the vessel's capture,—copies thereof taken by the prize-master, and verified by his affidavit, were admitted in evidence. *The Julia*, 1 Gall., 594; 8 Cr., 181.

§ 936. **Marriage.**—Upon writ of dower the marriage was permitted to be proved by parol evidence of cohabitation as man and wife. *Blodget v. Thornton*,* 3 Cr. C. C., 176.

§ 937. **Naturalization.**—A record of naturalization need not show that all the requisites have been complied with. *It seems* that others may be shown by parol. *Stark v. Chesapeake Ins. Co.*, 7 Cr., 420.

§ 938. Naturalization of an alien cannot be proved by parol. *Slade v. Minor*,* 2 Cr. C. C., 139.

§ 939. Parol evidence is insufficient to prove that an applicant for naturalization has been

in the United States the requisite length of time under the act of April 14, 1802. Anonymous, Pet. C. C., 457.

§ 940. Parol evidence may be received to show that a foreigner residing and owning land in this country was duly naturalized, where the records containing the naturalization proceedings have been destroyed, and a long time has elapsed since he acquired the property. *Hogan v. Kurtz*, 4 Otto, 773.

§ 941. Notes.— Preliminary evidence sufficient to establish the destruction of a note. *Vuyton v. Brenell*,* 1 Wash., 469. See §§ 260, 565.

§ 942. To admit secondary evidence of a note sued on, it is not necessary that the declaration shown be upon a lost note, for this would exclude secondary evidence in all cases where the note is lost after the declaration is filed. *Renner v. Bank of Columbia*, 9 Wheat., 581.

§ 943. It is not necessary that a note should be proved to have been destroyed in order to admit secondary evidence of its contents. If it has been lost by accident, and no fault is imputable to the party, it is sufficient. If circumstances justify a well grounded belief that the original paper is kept back by design, secondary evidence ought not to be admitted. *Ibid.*

§ 944. Proof of the contents of a lost note ought to be the best the party has in his power to produce, and, at all events, such as to leave no reasonable doubt as to the substantial parts of the paper. But a notarial copy should not be demanded, as protest is not necessary. *Ibid.*

§ 945. A notarial copy of a lost note may, if connected by the testimony of witnesses with the note sued upon, be given in evidence of the contents of that note. *Peabody v. Denton*,* 2 Gall., 351.

§ 946. Where a note was left with an attorney for collection, and could not be found among his papers after his death, secondary evidence of its contents was admissible. *The Bank v. Little*,* 2 Cr. C. C., 627.

§ 947. In an action against an indorser of a note, indorsed by his agent who had authority to renew any notes of which he was maker or indorser, parol evidence may be given of the existence of a note indorsed by the defendant previous to the authority given to the agent, and that the note in suit was given to renew a note given to renew a note given to renew that note, evidence having been given that the original note has been delivered up to the maker and canceled, and that the maker is dead and it is not known who has possession of his papers. *Bank of Washington v. Pierson*, 2 Cr. C. C., 685.

§ 948. In an action against the assignor of a note the record of a former suit against the maker is only evidence of due diligence against him, but is not legal evidence of the assignment of the note so as to dispense with the production of the original. *Sebree v. Dorr*,* 9 Wheat., 558.

§ 949. A law dispensing with the formal proof of notes or assignments of them, unless the signature and the assignment is denied under oath, does not authorize the admission of a copy of a note without any excuse for the non-production of the original. *Ibid.*

§ 950. In an action by the indorsee and holder of a promissory note who has never put it in circulation, against his own indorser, the latter may prove that it was agreed in writing, which writing has been accidentally destroyed, at the time of the indorsement, that he should not be held liable or sued thereon. *Davis v. Brown*, 4 Otto, 423.

§ 951. Parol evidence is admissible to prove the loss of a chose in action, provided that it is the best evidence of which the nature of the case will admit. The rule does not in general apply to bank-notes or other instruments which pass by delivery only. But where one presents the half of a bank-note for payment, he may prove by parol that he was the owner of the whole, and that he lost the other half. *Bullet v. Bank of Pennsylvania*, 2 Wash., 172.

§ 952. Notice.— The contents of a written notice cannot be proved by parol, without notice to the party to produce it. *Underwood v. Huddleston*,* 2 Cr. C. C., 76; *Bank v. Kurtz*,* 2 Cr. C. C., 110.

§ 953. Where proceedings are had under special statutory authority, not according to the course of the common law, the recital of due notice in the record of such proceedings must be read in connection with that part of the record which gives the official evidence of notice prescribed by statute. No presumption will be allowed that other or different evidence was produced, and if the evidence in the record will not justify the recital, it will be disregarded. *Cissell v. Pulaski County*, 3 McC., 446.

§ 954. The rule being that when it is sought to conclude a party by constructive service, by publication, a strict compliance with the statute is required, and that every fact necessary to the exercise of the jurisdiction based on this mode of service must affirmatively appear in the mode prescribed by the statute, parol evidence cannot be received to supply an omission in the proof which the statute requires. *Ibid.* See *Gray v. Larrimore*, 2 Abb., 549.

§ 955. Public officers.— Parol evidence is admissible to prove the period when a person was considered by the government as minister of a foreign nation. *United States v. Liddle*, 2 Wash., 205. See §§ 492, 671.

§ 956. The rule that secondary evidence shall not be admitted where primary evidence is attainable has been relaxed in some cases for general convenience. Thus, where one has acted notoriously as a public officer, it is deemed *prima facie* evidence of his character, without producing his commission or appointment. *Jacob v. United States*, 1 Marsh., 520.

§ 957. The principle of the rule requiring the best or highest evidence is founded on the presumption that there is something in the better evidence which is withheld, adverse to the party resorting to inferior or secondary evidence. The general effect of the rule is to prevent fraud, and to induce parties to bring before juries the kind of evidence least calculated to perplex and mislead them, and the reason of the rule limits its application; consequently it does not operate where the law itself obviates the presumption of fraud which would otherwise arise. Hence, in general, to prove that a person is a public officer, it is sufficient to show that he acted as such. So, where a document is of a public nature, a copy is sometimes admitted, for the production of the original is dispensed with on account of the inconvenience resulting from the frequent removal of such papers; and therefore the absence of the original affords no presumption of fraud. *McCall v. United States*,* 1 Dak. T'y, 320.

§ 958. Receipts.—The manner of signing a receipt and the contents of it cannot be given in evidence; the receipt must be produced. *Romayne v. Duane*, 3 Wash., 246.

§ 959. A receipt offered to prove that a certain sum of money paid to the plaintiff by a third person was paid on account of the defendant cannot be admitted for this purpose, when the third party is alive and may be examined. *Jordan v. Wilkins*, 3 Wash., 110.

§ 960. The testimony of a witness that on a certain day he paid a sum of money and took a receipt is admissible though the receipt is not produced. *Meade v. Keane*,* 3 Cr. C. C., 51.

§ 961. Receipts signed by a collector, showing the aggregate amount of the alphabetical assessment lists, even if not sufficient alone to charge him with the sums charged as taxes collected upon the assessment lists, are nevertheless competent evidence, which, by other testimony, may be made full proof. They are not secondary evidence, because they show the existence of other receipts more in detail. *United States v. Hunt*, 15 Otto, 183.

§ 962. Miscellaneous.—For the purpose of identifying certain barrels as those mentioned in a steamer's manifest, a witness' description of the marks on the heads is admissible without showing the loss of the heads. *United States v. Graff*,* 14 Blatch., 381.

§ 963. It is admissible to prove the name on a trunk without producing it in court. *Kansas Pacific Railway Co. v. Miller*,* 2 Colo. T'y, 442.

§ 964. Under the law of Texas of May 18, 1846, it is sufficient to file a certified copy of a lost document with the papers in the case and give notice of an intention to use it as evidence on the trial three days before the trial, but it is not necessary to make proof of the loss of the document until the time of trial. *Hanrick v. Barton*,* 16 Wall., 166.

§ 965. The local record of a mining community, while it may be the best evidence of the rules and customs governing the community, and to some extent the distribution of mining rights, is not the best or only evidence of priority or extent of actual possession. *Campbell v. Rankin*, 9 Otto, 261.

§ 966. To prove that a permit to purchase cotton in the south during the rebellion was issued by the special treasury agent, the best evidence is the permit itself. But if it is not produced on call, secondary evidence is admissible. Of such evidence there are no degrees, and the testimony of the agent is as good as his books. *Butler v. Maples*, 9 Wall., 766.

§ 967. The acts and proceedings of a board of commissioners of a navy hospital may be shown by oral evidence where the law requires no record to be kept. *United States v. Fillebrown*, 7 Pet., 28.

§ 968. In an action against a surety on a marshal's bond, the marshal being charged with failing to account for moneys advanced to him by the secretary of the treasury, under the special direction of the president, the instruction of the president to the secretary of the treasury may be proved by oral evidence where the witness (a clerk in the treasury department) proves (1) the existence of a special written instruction from the president, made expressly to carry into effect a law, and forming the established rule and usage of the department; (2) a conflagration in the treasury department, the legal and proper depository for this instruction; and (3) the belief of the witness that the document was destroyed by the conflagration. *Williams v. United States*, 1 How., 290.

§ 969. If one set of instructions of the postmaster-general has superseded another set, the evidence is to be sought by comparing them, and parol evidence cannot be given. *Dunlop v. Munroe*, 7 Cr., 242.

§ 970. A partnership cannot be proved by parol evidence of the contents of cards bearing the firm name; the cards must be produced. *Wilson v. Colman*,* 1 Cr. C. C., 408.

§ 971. In order to prove the loss of a power of attorney to convey land forty years after the execution thereof, so as to let in secondary evidence, an affidavit of the grantee of the attorney in fact was read, stating that he believed the power of attorney to be lost or destroyed;

also a deposition, made by one who had searched among the papers of the attorney in fact, stating that he believed the same to be lost or destroyed; also a deposition by the widow of the attorney in fact; also the deposition of one stating that he had made several searches for the power of attorney in the office of the clerk of the county (where it was recorded), and in other places, and an application to the wife of the grantor in the power of attorney, and to the son of the attorney in fact, and had made an advertisement in two newspapers in the state respecting the same, all of which proved ineffectual; *held*, that sufficient ground was laid to let in secondary proof. *Winn v. Patterson*,* 9 Pet., 663.

§ 972. In a suit for the infringement of a patent, parol proof of a lost memorandum containing a list of the rights sold by the patentee, and among others an assignment of part of this patent to the person under whom the defendants claimed, was held inadmissible. *Baldwin v. Sibley*, 1 Cliff., 150.

§ 973. The interest due on bonds may be recovered without the production of the coupons, when the owner can show that they are wrongfully withheld from him in the territory of an enemy, and also that they were so withheld when they became due, so that no one can have acquired the rights to them of a *bona fide* holder without notice. *Union Bank of Louisiana v. City of New Orleans*,* 14 Am. L. Reg., 555.

§ 974. A telegram was held inadmissible against a defendant where the original was not produced, nor proved to have been in the handwriting of the defendant, or sent or authorized by him. *United States v. Babcock*,* 3 Dill., 571.

§ 975. Where a warrant under which an arrest was made has been given by the constable to a third person, who is not summoned as a witness, the court will not allow secondary evidence of the contents of the warrant without some evidence that the warrant is lost. *United States v. Long*,* 1 Cr. C. C., 373.

§ 976. An office copy of a will is good evidence of the contents of the will on proof of loss of the original. *Spencer v. Spencer*,* 1 Gall., 624.

§ 977. The rule requiring the production of the best evidence does not require that, where there are several witnesses to the same facts, all shall be produced. The evidence may be less conclusive or less satisfactory, if only one is produced, but it is none the less competent. *United States v. Gibert*, 2 Sumn., 19.

§ 978. It is held that parol evidence is admissible to show that the whole number of commissioners was present at an election for mayor of the city of Washington. *United States v. Carbery*, 2 Cr. C. C., 358.

§ 979. Copies—Authentication, etc.—A letter-press copy of a letter, made at the time a letter was written, cannot be received in evidence as an original. *Chapin v. Siger*, 4 McL., 378.

§ 980. Shipping articles having been examined and proved in the presence of a commissioner, upon the hearing on return of the summons, and restored to the vessel, and taken with her on her voyage, it seems that a copy certified by the commissioner is admissible in a suit for wages. *Henry v. Curry*, Abb. Adm., 433.

§ 981. A copy of a ship's register, certified by the register of the treasury to be a copy of the original register on file in his office, accompanied by a certificate of the secretary of the treasury, under the seal of the department, that the person certifying the copy is the register, and that the document is duly authenticated, is admissible in evidence as tending to show the character of the vessel. *Catlett v. Pacific Insurance Co.*, 1 Paine, 594.

§ 982. To introduce into a cause the copy of any paper, the truth of that copy must be established, and sufficient reasons for the non-production of the original must be shown. *Smith v. Carrington*, 4 Cr., 62.

§ 983. Manifests of cargoes being required by law to be recorded, a copy certified under the hands and seals of the custom-house officers, and proved by a witness who has compared it with the record, may be received in evidence. *United States v. Johns*, 4 Dall., 412.

§ 984. A copy of the manifest of the cargo of a vessel, taken at Havana, certified under the hand of an officer called a notary of registers, without a seal, with a certificate annexed, signed by three notaries, under the seal of the college of notaries, stating that full faith and credit has and ought to be given to the authentication of the notary of registers, was rejected by the court because it did not appear that the notary had charge of these papers, and had authority to authenticate them. *Talcott v. Delaware Insurance Co.*, 2 Wash., 449.

§ 985. Where the common law proof of a writing has been changed by statute, and copies substituted in place of originals, the mode of authentication required by the statute must be strictly pursued; all that the act requires should appear from the face of the new evidence. So where the statute provided that marshals' bonds should be filed and recorded, and that certified copies should be evidence, it was held that, where the certificate did not show the filing and recording of the bond, it was inadmissible. *United States v. Robinson*,* 1 Wall. Jr., 161.

§ 986. The opinions of the supreme court of the United States not being filed with the clerk, he cannot certify copies of them under the seal of the court. The reporter only can furnish authenticated copies. *Anonymous*, 3 Pet., 397.

§ 987. In Pennsylvania a certified copy of the record of an award is inadmissible, because it is not required by the laws of Pennsylvania to be recorded. *James v. Gordon*,* 1 Wash., 333.

§ 988. A copy of an instrument is not admissible in evidence unless the original be accounted for. But by the civil law, which prevails in Louisiana, where a contract or other act is executed before a notary, the original remains in his possession, and cannot be taken away, and a copy certified by him, or his successor, to be a true one, is admissible in evidence. The original not being deliverable to the parties, its non-production is sufficiently accounted for to admit a copy in suits in other states. *Owings v. Hull*, 9 Pet., 607.

§ 989. By the law of Louisiana the notary is required to record all protests of bills made by him and notices given, and this is the original, a certified copy of which is made evidence. And such a certified copy, attached to a deposition of the notary, is competent to prove the fact of protest. *McAfee v. Doremus*, 5 How., 53.

§ 990. — **public records.**— The provision of the act of congress of March 3, 1797, rendering admissible in evidence copies of bonds, contracts and other papers relating to or connected with the settlement of any accounts between the United States and any individual, is not restricted to cases where suits are commenced under the first section of the act, but is general and applies to all cases where the evidence is required. *United States v. Lent*, 1 Paine, 417. See §§ 362, 879, 914.

§ 991. In an action on a postmaster's bond, a copy of the bond, duly authenticated according to the act of congress, may be admitted in evidence. *United States v. Wilkinson*, 12 How., 246.

§ 992. In an action upon an official bond, the execution of which is denied, its execution cannot be proved by a copy certified under section 882 of the Revised Statutes, but it must be certified under section 886, by the register, subject to the right of the defendant to call for the original instrument. *United States v. Humason*, 7 Saw., 252.

§ 993. In a suit in equity for an account between members of a partnership, copies of accounts and papers on file in the office of the quartermaster-general, relating to the sale and delivery of horses for the use of the government by the partnership, are admissible in evidence, such copies being authenticated by the certificate of the third auditor of the treasury as true copies, and the official character of the third auditor being certified by the secretary of the treasury. The act of congress provides that copies of such papers shall be evidence in the courts. *Thompson v. Smith*, 2 Bond, 320.

§ 994. In a suit upon a collector's bond, the certificate of the secretary of the treasury was held to be a sufficient authentication of a copy of the bond, where the original was in the custody of that department, and was wholly disconnected from the settlement of the account embraced in the transcript evidenced by the certificate of the register. *Chadwick v. United States*, 3 Fed. R., 750.

§ 995. The statutes providing for the authentication of copies of documents in the executive departments are to be understood and interpreted by the same reasons that govern the common law. The words "documents and papers" used in the acts of congress cannot be held to mean every document on file, but such only as were made by officers of the government in the course of their duty. A receipt for property captured, procured from a military governor by a claimant, and by him filed in an executive department, is not such an official document, and an authenticated copy cannot be read in evidence. The original must be produced and proved. *Block's Case*,* 7 Ct. Cl., 406.

§ 996. Papers filed with the secretary of the treasury, and which have become a part of the archives and records of his office, need not be produced, but are proved by copies certified by the officer having them in charge. The government is not bound to furnish either the originals or certified copies to suitors with whom it is contending, unless upon demand at the proper office, and tender of lawful fees. Notice to produce the originals at the trial, given to the counsel for the government, does not authorize the use of other evidence of their contents than the properly certified copies. *Barney v. Schneider*, 9 Wall., 248.

§ 997. Photographic copies of papers which are on file in the war department, and which cannot be removed without public detriment and inconvenience, which copies are authenticated in the usual way by proof of handwriting, are admissible in evidence. *Leathers v. Salvor Wrecking Company*, 2 Woods, 680.

§ 998. A copy of the proceedings of the commissioners of bankruptcy in England, certified by a notary public at Liverpool and by the American consul there; and another such copy certified by a notary public and the mayor of Liverpool, were rejected as evidence because they were not recorded in England, so as to make them evidence there — as required by the act of assembly,—and because they were not sworn copies. *Leay v. Wilson*, 1 Cr. C. C., 191.

§ 999. A copy of a record of condemnation proceedings, without the seal of the officer who made the copy, was rejected in this case, it not appearing whether the officer had a seal or not. *Talcott v. Delaware Insurance Co.*, 2 Wash., 449.

§ 1000. A transcript from a record required by law to be kept by a county auditor cannot be received in evidence if it differs from the record in an essential matter. *Miner v. McLean*, 4 McL., 138.

§ 1001. A certified copy of the docket entries is not legal evidence of a record. *Cromwell v. Bank of Pittsburg*, 2 Wall. Jr., 569.

§ 1002. An exemplified copy of a judgment, attested by the clerk, with the seal of the court, and the proper attestation by the judge, is competent evidence of the judgment in a federal court in another state, under the act of congress of May 20, 1790, although it is not such as is used in the courts of the state where the judgment was rendered, or at common law. *Taylor v. Carpenter*, 2 Woodb. & M., 1.

§ 1003. Upon an indictment for bigamy, a certified copy of the bond given by the prisoner to the clerk of the court of hustings in Richmond to obtain a marriage license, when offered in behalf of the United States, was rejected. *United States v. Lambert*, 2 Cr. C. C., 137.

§ 1004. A copy of a will and the probate thereon, certified by the judge of probate, but not under the seal of the court, was admitted in evidence in this case, on the certificate of the judge that the court had no seal, the court overruling parol proof to the contrary. *Morgan v. Curtenius*, 4 McL., 366.

§ 1005. A duly authenticated copy of an official letter of instructions from the state auditor of Ohio to a county auditor is competent evidence, the original being an office paper in the proper keeping of the county auditor, which cannot be taken from the files. *Raymond v. Longworth*, 4 McL., 481.

§ 1006. — laws.— An exemplification of a state law under the seal of the state is admissible in evidence in a federal court without further attestation. *United States v. Johns*, 4 Dall., 412. See §§ 491, 920.

§ 1007. Under the act of congress of May 26, 1790, relating to the authentication of the public acts of judicial and other bodies, the certificate of the clerk of the executive council, and the seal of state annexed, is a sufficient authentication of an act of a state legislature. *United States v. Johns*, 1 Wash., 363.

§ 1008. Under the act of congress of May 26, 1790, prescribing the mode in which the public acts, records and judicial proceedings of each state shall be authenticated so as to take effect in every other state, the seal of the state is a sufficient authentication of an act of the legislature. The annexation of the seal is presumed to have been made by the person authorized. And erasures and written interlineations in the printed copy certified are presumed to have been there before the seal was affixed. *United States v. Amedy*, 11 Wheat., 392.

§ 1009. The statute book of a state, purporting to be published by authority of the legislature of that state, and deposited in the state department of the United States, under the act of congress requiring the secretary of state to obtain copies of the laws of the several states, and accompanied by the testimony of a lawyer of that state that that edition of the laws is admitted as authentic in the courts of that state, is admissible as evidence of a law of such state in the courts of the District of Columbia. And it need not be authenticated according to the provisions of the act of congress of May 26, 1790. *Commercial and Farmers' Bank of Baltimore v. Patterson*, 2 Cr. C. C., 346.

§ 1010. The act of the legislature of Louisiana of August 11, 1868, entitled "An act to increase the revenues of the state and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force," is a public act, and may be proved in a federal court by the introduction of the volume of state laws in which it is contained, published by the authority of the legislature. *United States v. Noelke*, 17 Blatch., 554.

§ 1011. A pamphlet of the laws of Maryland, published by authority of its legislature, and proved by a witness to be the book which is admitted in the courts of Maryland as evidence of the laws of that state, is admissible in the courts of the District of Columbia to prove an act of that state incorporating a company. *Rockville & Washington Turnpike Road v. Andrews*, 2 Cr. C. C., 451.

§ 1012. In order to introduce in evidence the written local mining laws of a district, it is necessary that it should appear *aliunde* that the copy comes from the proper custody, that the person certifying the copy was authorized to certify copies, and that the copy is a copy of the laws in force in the district at the required date. These things cannot be shown by affidavit. *Roberts v. Wilson*,* 1 Utah T'y, 292.

§ 1013. — legislative journals.— Copies of the journals, certified by the secretary of state, and the printed journals, published in obedience to law, are both competent evidence of the proceedings of the legislature. *Post v. Supervisors*, 15 Otto, 667.

§ 1014. By virtue of the statute of Illinois of February 12, 1849, the copies of the original daily journals kept by the clerks of the two houses, made by persons contracted with or employed for the purpose as authorized and directed by that act (though not sworn public officers), in well bound books furnished by the secretary of state, pursuant to the duty thereby imposed on him, and afterwards deposited and kept in his office, are official records in his custody, copies of which certified by him are admissible upon settled rules of evidence; and neither the competency nor effect of such copies is impaired by the loss or destruction of the daily journals or minutes. *Ibid.*

§ 1015. — **land titles; deeds and surveys.**—Official copies of papers belonging to the title of the parties, taken from the office in which those papers are kept, and regularly authenticated, may be received in evidence. *Blunt v. Smith*, 7 Wheat., 248. See §§ 242, 890, 898, 900, 907, 2355.

§ 1016. A certified copy of a survey from the surveyor-general's office is admissible in evidence. *Meehan v. Forsyth*, 24 How., 175.

§ 1017. Copies of the records appertaining to the land office, certified by the register, are evidence in Mississippi, and the certificate of the commissioner of the general land office is not necessary. *Best v. Polk*, 18 Wall, 112.

§ 1018. A copy of a grant given by a public officer whose duty it is to keep the original ought to be received in evidence. So held with respect to a grant of lands by a Spanish officer in Florida, where the original was kept by the officer, and a copy delivered to the grantee to serve him as a title in form. *United States v. Percheman*, 7 Pet., 51.

§ 1019. Deeds of confirmation of titles to land in Florida derived from the Indian tribes, being preserved in the office as the record, and a *testimonio* or copy delivered to the party and certified to be the original paper, according to the civil law then in force in Florida, this *testimonio* or copy is admissible in evidence. *Mitchel v. United States*, 9 Pet., 711.

§ 1020. In Texas a certified copy of a Mexican title from the general land office is *prima facie* evidence of its existence, since it will be presumed that the original is an archive of the land office. *Airhart v. Massieu*, 8 Otto, 491.

§ 1021. A certified extract from the surveyor-general's office is not evidence, not being a copy of any document on record in the office. *Griffith v. Tunckhouser*, Pet. C. C., 418.

§ 1022. A connected plot of different tracts, made out and put together in the land office by an officer thereof, is not evidence, because it does not profess to be a copy of any plot of record in the office. *Ibid.*

§ 1023. A copy of letters testamentary which have been granted by the court of probates of Louisiana, certified by the clerk and register thereof to be a true copy of the original, accompanied by his certificate that he cannot send the original, which is on file in the court, is admissible as being the best evidence which the nature of the case admits of. *Owings v. Hull*, 9 Pet., 607.

§ 1024. By a statute of Indiana of 1824, a duly certified copy of a will made and recorded in another state, passing lands or other property in Indiana, is made admissible evidence. *O'Brien v. Woody*, 4 McL., 75.

§ 1025. A copy of a deed from the public records was permitted to be read in evidence, where the original was not in the possession of the party offering the copy, and such party had been informed by the persons with whom it had been deposited that it had been lost, the deed having been regularly recorded, and no suspicion attaching to the instrument. *Gregg v. Forsyth*, 24 How., 179.

§ 1026. The law which makes copies of the record of a conveyance evidence when duly certified is satisfied by the certificate of the officer who has legal custody of the records, though he is not the same officer who had charge of the records at the time the conveyance was recorded. So where a conveyance was recorded by the register of probate as provided by law, a copy certified by the register of deeds, to whom the records were afterwards transferred by law, was held admissible. *New York Dry Dock v. Hicks*,* 5 McL., 111.

§ 1027. An exemplification of a record of a deed is admissible as evidence of the same dignity as the deed itself. And this rule exists in states which have adopted the civil law. *United States v. Sutter*, 21 How., 170.

§ 1028. Copies of deeds in the land-record books of the county of Washington, D. C., may be read in evidence. *Bank of United States v. Benning*, 4 Cr. C. C., 81.

§ 1029. Where a conveyance of land situated in Texas was made according to the civil law, in Louisiana, in 1836, being made in a notary's book and a copy furnished to the grantee, as a second original, this copy was held admissible in evidence in a suit in Texas, a witness, who had examined the original in the book of the notary, having testified that the copy was a true one; that he was acquainted with the handwriting of the notary, who was dead, and that it was genuine; and that the signature of one of the subscribing witnesses, with whose handwriting he was acquainted, and who was since dead, was genuine. *White v. Burnley*, 20 How., 235.

§ 1030. A copy of deed offered in evidence, certified by A. B., deputy register, for C. D., register, was held to have been properly certified. *Cook v. Hunter*,* 2 Overt. (Tenn.), 113.

§ 1031. Under the law of Maryland, an office copy of a recorded deed is admissible in evidence, without proving the loss of the original. *Dick v. Balch*, 8 Pet., 30.

§ 1032. If a deed, executed in Michigan according to the laws of that state, and recorded in Illinois, where the land is situated, is proved to have been lost, a certified copy of the record is, by the statute of Illinois, admissible in evidence. *Elwood v. Flannigan*, 14 Otto, 562.

§ 1033. Under the laws of Michigan, providing that a conveyance of lands within the territory, executed without the territory in conformity to the laws of the place of execution, should be valid and might be recorded, a properly certified copy of the record of such a deed is admissible in evidence. *New York Dry Dock v. Hicks*,* 5 McL., 111.

§ 1034. Where a deed conveyed land in several counties and was recorded in one of those counties, it was held, under the act of Pennsylvania of 1715, that an exemplification of the deed was good evidence as to the lands in the other counties. *McKeen v. Delancey's Lessee*, 5 Cr., 22.

§ 1035. A record copy of a deed not required by law to be recorded is not evidence. *Lemon v. Bacon*, 4 Cr. C. C., 466.

§ 1036. An exemplification of the record of a copy of a deed cannot be received in evidence, the copy not being legally entitled to be recorded. *Barger v. Miller*, 4 Wash., 280.

§ 1037. The copy of a deed taken from the record of the probate court where it was recorded is not admissible in evidence without accounting for the original, where there is no law of the state authorizing the use of such copies in place of and without accounting for the original, and the registry acts do not assign any value to the record as evidence in the courts. *Griffin v. Reynolds*, 17 How., 609.

§ 1038. A copy of a recorded deed, certified by the recorder, but not authenticated by his seal as required by law, is not admissible in evidence. *Hotchkiss v. Glasgow*, 5 McL., 424.

§ 1039. Registration of a deed being necessary to pass title under the law of North Carolina, and registration of a copy being unauthorized by the law of that state, a certified copy of a registered copy cannot be received in evidence. *Olcott v. Bynum*, 17 Wall., 44.

IV. PAROL EVIDENCE TO AFFECT WRITTEN INSTRUMENTS.

SUMMARY—*To explain the meaning of phrases*, § 1040.—*To explain the word "agents" in a bill of exchange*, § 1041.—*To show that a cashier acted for his bank*, § 1042.—*To prove collateral agreement*, § 1043.—*To explain an offer of compromise*, § 1044.—*To identify lands in a sheriff's deed*, § 1045.—*To establish a boundary line*, § 1046.—*To add to an incomplete contract*, § 1047.—*To show consideration*, § 1048.—*To show time of payment*, § 1049.—*To show custom or usage*, §§ 1050-52.—*As to understanding of parties*, § 1053.—*Oral agreement as to place of payment of note*, § 1054.—*Not admissible to vary bill of exchange*, §§ 1055-56.—*Oral guaranty to vary or add to a contract*, § 1057.—*As to change in shipping articles*, § 1058.

§ 1040. By a written agreement A. agreed to "hire the steamboat Franklin until the Sydney is placed on the route." The agreement was made in the autumn, with the expectation that the Sydney would be put on in a few days, but she was not ready till the following spring. During the winter the river was frozen and A. had no occasion for a steamboat. It was held that oral evidence was admissible to show that the phrase "until the Sydney is placed on the route" was not intended as an absolute limitation of time, but to denote a short period. *Bradley v. Washington, etc., Packet Co.*, §§ 1059-63.

§ 1041. When a bill of exchange is drawn and signed by a firm with the firm signature, and the word "agents" added to that signature, parol evidence is admissible to show that they signed the bill only as agents of a firm whose name does not appear on the bill. *Dessau v. Bours*, §§ 1064-66.

§ 1042. When a promissory note is given to "A., cashier," parol evidence is admissible to show that the promise was made to him as cashier of a bank, and that the promise was intended to be made to the bank. Such evidence has no tendency to vary or contradict the terms of the written instrument. *Baldwin v. Bank of Newbury*, §§ 1067-69.

§ 1043. When a promissory note, given in payment for property sold, provides that the property shall be delivered when the note is paid, oral evidence is admissible to prove that, at the sale, it was agreed that the title to the property should remain in the vendor until the purchase money should be paid. *Truman v. Hardin*, §§ 1070-71.

§ 1044. When an offer of compromise is contained in a letter, oral evidence may be introduced to explain the offer of compromise. *West v. Smith*, §§ 1072-74.

§ 1045. When a sheriff's levy and deed of real estate contains a description of the premises

which is ambiguous, oral evidence is admissible to show what real estate is meant by the description. *Atkinson v. Cummins*, § 1075.

§ 1046. When a deed refers to a plat or map to fix a boundary line, and this map is not found, but oral evidence is offered which fixes the position of the line, such evidence is admissible to fix the line and to prevent the deed from being void for uncertainty. *Deery v. Cray*, §§ 1076-77.

§ 1047. A mate signed articles for a voyage from San Francisco to Calcutta, no rate of wages being specified. At Calcutta he was discharged and returned to Boston before the mast. He sued the owners and master of the vessel, claiming and offering parol evidence to prove that he shipped for a voyage from San Francisco to Boston via Calcutta, at a specified rate of wages. It was held that as this evidence did not alter the written contract in the articles, which did not purport to contain the whole contract, the evidence was admissible. *Sheffield v. Page*, §§ 1078-83.

§ 1048. When a written promise, signed by one person, and without consideration, is shown to be only a part of a complete oral contract and not intended by the parties to be a full memorandum of the contract, oral evidence is admissible to show that the consideration of the agreement was another promise. *Lafitte v. Shawcross*, §§ 1084-85.

§ 1049. When, in a written contract of sale, the time of payment is not specified, parol evidence is admissible to show what time was agreed upon by the parties. *Halsey v. Hurd*, §§ 1086-89.

§ 1050. Oral evidence of a custom or usage in a trade may be given to explain the meaning of a written contract relating to that trade, because the parties are supposed to know such custom and to contract with reference to it; but if the terms of the written contract are inconsistent with such custom, this rebuts the supposition, and oral evidence of such custom is inadmissible. *Robinson v. United States*, §§ 1090-91.

§ 1051. Oral evidence of a custom in the grain trade to deliver barley in sacks is admissible in a suit on a contract which specifies the quality of the barley, the times of delivery, the quantities and the place, but does not specify whether it was to be delivered in sacks or in bulk. *Ibid.*

§ 1052. Where the language of a written contract is neither technical nor ambiguous, oral evidence of a custom or usage is inadmissible to vary the terms of the contract. *Partridge v. Insurance Co.*, §§ 1092-93.

§ 1053. Where a contract is made between the bondholders and stockholders of a railroad, by which a certain amount of preferred stock is issued, and this contract is contained in an indenture, oral evidence of the understanding of the parties to the contract is not admissible to vary the written terms. If there are several writings referring to the same subject-matter, they may all be construed together, to get at the meaning of the parties. *Bailey v. Railroad Co.*, §§ 1094-95.

§ 1054. An oral agreement entered into at the time of the making of a note, between the maker and one who subsequently becomes an indorsee, fixing the place at which the note shall be payable, is a nullity, and does not affect the payee's liability. *Specht v. Howard*, § 1096.

§ 1055. Evidence of an oral agreement, alleged to have been made at the time of the drawing, making or indorsing of a bill or note cannot be permitted to vary, qualify or contradict, or add to or subtract from, the absolute terms of the written contract. *Forsythe v. Kimball*, § 1097.

§ 1056. Parol evidence is inadmissible to prove an agreement by the payee of a bill of exchange not to present it for acceptance till after a certain other draft had been paid. *Brown v. Wiley*, § 1098.

§ 1057. An oral guaranty, made at the same time with a written agreement, which purports to cover the whole contract of the parties relative to the subject-matter, is not admissible in evidence to alter or contradict the written agreement or to show a failure of consideration. *Buchtel v. Mason Lumber Co.*, §§ 1099-1101.

§ 1058. The shipping articles being kept in the possession of the master of a vessel, oral evidence to prove that part of the articles were inserted after the voyage was partly performed is inadmissible in behalf of the owners, in a suit by a seaman for wages. *The Triton*, § 1102.

[NOTES.— See §§ 1103-1391.]

BRADLEY v. WASHINGTON STEAM PACKET COMPANY.

(13 Peters, 89-106. 1839.)

Opinion by MR. JUSTICE BARBOUR.

STATEMENT OF FACTS.— This case is brought before us by a writ of error to a judgment of the circuit court of the District of Columbia, for the county of

Washington. It was an action of *assumpsit*, brought by the defendants in error, against the plaintiff in error, to recover a sum claimed for the hire of the steamboat Franklin.

The claim was founded upon a written contract, concluded between the parties, by the following correspondence: On the 19th of November, 1831, the plaintiff in error wrote to the defendants in error, a note, of which the following is a copy: "I agree to hire the steamboat Franklin until the Sydney is placed on the route, to commence to-morrow, 20th instant, at (\$35) thirty-five dollars per day, clear of all expenses other than the wages of Captain Nevitt. W. A. Bradley."

To this note, W. Gunton, as president of the company, replied on the same day, in the following words: "On the part of the Washington, Alexandria & Georgetown Steam Packet Company, I agree to the terms offered by William A. Bradley, Esq., for the use of the steamboat Franklin until the Sydney is placed on the route to Potomac creek, which is \$35 per day, clear of all expenses, other than the wages of Captain Nevitt, which are to be paid by our company."

Upon the trial of the cause, on issue joined, upon the plea of *non assumpsit*, a bill of exceptions was taken by the defendant; from which it appears that the plaintiffs in the court below, having given in evidence the correspondence already stated, further gave in evidence a note, signed by William A. Bradley, dated December 5, 1831, addressed to Pishey Thompson, requesting him to advise the president and directors of the Steam Packet Company that, the navigation of the Potomac being closed by ice, they had that day commenced carrying the mail by land, under their winter arrangement, and had, therefore, no further occasion for the steamboat Franklin, which was then in Alexandria, in charge of Captain Nevitt; and offering to pay the balance due for the use of the Franklin, on the presentation of a bill and receipt therefor; and also a letter from W. Gunton, addressed to William A. Bradley, dated the 6th December, 1831, in which, after stating that the letter of the 5th, from Bradley to Thompson, had been submitted to the board of directors of the company, he informed him that the board could not admit his right to terminate his agreement on the grounds which he had stated in his note to Thompson; and that they regarded it as being still in full force, and the boat as being in his charge. The plaintiff also proved that the steamboat Sydney was not placed on the route until the 7th of February, 1832; that the Sydney belonged to the defendant, and that she was not finished so as to be able to start from Baltimore until the 25th of January. And thereupon the plaintiffs claimed the hire of the steamboat Franklin from the 20th of November, 1831, to the 6th of February, 1832, seventy-nine days, at \$35 per day, allowing credit for \$350, paid by the defendant, and leaving a balance of \$2,415.

It appears from the bill of exceptions that after the plaintiff had closed his evidence, the defendant, amongst other things, offered to prove that he for several years had been, and then was, contractor for the transportation of the mail from Washington to Fredericksburg; that the customary route of said mail was by steamboat from Washington to the Potomac creek, thence by land to Fredericksburg, and that passengers were also transported on that route; that he kept an establishment of horses and stages, for the transportation of the said mail all the way by land from Washington to Fredericksburg, at seasons when the navigation of steamboats was stopped by ice; and had been obliged for a considerable portion of every winter, during the time he

had been so employed in the transportation of the mail, to use his said stages and horses, for the transportation of the mail, all the way by land to Fredericksburg, in the meantime laying up his steamboat; that just before the date of the contract, the defendant's own steamboat, usually employed on said route, had been disabled, and the defendant was at the time about completing a new boat, called the Sydney, which had been built at Washington, and sent round to Baltimore for the purpose of being fitted with her engine and other equipments; that, in January, 1832, the Sydney, being completely equipped, left Baltimore for Washington, as soon as the state of the ice made it practicable to attempt the voyage, was stopped by ice, and obliged to put in at Annapolis, whence she proceeded to Washington, as soon as the ice left it practicable; arrived at Washington on the 6th of February, 1832, and was on the next day placed by defendant on the route; that the 5th of December, 1831, Captain Nevitt, the commander of the Franklin, refused to go on the said route of the defendant, in consequence of the ice then forming in the river, unless he was directed to do so by the plaintiffs; that upon application to the president of the company, he directed the captain to proceed as required, and obey the orders of the defendant; that the captain did then proceed on the route, and returned as far as Alexandria, where he stopped, and sent up the mail by land, and, although required by defendant's agent, refused to come up to Washington with the said boat, in consequence of the ice which had formed in the river; and that the said boat lay at Alexandria, frozen up in the harbor, from that time to the 5th of February, 1832; that it was matter of notoriety, and known to and understood by the plaintiffs, at the time the contract in question was made, that as soon as the navigation should be closed by the ice, the United States mail from Washington to Fredericksburg would have to be transported all the way by land carriage, instead of being transported by steamboat to Potomac creek, and thence by land to Fredericksburg; and that the steamboat Franklin would not be required by defendant, and could not be used under said contract when the navigation should be closed.

The court refused to permit the evidence thus offered by the defendant to go to the jury. And then, on the motion of the plaintiffs, instructed the jury that if they believed from the evidence that the defendant wrote to the plaintiffs the paper of the 19th of November, 1831, and that the plaintiffs accepted the offer, by the same date, and that plaintiffs and defendant respectively wrote to each other the papers bearing date the 5th and 6th of December, 1831, and that the steamboat Sydney did in fact first arrive in the river Potomac on the 6th of February, 1832, and was placed on the route to Potomac creek on the 7th of February, 1832, that then the plaintiffs were entitled to recover, under the contract so proved, at the rate of \$35 *per diem*, from the 20th of November, 1831, to the 6th of February, 1832, both inclusive.

The questions then arising upon this record are: first, whether the court erred in refusing to permit the evidence offered by the defendant to go to the jury? and secondly, whether they erred in giving the instruction to the jury which they did give, at the instance of the plaintiffs?

§ 1059. *Parol evidence is admissible to explain a latent but not a patent ambiguity.*

As to the first question. It is a principle recognized and acted upon by all courts of justice, as a cardinal rule in the construction of all contracts, that the intention of the parties is to be inquired into, and, if not forbidden by law, is

to be effectuated. But the law has laid down certain rules, declaring by what kind of proof in any given case this intention is to be ascertained.

Amongst these rules, a leading one in relation to written contracts, to which class the one in question belongs, is this: That extrinsic evidence is not admissible to explain a patent ambiguity; that is, one apparent on the face of the instrument; but that it is admissible to explain a latent ambiguity; that is, one not apparent on the face of the instrument, but one arising from extrinsic evidence; for this is but to remove the ambiguity by the same kind of evidence as that by which it is created. The rule thus stated seems to be in itself quite plain and intelligible, and yet much difficulty has arisen in its application. The illustration most usually given of the operation of this rule, in the admission of extrinsic evidence, is that of a description of a devisee, or of an estate, in a will, where it turns out that there are two persons, or two estates, of the same name and description. These, however, are put, not as measuring the extent of the rule, but as exemplifying its application; and all other cases within the scope of the principle are, in like manner, open to explanation, by the same kind of evidence.

§ 1060. — *or to apply a written instrument to its subject-matter.*

Accordingly it is laid down, in a very accurate writer on the subject of evidence (3 Starkie, 1021), that extrinsic parol evidence is admissible to give effect to a written instrument, by applying it to its proper subject-matter. Let us examine some of the many cases which have been decided upon the subject of the admissibility of this evidence, in relation to written instruments.

In the first place, wherever there is a doubt as to the extent of the subject devised by will, or demised, or sold, it is matter of extrinsic evidence to show what is included under the description, as parcel of it. Accordingly, in 1 Term R., 701, Buller, judge, said, whether parcel or not of the thing demised is always matter of evidence. So where a grantor in a deed described the premises as the farm on which he then dwelt, this was held to be a latent ambiguity, which might be explained by evidence *aliunde*; and evidence was admitted that a particular piece of land, claimed under the deed, was at the time of the grant in a state of nature, uninclosed, and separate from the rest of the farm, and that the grantor remained in possession, and occupied it as his own till his death — to show that it was not within the grant. 4 Day, 265.

In 8 Johns., 116, the case was this: A., by a written contract, agreed to receive of B. sixty shares of the Hudson Bank, on which \$10 per share had been paid, and to deliver B. his note for \$667, and pay him the balance in cash, and also to pay five per cent. advance. It was decided that this was a case of latent ambiguity, and the nominal value of each share being \$50, parol evidence was admitted, to show whether the five per cent. advance was to be paid on the sum paid in only, or of the nominal amount.

In 2 Leigh, 630, the principle is laid down by the court, that parol evidence is not admissible to vary, contradict, add to, or explain a written agreement; but in cases of equivocal written agreements, the circumstances under which they were made may be given in evidence to explain their meaning. In the case of *Birch v. Depeyster*, 1 Starkie's Cases, 210, the charter-party stipulated that the captain should receive a specific sum in lieu of privilege and primage, and the question was, whether the terms of the contract excluded all right on the part of the captain to use the cabin for the carriage of goods, on his own account. Gibbs, chief justice, said: Evidence may be received to show the sense in which the mercantile part of the nation use the term privilege, just as

you would look into a dictionary to ascertain the meaning of a word; and it must be taken to be used by the parties in its mercantile and established sense.

So where a charter-party stipulated that a freighter should pay a certain sum per pound, etc., British weight, it was held that, as the word weight had two meanings, gross and neat, this was such a latent ambiguity as to warrant the introduction of parol testimony. 1 Nott & McC., 45. In the case of *Peisch v. Dickson*, 1 Mason, 11, it is said by the judge, that if, by a written contract, a party were to assign his freight in a particular ship, it seemed to him that parol evidence might be admitted of the circumstances under which the contract was made, to ascertain whether it referred to goods on board the ship, or an interest in the earnings of the ship; or in other words, to show in what sense the parties intended to use the term.

Nor is this principle at all confined to mercantile contracts; for in *Robertson v. French*, 4 East, 130, Lord Ellenborough, speaking on this subject, said that the same rule which applied to all other instruments applied also to a policy of insurance. The admission of this kind of proof has been carried to a great extent, too, with a view to a correct construction of wills. In the case of *Shelton's Executors v. Shelton*, 1 Wash., 56, it is said that, to discover the intention of a testator, parol evidence may be admitted of his circumstances, situation, connection with the legatees, and his transactions between the making of his will and his death. And this same doctrine is advanced by the same court, in 3 Hen. & Mun., 283.

We will close this reference to cases with that of *The Mechanics' Bank v. The Bank of Columbia*, 5 Wheat., 326 (AGENCY, §§ 45, 46). In that case, it was held by this court, that where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or a private act, parol evidence was admissible to show that it was an official act; and accordingly many facts and circumstances were given in evidence, to prove in what character it was drawn.

The cases which we have thus collected together from amongst the very many which exist will serve to show in how many aspects the question of the admissibility of extrinsic evidence in relation to written contracts has been presented and decided; and in how many forms, according to the various circumstances of the cases, the principle which we have been considering has been applied. Sometimes it has been applied to deeds, sometimes to wills, and sometimes to mercantile and other contracts. In some cases it has been resorted to to ascertain which of several persons was intended; in others, which of several estates. In some, to ascertain the identity of the subject; in others, its extent. In some, to ascertain the meaning of a term, where it had acquired by use a particular meaning; in others, to ascertain in what sense it was used, where it admitted of several meanings. But in all the purpose was the same: to ascertain by this medium of proof the intention of the parties, where, without the aid of such evidence that could not be done; so as to give a just interpretation to the contract.

§ 1061. *In construing a contract, where there is a latent ambiguity, extrinsic evidence of the circumstances under which it was made is admissible.*

Without attempting to do what others have said that they were unable to accomplish; that is, to reconcile all the decisions on the subject, we think that we may lay down this principle as the just result: That in giving effect to a written contract, by applying it to its proper subject-matter, extrinsic evidence

may be admitted to prove the circumstances under which it was made, whenever, without the aid of such evidence, such application could not be made in the particular case.

With this principle in view, we proceed to inquire whether the evidence offered by the defendant, in this case, ought to have been received by the court. Now had the evidence been received, it would have disclosed the following state of facts: That the route mentioned in the contract was one on which the plaintiff in error transported passengers, and also the mail; that the steamboat Sydney, mentioned in the contract, was designed to perform this service; and that the Franklin was wanted for the same purpose; that the Sydney was then at Baltimore, for the purpose of being fitted with her engine and equipments; that although the transportation of passengers and the mail was carried on, by the plaintiff in error, in a steamboat, whilst the river was open, yet, when the river was closed by ice, so that navigation was obstructed, the plaintiff in error then transported passengers and the mail all the way over land to Fredericksburg; that when the river was thus obstructed, the plaintiff in error could not and did not use a steamboat; and that all these facts were known to the defendants in error.

§ 1062. *A contract for the use of a certain steamboat until a certain other is placed on the route is subject to be explained by the circumstances under which it was made.*

We think that this evidence ought to have been received, because it would have tended to show, by the circumstances under which the contract was made, what was the intention of the parties; and in the language of the rule which we have laid down, that the contract, without its aid, could not be applied to its proper subject-matter.

The terms used in the written contract are, "for the use of the steamboat Franklin until the Sydney is placed on the route to Potomac creek." It is contended that this amounted to a stipulation to keep the Franklin in use until the Sydney was placed on the route; no matter what length of time may have elapsed before that was done. Suppose that the Sydney had been accidentally consumed by fire the day after the hiring of the Franklin, the effect of this construction would be, to make that hiring co-extensive in point of time with the existence of the Franklin in a condition for use, although it is obvious that a temporary hiring only was in the contemplation of the parties. Again, suppose the plaintiff in error had sold the Sydney, and bought another boat, and put that other on the route; the construction contended for would lead to the result that the hire of the Franklin would still have continued to have gone on, indefinitely. If this were so, it must be upon the principle that it entered into the contemplation of the parties, as a material term of the contract, that the plaintiff in error should keep the Franklin in use, not until he ceased to want it by having a steamboat to take its place, but until the identical steamboat Sydney, and no other, should take its place. We think that the evidence offered, and rejected by the court, would have shown why reference was made to the Sydney being placed on the route, that is, because she was expected to be ready for use in a very short time. It would have shown further, that the defendants in error knew the service for which their boat was wanted. What was the nature of that service? That whenever the river was obstructed by ice, the Franklin would not be wanted, because it could not be used, and because then another mode of transportation was resorted to. From all this it would have been competent to infer that the words "until the

Sydney is placed on the route" were not intended to fix that time as the period to which the hiring was to continue, at all events, and under all circumstances; but as being referred to, because the Sydney was then expected to be ready for use in a very short time; and, so soon as she could be used, the Franklin would not be wanted, even although there should be no obstruction to navigation by ice. And, moreover, it would have been competent to infer that as the defendants knew why the Franklin was wanted; for what service she was wanted; the character of that service, that is, that it would cease when she could not be used, by reason of the river being closed with ice, that, therefore, the real intention of the parties, to be derived from the written contract and the parol evidence taken together, was a hiring and letting to hire for so long a time as the boat could be used, that is, until the navigation was obstructed, subject to being terminated at any previous time when the Sydney was ready to take her place. We think that the rule of law, which admits extrinsic evidence for the purpose of applying a written contract to its subject-matter, justifies its admission beyond the mere designation of the thing or *corpus*, if we may so express it, on which the contract operates, and extends so far as to embrace the circumstances which accompany the transaction, when, without the aid of those circumstances, the written contract could not be applied to its proper subject-matter.

This principle is illustrated by the cases which we have before referred to. Take, for example, the case cited from 1 Mason, 11. That was *assumpsit* for a balance alleged to be due on consignments. In that case parol evidence was received of the circumstances under which a contract was made, which contained this clause relating to the plaintiff's goods, namely: "On which goods Mr. D. (the defendant in the case) has advanced me \$5,833, for which amount he will hold for reimbursement, on the amount and net proceeds of the sales of said goods, which are only considered answerable, for said amount advanced, as per our agreement," for the purpose of showing whether it was intended to waive any personal claim on the plaintiff, and to restrict the defendant's security, for the repayment of the advance, to the goods only; or was meant merely to exempt the goods of the shippers, on freight, from being included as a security for the advance on the plaintiff's goods.

So we have seen, in the case from 2 Leigh, 630, the proposition is stated, in terms, that in equivocal written agreements the circumstances under which they were made may be given in evidence to explain their meaning; and, accordingly, in that case, the judges rely upon the circumstances as disclosed by the parol evidence, in connection with a written promise of indemnity in deciding on its legal effect.

We could suggest many cases which we think would illustrate this principle, and prove that, from the necessity of the case and consistently with the rules of law, the circumstances under which a written contract is made must be open to proof by extrinsic evidence, in order to ascertain the intention of the parties and thus correctly interpret it. Suppose that, during the late war, a person had been engaged, by contract, to transport munitions of war to the army; that, for that purpose, he had hired a steamboat of another, and had signed a written agreement by which he engaged to take good care of the boat; suppose that, whilst he was engaged in this transportation, the boat had been destroyed by the enemy, as it might rightfully have been by reason of the hostile character impressed upon it; that, thereupon, a suit had been

brought by the person who let it to hire, upon the stipulation to take good care of the boat. Can it be doubted that it would have been competent for the defendant to have proven that he was a contractor with the government to transport munitions of war; that he had hired the boat for that express purpose, and that these facts were known to the other party, so as to show the intention and understanding of the parties as to the kind of danger to which the boat would unavoidably be exposed, in performing the very service for which it was hired?

We will state only one case more, founded on the suggestion of Mr. Chief Justice Ellsworth, in a note to 3 Dall.; 421. Suppose a man signs a written agreement in these words, namely: "I will take your ship John." May not the party, as the chief justice asked, go beyond the note, to explain, by existing circumstances, the meaning of the word take; which, accordingly as the circumstances might be one way or another, might equally embrace a purchase or a charter-party?

§ 1063. *To apply a writing to its subject-matter, evidence of the circumstances under which it was made, or of the meaning of terms used in it, is admissible.*

All the cases which we have cited, in which extrinsic evidence has been received, and those which we have supposed, in which we think that it would be admissible, proceed on one principle only, and can only be justified upon that principle. And that is this: that the rule which admits extrinsic evidence, for the purpose of applying a written contract to its proper subject-matter, extends beyond the mere designation of the thing on which the contract operates; and embraces within its scope the circumstances under which the contract concerning that thing was made; when, without the aid of such extrinsic evidence, such application of the written contract to its proper subject-matter could not be made. Hence Mr. Starkie, in his third volume on evidence, 1021, after having laid down the principle that extrinsic parol evidence is admissible to give effect to a written instrument by applying it to its proper subject-matter, adds: "And also as ancillary to the latter object (that is, the application to its proper subject-matter), for the purpose, in some instances, of explaining expressions used in a peculiar sense, and of annexing customary incidents," etc.

Let us take a case under each branch of this rule; and by this exemplification we shall more clearly see the operation of the rule itself, and the very decided bearing which it has upon this case. Then as to the first branch, as to parol evidence for the purpose of explaining expressions used in a peculiar sense. Let us take the case before cited, where the question was as to the legal effect of a written contract to receive a stipulated sum in lieu of privilege and primage; in other words, what was the meaning of these terms? Parol evidence was received to show the sense in which the mercantile part of the nation used the word privilege, and why? Because the real question was not what was the meaning of the word privilege in general; if that had been the question, it would have been a patent ambiguity, and parol evidence would have been clearly inadmissible; but the real question was, what was the meaning of the word privilege as used in that contract; it being a word which had acquired in the mercantile world a peculiar meaning, that meaning must be inquired into by parol evidence to get at the intention of the parties, as it was a mercantile contract. Thus, it will be seen, that it was necessary to go into the mercantile sense of the word, that being the sense in which it was used in the case stated, in order to apply the written contract to its proper subject-

matter. Accordingly, Mr. Starkie, in his book on evidence, 1033, states that to be the reason why evidence is admissible to prove the special and peculiar sense in which a word is understood.

Now, let us take a case to exemplify the second branch of the rule as to annexing customary incidents. The case of *Senior v. Armitage* will illustrate the second branch of this rule, that of the admission of parol evidence to annex customary incidents. In that case it was held that a custom for an away-going tenant to provide work and labor, tillage and sowing, and all materials for the same, in his away-going year, the landlord making him a reasonable compensation, is not excluded by an express written agreement between the landlord and tenant, which is consistent with such a custom. Now, here, proof of the custom was considered as necessary to apply the contract to its proper subject-matter. So, in the two cases which we have supposed of the steamboat and the ship; we think the extrinsic evidence which we have mentioned would be admissible, because the question would not have been the meaning of the stipulation to take proper care of the boat in the one case, and to take the ship in the other, in the general sense of these expressions; but what was the meaning of proper care as to that steamboat, and of the word take as to that ship, under the circumstances which attended the respective contracts concerning them; neither a steamboat in the one case, nor a ship in the other, was the proper subject-matter of the contract, but each of them, in connection, with its accompanying circumstances; in other words, that steamboat, under the circumstances under which it was hired, and that ship, under the circumstances under which it was taken.

And so in the case before us, upon the same principle, the subject-matter of the contract was not merely the steamboat Franklin, but the steamboat Franklin under the circumstances under which it was hired. The parol evidence then, in this case, was admissible, because without its aid the written contract could not be applied to its proper subject-matter; and therefore it was proper to prove the circumstances attending the transaction. Having thus stated our opinion to be that evidence ought to have been received to prove the facts stated in the bill of exceptions on the part of the defendants, it follows, as a consequence, that the court below erred in giving to the jury the instruction which they did give, at the instance of the plaintiffs in the circuit court.

We think, therefore, that the judgment is erroneous, and must be reversed with costs. And a *venire facias de novo* is awarded, with instructions that, upon the next trial, the court shall receive parol evidence to prove the facts stated in the bill of exceptions to have been offered to be proved by the defendant at the former trial, except the fact of the communication made to the plaintiff by the defendant, or his agent, before the time of making the contract, that the defendant intended to keep the steamboat Franklin in use under the contract, so long as the navigation remained open, and no longer; and with the further instruction to the court not to give the jury the instruction stated in the exception to have been given at the former trial.

JUSTICES THOMPSON, CATRON and STORY dissented.

DESSAU v. BOURS.

(Circuit Court for California: 1 McAllister, 20-25. 1855.)

STATEMENT OF FACTS.—Action by payee against drawer, on a sight draft, drawn on William Hagan & Co. by Robinson, Bours & Co., agents.

Opinion by McALLISTER, J.

On the face of this instrument there can be no doubt of the responsibility of defendants. No mention is made of any principal; nor is any fact patent on the face of the paper which discloses the existence of any person save the drawers who are to be charged. Thus viewed, by the well settled rule of law, the word “agents” appended to the drawers’ names is to be regarded merely as *descriptio personarum*, and the instrument fixes upon the signers an unqualified responsibility. The defense to the action rests upon an answer which avers that the bill was drawn by defendants as agents of certain persons named Burgoyne & Co.; that at the time it was drawn, such fact was communicated to the plaintiff, and he was informed that the defendants were in no way liable for the due acceptance or payment of the bill; that, after being so informed, the plaintiff took the bill, and then and there agreed with defendants, that, in case of non-acceptance or non-payment of same, defendants were not to be liable; but that he (the plaintiff) would look solely to the said Burgoyne & Co. for indemnity.

§ 1064. *The rule applicable to undisclosed principals in cases of sales does not cover the case of a bill of exchange signed by drawer as “agent.”*

To the answer, a *demurrer* has been filed by the plaintiff, and the question raised by the pleading is, whether parol testimony is admissible to discharge a party from the liability fixed upon him by law, by the terms of the bill under consideration. The names of Burgoyne & Co. do not appear on the bill, and if made liable, they are to be made so under the authority of that class of cases, relied on in this case, which authorizes the admission of parol testimony to fix the liability of an unknown principal. The rule which admits such testimony to charge an unknown principal, while it rejects such when its object is to discharge the signer of a written contract, is advanced by Mr. Smith, in his *Leading Cases*, and has been subsequently adopted in *Westminster Hall*. But the cases collated by that writer, and those which in England and this country affirm the principle, will be found to be cases of sales. The court considers none of these strictly applicable to the case at bar. There is a distinction between the admission of parol testimony to charge an unknown principal in a transaction of sale, and to fix the liability of a party upon a bill on which his name does not even inferentially appear.

In a recent case in England, Lord Abinger, Ch. B., and Parke, Gurney and Rolfe, BB., decided that a partner might be held upon a written contract signed by his copartners, but on which his name did not appear; considering the case one of agency. While they state that all written contracts not under seal stand upon the same footing as contracts not written, they expressly admit that in the case of a bill of exchange, or promissory note, none but the parties named in the instrument can be sued upon it. *Beckham v. Drake*, 9 M. & W., 79, 92; 1 Parsons on Contracts, 48, n. a.

§ 1065. *A person whose name nowhere appears on a bill of exchange cannot be charged by parol proof as responsible upon it.*

In accordance with this doctrine is the case of *Pentz v. Stanton*, 10 Wend., 271, relied on by counsel for the *demurrer*. The force of this authority

is assailed upon the ground that in the marginal note of the reporter, as well as in the argument of counsel, it appears in that case, no disclosure of the name of the principal was made. Such is the fact; but it is equally true, that the court did not place its decision upon that ground; but on the broad principles of commercial law. It says, "the plaintiff cannot on the bill of exchange recover against the present defendant. His name nowhere appears upon it. It was drawn and subscribed by West in his own name, with the simple addition of 'agent;' but without any specification whatever of the name of the principal." Again, "It is not sufficient to charge the principal, or protect the agent from personal liability, merely to describe himself as agent, if the language of the instrument imports a personal contract upon his part." It is urged that if Burgoyne & Co. are not liable, that fact fixes the liability of defendants. It does not follow, from the circumstance that the former are not responsible on paper on which their names do not appear, that the liability of defendants must on that account be *conclusively* fixed. Their responsibility depends upon the admissibility of certain evidence, which question is raised by the *demurrer* in this case; and if it be overruled, then upon the clear and satisfactory character of the evidence the defendants may give of the facts pleaded depends their liability. To sustain it, the counsel for the plaintiff has cited several cases from Massachusetts. In the first of these, the party signed the note sued on as "guardian of an insane person;" and in the second, as "guardian of an infant." In both, the principals disclosed were incapable of contracting, and the inference therefore was, that the only party who could contract was the one intended to be charged, and the addition to his signature was regarded merely as a *designatio personæ*, or intended to serve him in making up his accounts. The third case was one where a party sued on a note made payable to him as agent; and it was held he might sue in his own name. 5 Mass., 299; 6 Mass., 58; 8 Mass., 103. Neither of these cases touches the point whether the parol testimony offered in this case can be received.

§ 1066. *Where the face of negotiable paper creates a doubt to whom the credit was given, parol evidence is admissible to remove that doubt.*

The rule deducible from the recent cases is, that where there is sufficient on the face of the instrument to create a doubt to whom the credit was given, then, as between the original parties, parol evidence is admissible to remove that doubt. In the application of this rule, the embarrassing question may arise, whether the form of an instrument in a given case is such as will admit parol evidence to remove the doubt suggested by its terms. In the case of *The Mechanics' Bank of Alexandria v. The Bank of Columbia*, 5 Wheat., 326 (AGENCY, §§ 45, 46), the check sued on was signed by William Patton, individually. The question was, is this a private check, or drawn as cashier? The court say (p. 335), "Had the draft signed by Patton borne no marks of an official character on the face of it, the case would have presented more difficulty." They then advert to the fact that the check, which was in the usual form, had prefixed to it the words "Mechanics' Bank of Alexandria," as sufficient to authorize the admission of parol testimony, to show the true nature of the transaction. It is to be observed that such testimony was admitted to charge a party whose name did not appear upon the check. A further step in the relaxation of the rule was taken in the case of *The Susquehanna Bridge Co. v. Evans*, 4 Wash., 480, where testimony was admitted in an action between indorser and indorsee, to establish a parol agreement between the parties entered into at the time of

indorsement. The point under consideration came before the supreme court of New York in *Mott v. Hicks*, 1 Cow., 513. A note was given in the name of the president and directors of the Woodstock Company, signed by W. Hicks, president, and made payable to Isaac Horsfield, who indorsed as agent. On trial of an action on the note, the indorser, Horsfield, was offered as a witness and objected to. The question of his liability, as indorser, came up directly. It was held, first, that the maker of the note was not individually liable, there being sufficient on the face of the instrument to indicate the principal; second, that parol evidence was admissible to discharge the indorser, inasmuch as he had indorsed as "agent," which, it was considered, had opened the door to the admissibility of testimony.

But the question has been met more directly in the case of *Hicks v. Hinde*, 9 Barb., 528. The action was upon a draft, signed by John Hinde, "agent," and the court, after adverting to the case of *Pentz v. Stanton*, 10 Wend., 271, and other cases, decided that the drawing of the draft was restrictive, and that the word "agent," annexed to the signature of the maker, was equivalent to a declaration that he would not be held responsible personally on the draft. In such case, parol evidence was admissible. These two last cases have been cited approvingly in New York, in *Babcock v. Beman*, 1 Kern., 200, and may be taken as the law of the most commercial state in the Union. The rule is not only adopted, but carried to a greater extent in Pennsylvania. In *Miles v. O'Hara*, 1 Serg. & R., 32, the drawer of a bill of exchange was permitted to rebut the presumption of liability arising out of his unqualified and unrestricted signature, by introducing parol testimony to establish his agency, and the knowledge of it by the opposite party. A decision to the same effect will be found in *Hill v. Ely*, 5 Serg. & R., 363. But this court cannot go to the extent to which the courts of Pennsylvania have gone in the admission of parol testimony, to discharge parties who have put their signatures to commercial paper without any restriction. Those courts have done so by reason of their peculiar structure. Mr. Justice Duncan, in the last-cited case, predicates the right to receive parol testimony in such cases on the ground that the courts of law of Pennsylvania will administer any relief which could be obtained in a court of equity, there being no court of chancery in that state. But as the case at bar comes within the decisions of the courts of law in New York, heretofore cited, and no case has as yet been brought to the attention of this court in which an adverse ruling directly on the point has been made, this court is arrived at the conclusion that, under the circumstances of this case, the parol testimony is admissible. The demurrer must, therefore, be overruled.

BALDWIN v. BANK OF NEWBURY

(1 Wallace, 234-243. 1863.)

ERROR to U. S. Circuit Court, District of Massachusetts.

STATEMENT OF FACTS.—This was a suit by the Bank of Newbury, a Vermont corporation, on a promissory note made by Baldwin, by which he promised to pay "to the order of O. C. Hale, Esq., cashier," etc. The note was made payable at either bank in Boston. After the making of the note Baldwin was discharged under the insolvent laws of Massachusetts, the discharge purporting to cover all contracts to be performed within the state. The bank took no part in the proceedings. Two questions arose: 1. Whether the discharge was good as against the bank. 2. Whether it might be shown by parol

evidence that Hale was the cashier of the bank and that he acted for the bank in taking the note. The court found in favor of the bank.

§ 1067. *Discharge under state insolvent law not a discharge as to contracts made with citizens of other states.*

Opinion by Mr. JUSTICE CLIFFORD.

1. Two questions are presented for decision, but the first is the same as that just decided in the preceding case, (a) and for the reasons there given must be determined in the same way. Contrary to what was held in the case of *Scribner et al. v. Fisher*, 2 Gray, 43, we hold that the certificate of discharge in the case was no bar to the action, because the debt was due to a citizen of another state. Such was the rule laid down in *Ogden v. Saunders*, 12 Wheat., 279 (Const., §§ 1940-2008); and we also hold that the circumstance that the contract was to be performed in the state where the discharge was obtained does not take the case out of the operation of that rule.

§ 1068. *Parol evidence is admissible to show that a note given to "A., cashier," was given for benefit of the bank of which A. is cashier.*

2. Agreed statement also shows that O. C. Hale was in fact the cashier of the Bank of Newbury at the time the defendant executed the note, but the defendant insists, as he insisted in the court below, that parol evidence was not admissible to prove that the person therein named as payee in taking the note acted as cashier and agent of the corporation. He admits that the plaintiff can prove those facts if admissible, but denies that parol evidence is admissible for that purpose, which is the principal question on this branch of the case. Counsel very properly admit that such evidence would be admissible in suits upon ordinary simple contracts, but the argument is that a different rule prevails where the suit is upon a promissory note or bill of exchange. Suit in such cases, it is said, can only be maintained in the name of the person therein named as payee, and consequently that the plaintiff bank cannot be treated as such without explanatory evidence, and that parol evidence is not admissible to furnish any such explanation. Suppose the rule were so, still it could not benefit the defendant in this case, because it is unconditionally admitted that O. C. Hale was in fact cashier of the plaintiff bank at the time of the making of the said note.

Undeniably the note must be considered in connection with that admitted fact, and when so considered it brings the case directly within the rule laid down in the case of *Commercial Bank v. French*, 21 Pick., 486, and the several cases there cited upon the same subject. In that case the court say the principle is that the promise should be understood according to the intention of the parties. If in truth it be an undertaking to the corporation whether a right or a wrong name is inserted, or whether the name of the corporation or some of its officers be used, it should be declared on and treated as a promise to the corporation; and as a general rule it may be said that where enough appears to show that the parties intended to execute the instrument in the name of the principal, the form of the words is immaterial, because as between the original parties their intention should govern. But it is not necessary to place the decision on that ground alone, as we are all of the opinion that even if the facts set forth in the agreed statement are all to be regarded merely as an

(a) *Baldwin v. Hale*, 1 Wall., 223. Reported in full in DEBTOR AND CREDITOR, §§ 424-426. The point decided is, that a discharge under the insolvent laws of a state is not good as against a note given and made payable within the state, to a citizen of another state, the payee having taken no part in the insolvency proceedings.

offer of proof, subject to the objections of the defendant, still the case must be decided in the same way. Regarded in that point of view, the question then is whether the evidence offered was admissible. Promise, as appears by the terms of the note, was to O. C. Hale, cashier, and the question is whether parol evidence is admissible to show that he was cashier of the plaintiff bank, and that in taking the note he acted as the cashier and agent of the corporation. Contract of the parties shows that he was cashier, and that the promise was to him in that character. Banking corporations necessarily act by some agent, and it is a matter of common knowledge that such institutions usually have an officer known as their cashier. In general he is the officer who superintends the books and transactions of the bank under the orders of the directors. His acts within the sphere of his duty are in behalf of the bank, and to that extent he is the agent of the corporation.

§ 1069. *Oral evidence is admissible to show that a note given to the cashier of a bank was intended as a promise to the corporation. Such evidence has no tendency to contradict the instrument.*

Viewed in the light of these well-known facts, it is clear that evidence may be received to show that a note given to the cashier of a bank was intended as a promise to the corporation, and that such evidence has no tendency whatever to contradict the terms of the instrument. Where a check was drawn by a person who was a cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or a private act, this court held, in the case of *The Mechanics' Bank v. The Bank of Columbia*, 5 Wheat., 326 (AGENCY, §§ 45, 46), that parol evidence was admissible to show that it was an official act. Signature of the promisor in that case had nothing appended to it to show that he had acted in an official character, and yet it was unhesitatingly held that parol evidence was admissible to show the real character of the transaction. Opinion in that case was given by Mr. Justice Johnson, and in disposing of the case he said, that it is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency. Rules of form, in certain cases, have been prescribed by law, and where that is so those rules must in general be followed; but in the diversified duties of a general agent, the liability of the principal depends upon the fact that the act was done in the exercise and within the limits of the powers delegated, and those powers, says the learned judge, are necessarily inquirable into by the court and jury. Maker of the note in that case had signed his name without any addition to indicate his agency, which makes the case a stronger one than the one under consideration. Same rule as applied to ordinary simple contracts has since that time been fully adopted by this court. Examples of the kind are to be found in the case of *The New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How., 381 (CARRIERS, §§ 220-42), and in the more recent case of *Ford v. Williams*, 21 How., 289 (AGENCY, § 209), where the opinion was given by Mr. Justice Grier. In the latter case it is said that the contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein. Parol proof may be admitted to show the real nature of the transaction, and it is there held that the admission of such proof does not contradict the instrument, but only explains the transaction.

Such evidence, says Baron Park, in *Higgins v. Senior*, 8 Mees. & W., 844, does not deny that the contract binds those whom on its face it purports to

bind, but shows that it also binds another by reason that the act of the agent is the act of the principal. Argument for the defendant is, that the doctrine of those cases can have no application to the present case, because the suit is founded upon a promissory note, but the distinctions taken we think cannot be sustained under the state of facts disclosed in the agreed statement. Mr. Parsons says, if a bill or note is made payable to A. B., cashier, without any other designation, there is authority for saying that an action may be maintained upon it, either by the person therein named as payee or by the bank of which he is cashier, if the paper was actually made and received on account of the bank; and the authorities cited by the author fully sustain the position. *Fairfield v. Adams*, 16 Pick., 381; *Shaw v. Stone*, 1 Cush., 254; *Barnaby v. Newcombe*, 9 Cush., 46; *Wright v. Boyd*, 3 Barb. S. C., 523. Among the cases cited by that author to show that the suit may be maintained by the bank is that of *The Watervliet Bank v. White*, 1 Den., 608, which deserves to be specially considered. Note in that case was indorsed to R. Olcott, Esq., cashier, or order, and the suit was brought in the name of the plaintiff bank, of which the indorsee was the cashier. Objection was made that the suit could not be maintained in the name of the bank, but it appearing that the indorsement was really made for the benefit of the corporation, the court overruled the objection, and gave judgment for the plaintiff. *Bayley v. Onondaga Ins. Co.*, 6 Hill, 476. Suggestion was made at the argument that the rule was different in Massachusetts, but we think not. On the contrary, the same rule is established there by repeated decisions, which have been followed in other states. *Eastern R. R. Co. v. Benedict*, 5 Gray, 561; *Folger v. Chase*, 18 Pick., 63; *Hartford Bank v. Barry*, 17 Mass., 94; *Long v. Colburn*, 11 Mass., 97; *Swan v. Park*, 1 Fairf., 441; *Rutland & R. R. Co. v. Cole*, 24 Vt., 33. Doubt cannot arise in this case that the person named in the note was in fact the cashier of the plaintiff bank, because the fact is admitted, and it is also admitted that the plaintiff can prove that in taking the note he acted as the cashier and agent of the corporation, provided the evidence is legally admissible. Our conclusion is that the evidence is admissible, and that the suit was properly brought in the name of the bank. The judgment of the circuit court is therefore affirmed, with costs.

Judgment accordingly.

TRUMAN v. HARDIN.

(District Court for California: 5 Sawyer, 115-118. 1878.)

Opinion by HOFFMAN, J.

STATEMENT OF FACTS.—This was an action by the assignees of Gilbert Horton, to recover the possession of certain mules alleged to have been the property of the bankrupt at the time of filing the petition. It is admitted that the mules were formerly the property of the defendant, and that an agreement for their sale was made between him and the bankrupt. The question is, was the sale an absolute one, or was it agreed that the right of ownership should remain in the vendor until the purchase moneys were paid? The only written evidence of the agreement is in the form of a promissory note by the vendee, which is as follows:

“\$1,500.

POPE VALLEY, June 15, 1874.

“Twelve months after date, for twenty mules, I promise to pay Robert L. Hardin, or order, fifteen hundred dollars in United States gold coin, with in-

terest from date till paid, at the rate of one and a quarter per cent. per month. The said mules to be vented and delivered to said Horton when the said sum and interest is paid. GILBERT HORTON."

On the execution of this note the mules were delivered to Horton and remained in his possession, with the exception of some short intervals unnecessary to notice, until the bankruptcy. A suit in replevin was subsequently brought by the defendant in this proceeding, and the bankrupt having interposed no defense, the mules were delivered to the former by the sheriff. The assignee now sues to recover the possession or the value of the property.

§ 1070. *Where a promissory note is given for purchase money of property sold, parol proof of the time when the title should be vested is admissible.*

It is contended on the part of the defendant that at the time of the sale it was distinctly understood and agreed that the mules should remain the property of the vendor until paid for. The assignee resists the introduction of parol testimony to establish this agreement, on the ground that it would alter or contradict the written instrument above set forth. But it will be observed that this instrument is merely a promissory note signed by the vendee alone. It does not purport to create any obligation on the part of the vendor. It indicates an executory agreement to pay for twenty unspecified mules when delivered—a certain sum on a certain day. But it would be unavailable to charge the vendor, because it is not signed by him as the statute of frauds requires. It is, therefore, in no sense a bill of sale or an agreement for a sale. It is merely an agreement to pay for certain property to be thereafter delivered. The mere production of this note with proof of the signature of the maker would of itself be ineffectual to establish, as against the defendant, the fact of sale. Parol proof would be necessary to show his acceptance of it, and the transaction which led to its execution. This parol proof, and not the note itself, would be the evidence to charge the vendor, and the note could then be received as evidence of the terms of sale, not as a written contract *inter partes*, for it is executed by only one of them, but as a part of the *res gestæ*, and as showing the real nature of the transaction.

If then the proofs now offered were inconsistent with the transaction, as described by the note in relation to the price to be paid, the credit to be allowed or the number of mules to be delivered, they would be disregarded, not because they contradicted the terms of the written contract of the parties, for they have made none, but because the note being in writing, and made by one and accepted by the other, would afford the more reliable evidence. But the parol proofs offered do not contradict or vary the agreement, as evidenced by the note.

§ 1071. *When payment is held to be a condition precedent of the vesting of title.*

It is proposed to show an express agreement that the title was to remain in the seller until payment of the price upon a fixed day. This is not only not contradictory to the note, but confirmatory of it, for the note provides in effect that the mules are not to be delivered or "vented" (that is, branded with the owner's sale mark), until the price is paid. This agreement seems to have been waived, so far as the retention of possession by the seller was concerned, for the mules were delivered to the vendee. But the parol proofs show that the title was to remain in him, in accordance with the stipulation in the note with regard to "venting."

The parol proof and the terms of the note thus clearly establish what was the understanding of the parties, and bring the case within the rules governing

conditional sales. Parsons, in his work on contracts, observes: "But where the right to receive payment before delivery is waived by the seller and immediate possession is given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the purchaser." 1 Pars. on Con., 449; 2 Kent's Com., 495; Putnam v. Lamphier, 36 Cal., 157.

And it has been held that the vendor's title will prevail over that of the innocent *bona fide* purchaser for value from the vendee in possession. Kohler v. Hayes, 41 Cal., 455; Wright v. Solomon, 19 Cal., 64; Saltus v. Everett, 20 Wend., 267. The assignee in bankruptcy is certainly in no better position than an innocent purchaser for value. See Benj. on Sales, Am. ed., sec. 320 *in nota*. Judgment for defendant.

WEST v. SMITH.

(11 Otto, 263-273. 1879.)

ERROR to U. S. Circuit Court, District of Connecticut.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Due removal of the suit before the court was made from the state court where it was commenced, into the circuit court, in which case it is no longer usual to file new pleadings, the act of congress providing that the practice, pleadings and forms and modes of proceeding in common law actions shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time, in like causes, in the courts of record of the state within which such circuit court is held, any rule of court to the contrary notwithstanding. 17 Stat., 197; R. S., sec. 914.

Sufficient appears to show that the writ in the practice of the state courts contains the declaration, the command of the same to the sheriff being that he shall summon the defendant to appear and answer to the plaintiff in a certain plea, wherein is set forth the cause of action. Pursuant to that practice, the defendants in this case were summoned to appear in a plea of the case, the declaration containing two counts in *assumpsit*,—the first being a count for goods sold and delivered, in the sum of \$8,000, in two forms; the second being a count for work and labor done and performed, in the sum of \$8,000, at the special instance and request of the defendants. Both counts are in the usual form, and the declaration concludes with the usual breach alleging non-payment, to the damage of the plaintiffs in the sum of \$10,000. Personal service was made; and the defendants having appeared and removed the cause into the circuit court, pleaded the general issue that they never did assume and promise in manner and form as the plaintiffs in their declaration have alleged, and tendered an issue to the country.

Special matter may be given in evidence under the general issue, according to the state practice, if previous notice be given by the defendant or defendants. Such notice was given by the defendants in this case, that they would give in evidence a written agreement, and the extension of the same for one year, which is fully set forth in the transcript. *Profert* of the instrument was made, and the defendants averred that the supposed promises were made, if ever, in consideration of work and labor done by the plaintiffs in the pretended performance of the stipulations and agreements in said written contract contained, in respect to which the defendants allege that the plaintiffs did not keep and perform their said agreements and obligations, to the damage of the defend-

ants in the sum of \$20,000, and greatly exceeding the amount that would be due to the plaintiffs for the alleged labor and work they had performed. What they claim is to set off so much of said damages as may be sufficient to extinguish their indebtedness to the plaintiffs, and to recoup and recover the excess of the \$20,000 by a judgment in their favor.

In addition to the notice of such special matter, they also pleaded the statute of limitations, which, it seems, would not be admissible under the general issue and notice of special matter. Leave was asked by the plaintiffs to file two additional special counts; and the court allowed them to file the one called in the transcript the second special count, subject to the objection of the defendants. Preliminary matters being closed, the parties went to trial, and the verdict and judgment were for the plaintiffs in the sum of \$7,978.84. Exceptions were filed by the defendants, and they sued out the present writ of error, and removed the cause into this court.

Two errors are assigned in this court, as follows: 1. That the circuit court erred in allowing the new count to be filed. 2. That the court erred in admitting parol evidence of the plaintiffs' intention in writing the letter set forth and described in the transcript.

§ 1072. *When a case has been removed from a state to a federal court, a plaintiff may be permitted to add counts to his declaration if such is the practice of the state.*

1. Amendments to the declaration under the state statute may be made by the plaintiff to correct any defect, mistake or informality in the same, not changing the form or ground of the action; and he may insert new counts in his declaration for the same cause of action as that alleged in the original counts. State Stats., Revision 1875, 426.

Authority is also given by the same statute to insert counts in any form of action which might have been originally inserted in the declaration. As quoted, the word "in" before "which," as found in the published statute, is left out, it being regarded as a misprint, or, if not, that the word "declaration" should follow it, which would give the provision the same meaning as if the word "in" was omitted. Nor is it necessary in this case to construe that provision, as it is clear that the question before the court is controlled by the preceding part of the section, which authorizes the plaintiff to insert new counts in the declaration for the same cause of action as that alleged in the original counts, as well as to correct any defect, mistake or informality in the declaration not changing the form or ground of action.

Such amendments to the declaration are allowed in the state courts with great liberality, and it appears that the practice is carried to such an extent as to justify the remark of the court in a case cited for the plaintiffs, that the decisions of other states furnish but little guidance in expounding the meaning of their statute upon the subject. *Nash v. Adams*, 24 Conn., 33-38.

Their original statute was passed at a very early period, and has been several times amended so as to enlarge and extend the power of the court, and the course of the decisions in the courts has been in the same direction, so as to further the beneficial purpose intended by it, which was to prevent the plaintiff from being put to a new action when, by accident, mistake or inadvertence, he had in his declaration failed to describe his claim with legal accuracy. In a great proportion of the cases, say the court, where amendments are allowed, the ground of action is in one sense changed, as where, for instance, the note in suit is incorrectly described; but amendments in such cases are

very frequent where the court is satisfied that the error arose merely from mistake or inadvertence, and that the action was intended to be brought for the cause of action described in the amendment.

Other examples of like import are given in the opinion, and the court remarks that the phrase, "ground of action," is not used in the statute in any technical or narrow sense, but was intended to refer rather to the real object of the plaintiff in bringing the suit than to the technical meaning of the words; and added, that such a construction had always been given to the phrase as would further that object. *Bulkley v. Andrews*, 39 Conn., 523, 535.

Where power is given to the court to allow the amendment, the ruling of the court in that regard is a matter of discretion, and is not the subject of error. *Stuart v. Corning*, 32 id., 105, 108; *Merriam v. Langdon*, 10 id., 460, 472. New counts setting forth more specifically the cause of action mentioned in the prior counts are not objectionable, as it cannot be held in such a case that the new counts describe a new cause of action. *Baldwin v. Walker*, 21 id., 168, 180; *Hollister v. Hollister*, 28 id., 178, 180.

Whenever the declaration misdescribes a writing which constitutes the cause of action, the state courts will allow the plaintiff to amend and make the description accurate; and it is even held that in an action for a breach of covenant the plaintiff may add a new count setting forth a new and distinct incumbrance not previously mentioned in the declaration. *Spencer v. Howe*, 26 id., 200. Cases appealed, it is held in that state, may be amended in the appellate courts; and the rule is well settled that if the new counts are founded upon the same transaction as the old ones, they do not change the ground of action, within the meaning of the act allowing amendments. *Howland v. Couch*, 43 id., 47-50.

Writs of summons or attachment in that state may be sued out in civil actions, and the defendant, as matter of argument, to show that the amendment was improperly allowed in this case, insists that its effect would be to discharge an attachment, as it would otherwise enlarge the lien which the attachment created. Two answers may be made to that suggestion in the case: 1. It is not shown that any of the property of the defendant was attached by the sheriff. 2. But if it was, the defendant will not be injured if the plaintiff sees fit to discharge his attachment.

Without more, these authorities are sufficient to show that the ruling of the circuit court in allowing the amendment was fully justified by the state decisions, and that it is correct. Suppose that is so, still it is insisted by the defendants that the ruling of the court embraced in the second assignment of error was erroneous, and that the judgment for that cause must be reversed.

Articles of agreement were executed between the parties to the effect that the defendants agreed to furnish for the plaintiffs cotton of a certain description, to keep the mill of the plaintiffs supplied for a certain time, the cotton to be manufactured by the plaintiffs into yarn, two-threaded, and of a certain described fineness, for thirty cents per pound, allowing sixteen per cent. for waste. Cash payments the first day of each month were to be made by the defendants for manufacturing the yarn. Under that contract, as set forth at large in the transcript, the defendants delivered a large amount of cotton to the plaintiffs, who manufactured it into yarn, which they delivered to the defendants. Invoices of cotton purchased by the defendants were shipped to the plaintiffs, and when the same was manufactured into yarn by the plaintiffs, the yarn was sent back in bags, accompanied with invoices, to the defendants.

Accounts between the parties were rendered monthly, and, when adjusted, the plaintiffs drew upon the defendants for the money due for manufacturing the yarn; and it appears that the drafts were uniformly paid until the last month of the contract. Payment of the last draft being refused, the plaintiffs brought *assumpsit*, and furnished the defendants with the bill of particulars exhibited in the record.

It appears that the defendants were tape manufacturers, and that they procured the yarn for the purpose of manufacturing tape, and they offered evidence tending to show that when the contract terminated they had on hand a large quantity of yarn not woven into tape, which they had tested, and for the first time discovered that it was of a coarser quality than that specified in the contract, and they alleged that if the whole was of that quality they had been seriously damaged.

Opposed to that the plaintiffs offered evidence tending to disprove that charge, and to show that during the early part of the contract they, at the request of the defendants, manufactured a certain quantity of yarn for them of a lower grade, and that if the defendants had on hand any of a lower grade than the contract required, it must be part of that so manufactured by the plaintiffs at the request of the defendants, who accepted the same with full knowledge of its defects.

Four letters upon the subject were written by the defendants to the plaintiffs, and in the course of the trial the defendants gave those letters in evidence, together with one written to them by the plaintiffs in reply to the last of their series. In that letter the plaintiffs refer to the fact that the defendants claim a deduction of five cents per pound on a specified quantity of the yarn, and state that they deduct that amount from the bill, adding to the effect that it leaves a balance due of \$2,680.24, etc.

§ 1073. *Where an admission is given in evidence it is competent to introduce proof that it was made for the purpose of avoiding litigation, even although the admission is in writing.*

For the purpose of rebutting any alleged admission contained in that letter, the plaintiffs gave notice to the defendants to produce the letters written by the plaintiffs in reply to the other letters to them given in evidence by the defendants. Said letters not having been produced, and it appearing that no copies had been kept, and that the originals were mislaid or lost, parol evidence of their contents was admitted, which showed that the plaintiffs denied the assertion of the defendants that the yarn was of a lower grade than the contract required; and they called the surviving partner of the firm, who was the writer of the letter of the plaintiffs given in evidence, and he was asked by the counsel of the plaintiffs whether he intended in and by that letter to admit that the defendants' claim for damages was valid, and that the yarn was below the contract grade; to which question the counsel of the defendant objected, and the court sustained the objection and excluded the testimony.

Failing in that, the plaintiffs then asked the witness whether his acceptance of the defendants' proposition to deduct five cents per pound from the quantity of yarn named was because he admitted that the yarn was not according to contract or to settle a controversy. Seasonable objection was made to the question by the defendants; but the court overruled the objection, and the witness answered that he accepted the proposition because he did not wish to be obliged to commence a law-suit in the city of New York, and to incur the expenses of a trial in the courts of that state; and the defendants excepted to

the ruling of the court, which is the foundation of the second assignment of error.

Evidence was then introduced by the plaintiffs showing that the defendants refused to pay the draft for the balance, making that deduction, and that they demanded the same reduction in price upon all the yarn previously manufactured and delivered. Certain exceptions were also taken to the charge of the court, but they are not embraced in the assignment of errors, and for that reason will not be re-examined.

Doubtless the general rule is that it is the province of the court to construe written instruments; but it is equally well settled that where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and extrinsic circumstances, the inferences of fact to be drawn from the paper must be left to the jury, or, in other words, where the effect of a written instrument collaterally introduced in evidence depends not merely on its construction and meaning, but also upon extrinsic facts and circumstances, the inferences to be drawn from it are inferences of fact and not of law, and of course are open to explanation. *Etting v. The Bank of the United States*, 11 Wheat., 59; *Barreda v. Silsbee*, 21 How., 146, 167. Other cases have been decided by this court in which the same principle was applied, and in which the doctrine is more fully explained and illustrated. *Iasigi v. Curtis*, 17 How., 183, 196.

Damages were claimed by the plaintiff in that case for a false representation respecting the pecuniary standing of a third person, whereby he, the plaintiff, had been induced to sell goods and had incurred loss. Letters were introduced and facts and circumstances connected with the letters proved; and this court held that it was for the jury to say, after examining the letters in connection with the facts and circumstances, whether they were calculated to inspire and did inspire a false confidence in the pecuniary responsibility of the party, to which the defendant knew he was not entitled.

Admissions by a party or by an authorized agent, either in court or out, may in general be given in evidence; but the circumstances surrounding the admission, the purposes for which it was made, and the conditions attached to it, may be fully shown. It may not infrequently happen that the party making the admission is not bound by it and will not be estopped from denying its truth, and in view of the showing on both sides, allowing each to prove the whole truth, it will be for the jury to determine how the proof stands on the facts in controversy on which the admission is claimed to bear. *Perry v. Simpson Waterproof Manuf. Co.*, 40 Conn., 313, 317.

The defendants charged at the trial that the act of the plaintiffs in making the deduction proposed by the defendants was presumptive evidence that the plaintiffs admitted that they had not fulfilled their contract. This was expressly denied by the plaintiffs. On the other hand the plaintiffs claimed that their act in making the deduction, taken in connection with the fact that they explicitly denied that they had broken their contract, was presumptive evidence, not that they admitted a breach of the contract, but that they made the deduction to avoid the expense of litigation. Neither of the presumptions was contrary to the language of the letter, and inasmuch as it was doubtful what the precise intent of the writer was, it is clear that the question of intention was open to explanation.

Parol evidence is inadmissible to contradict or vary the language of a valid written instrument, by which is meant that the language employed by the

parties in making it, and no other, must be used in ascertaining its meaning. Argument to support that proposition is unnecessary, and yet it is universally admitted that it may be read in view of the subject-matter and the attendant circumstances, in order more perfectly to understand the meaning and intent of the parties. 1 Greenl. Ev. (12th ed.), sec. 277.

Written instruments as used in the rule, says Taylor, include not only records, deeds, wills and other instruments required by statute or by the common law to be in writing, but every document which contains the terms of a contract between different parties. Text-writers everywhere support that rule; but Taylor admits that the rule will not strictly apply to certain less formal documents, of which he gives several examples. 2 Taylor, Ev. (6th ed.), 988.

Extrinsic evidence, it may be admitted, is not admissible in expounding written contracts to prove that other terms were agreed to which are not expressed in the writing, or that the parties had other intentions than those to be inferred from it; still it is competent, said Shaw, C. J., to offer parol evidence to prove facts and circumstances respecting the relations of the parties, the nature, quality and condition of the property which constitutes the subject-matter respecting which it was made. *Knight v. The New England Worsted Co.*, 2 Cush. (Mass.), 271-283.

Where a party was about to publish an advertising chart, and the defendant promised in writing to pay him \$50 for inserting his business card in two hundred copies of the chart, the supreme court of Massachusetts held, in an action to recover the amount, that parol testimony was admissible for the interpretation of the contract and its application to the subject-matter; that at the time of the making of the agreement the plaintiff represented and promised that his chart should be composed of a certain material and be published in a certain manner. In disposing of the case the court advert to the rule that the obligation of a written contract cannot be abridged or modified by parol evidence, but add that it is equally well settled that, for the purpose of applying the terms to the subject-matter, and removing or explaining any uncertainty or ambiguity which arises from such application, parol testimony is legitimately admissible, and for that purpose all the facts and circumstances of the transaction out of which the contract arose, including the situation and relation of the parties, may be shown. Authorities in great numbers are cited in support of the proposition; and the court further say, that the purpose of all such evidence is to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. *Stoops v. Smith*, 100 Mass., 63-66.

Apply the strictest rule to the question and it is clear that the ruling of the circuit court is correct, as the answer of the witness, which was admitted, did not tend in any view to contradict anything stated in the letter; but the ruling of the court may also be sustained upon the ground that the letter was a mere offer of compromise, which could not prejudice the rights of the plaintiffs, especially as the record shows that the defendants subsequently refused to pay the draft drawn for the balance.

§ 1074. *Written offers of compromise may be explained by oral evidence.*

Offers of compromise to pay a sum of money by the way of compromise, as a general rule, are not admissible against the party making the offer; but if admitted, it is clear that the offer is open to explanation, no matter whether it was by letter or by oral communication. *Gerrish v. Sweetser*, 4 Pick., 374; *Bridge Company v. Granger*, 4 Conn., 142, 148; *Stranahan v. East Haddam*,

11 id., 507, 513. By all or nearly all the cases the rule as established is not that an admission made during or in consequence of an effort to compromise is admissible, but that an offer to do something by the way of compromise, as to pay sums of money, *allow certain prices*, deliver certain property, or *make certain deductions*, and the like, shall be excluded. These cannot be called admissions, as they were made to avoid controversy and to save the expenses of vexatious litigation.

Decided cases may be found where it is said that the evidence is admissible unless the offer made was stated to be without prejudice; but the rule in general, both in England and the United States, is that the offer will be presumed to have been made without prejudice if it were plainly an offer of compromise. *Lofts v. Hudson*, 2 Man. & R., 481-484; Phil. Ev. (5th Am. ed.), 427, note 124; 1 Greenl. Ev., sec. 192. Suffice it to say that such evidence having been admitted, it was clearly competent to give evidence to explain it, especially as the evidence given did not contradict any of the terms of the letter introduced by the defendants.

Judgment affirmed.

ATKINSON *v.* CUMMINS.

(9 Howard, 479-486. 1849.)

ERROR to U. S. Circuit Court, Western District of Pennsylvania.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—The single question in this case arises on a bill of exceptions to the admission of certain testimony. In order to judge of its correctness, we must ascertain what was the matter in dispute before the jury at the time the testimony was offered and received.

The action was ejectment for a tract of land containing one hundred and fifty-eight and one-half acres. In 1822, George Pumroy was owner of this tract, and also of another of three hundred and twenty-six and one-half acres, lying near to it, but not adjoining. A judgment had been obtained against Pumroy for the sum of \$400, and an execution issued, on which the sheriff returned that he had levied on "a certain tract of land, situate in Derry township, adjoining lands of James Henry" (and a number of others), "containing four hundred acres, more or less, of which sixty acres were cleared land, and thirty acres of meadow, and on which were erected a grist-mill, dwelling-house," etc., etc. A sale was made by the sheriff under a writ of *venditioni exponas*, and a deed delivered by him to John Rhey, legally conveying to him the tract of land as described in the levy. Under this deed, Rhey took possession of the tract of three hundred and twenty-six and one-half acres, on which the grist-mill was erected, and has held it from the year 1822 till the present time. In 1841, he made a conveyance to Isaac Atkinson, the plaintiff's lessor, a citizen of Ohio, in whose name the present ejectment was instituted for the other tract, owned by Pumroy, of one hundred and fifty-eight and one-half acres, and now in the possession of the defendant Cummins.

The only evidence offered in support of the plaintiff's claim was, that two of the adjoining tracts called for as boundaries in his deed did not adjoin the mill tract of three hundred and twenty-six and one-half acres, but were contiguous to and adjoined the tract of one hundred and fifty-eight and one-half acres. It was admitted that all the other parts of the description correctly applied to the larger tract, but it was contended that, if this portion of the

description applied only to the other, the levy and deed for this reason included both.

The defendant, on the contrary, insisted that the levy and sale did not embrace any part of the land in dispute, and gave evidence to prove that it was a distinct and separate tract of land, having a house, barn, orchard and one hundred acres of cleared land, not occupied or used in connection with the larger or mill tract. They contended also that the deed called for but one tract of land, which was well described, except in this one particular, which was evidently an ambiguity, caused by a mistake of the sheriff in making his levy.

The defendant might, perhaps, have safely rested his case on the evidence as it now stood, but in order to remove all possible doubt, he offered to prove by the sheriff "how the mistake in the description occurred; and that the purchaser and other bidders at the sale had remarked this ambiguity in the description, and were informed how it happened, and were perfectly aware that but one tract was levied on and offered for sale, called the mill tract. That Rhey, the purchaser, was fully aware of it, and accordingly claimed and took possession of the mill tract only; that the sheriff, having afterwards heard a report that Rhey was asserting a claim to the property in dispute, took occasion to inquire of him if it was true; and that Rhey replied, 'that if he had said so it was only in jest; that he had bought and paid for one tract only, and to claim them both would be too much like putting his hand in his neighbor's pocket and robbing him.'" To the reception of this testimony the plaintiff's counsel objected, and the admission of it by the court forms the subject of the bill of exceptions now under consideration.

§ 1075. *Parol testimony may be received, not to contradict, but to explain and confirm, a sheriff's levy and deed.*

It is contended that this testimony ought not to have been received, because "the levy, *fieri facias*, *venditioni exponas*, sheriff's deed, etc., are records, and parol evidence is not admissible to contradict, vary or limit the description of the premises contained in them." This proposition is undoubtedly true. But it assumes the very fact in dispute, and on which the jury were about to pass, on parol proof given by both parties. It is true that, if a sheriff levies on a whole tract of land, and describes it accurately in his levy and deed, parol testimony cannot be received to show that he intended to sell less than his deed describes, or that he excepted a part of the premises at the time of the sale.

But that is not the case before us. The testimony offered is not to contradict the levy and deed, but to explain and confirm them. The plaintiff's testimony had shown that there was a latent ambiguity on the face of his deed. It purported to convey a single tract of land; it described one tract completely, with a single exception which applied to another. It might be void for uncertainty, if its description equally applied to two tracts, while it clearly purported to convey but one. It might convey one, and the part of the description which did not apply to that would be rejected as *falsa demonstratio*, or misdescription. Or it might possibly be intended to convey both; but in the present case the latter supposition had hardly a shade of probability to support it.

It would be of little profit to notice the infinite variety of cases on this subject, or to seek for one precisely in point with the present. The general rule is well stated by Tindal, chief justice, in the case of *Miller v. Travers*, 8 Bingh., 244, that "in all cases where a difficulty arises in applying the words of a will or deed to the subject-matter of the devise or grant, the difficulty or

ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject-matter really intended to be granted or devised."

The deed in this case called for but a single tract of land; the purchaser had himself taken possession and held up to certain boundaries for near twenty years, and had thus by his acts given his own construction of an ambiguity in his deed which he now showed by extrinsic evidence to exist. The evidence offered tended to confirm what appeared on the face of the deed, that but one tract was sold; that the practical location of his grant made by the purchaser was correct; that he had not acted under a mistake of his just rights, but had a due appreciation of the merits of the claim now set up to the land in question. This testimony may have been superfluous and unnecessary, but was not irrelevant or illegal. It did not contradict the record or deed under which the plaintiff claimed, but showed the gross injustice of the claim now attempted to be established under cover of an ambiguity in their terms. The judgment of the circuit court is, therefore, affirmed.

DEERY v. CRAY.

(10 Wallace, 263-272. 1869.)

ERROR to U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—This is an action of ejectment to recover a portion of the southern half of Kent Fort Manor, in Kent county, Maryland, which manor is a peninsula attached to the main land on its north side. Each party claimed title from Samuel L. Chew, the plaintiff, as heir of Lowman Chew, showing a *prima facie* title by descent:

The defendant then offered a deed from said Samuel Chew to his mother, Elizabeth, conveying "all that moiety or half part of a tract of land called Kent Fort Manor, lying and being in Kent Island, in Queen Anne's county, being all that part of said tract of land which lies to the southwestward of a line beginning on Northwest creek and running an easterly course, agreeable to the plat of said land made by William Brown, of Anne Arundel county, in such manner as to comprehend one-half of the number of acres of the whole tract, the said line to be run and ascertained under the direction of John Thomas, Esq., of Anne Arundel county."

Objection being made to this deed for uncertainty, unless the plat referred to was produced, the court permitted it to be read, subject to exclusion if, when all the evidence were in, it could not affect the title. Then to show the existence of the line mentioned, the defendant offered the following evidence: A map on record in a chancery suit in Maryland showing a division of the manor into two equal parts, made by a straight line beginning on Northwest creek and running to the eastern shore; also, deeds from Elizabeth Chew and others of her half part of the manor, to Arthur Bryan, as whose heir Susanna Tait, in partition in said suit, was allotted the southern half of the manor; also the testimony of a witness that he knew the land for sixty years, when a fence divided it into two portions, and Tait claimed the southern portion up to the fence; that when Samuel Chew lived on the north half, he and Tait rearranged the fence and recognized it as their common boundary. The defendants also read in evidence a mortgage from the plaintiff, executed ten months prior to institution of this suit.

Opinion by MR. JUSTICE MILLER.

The objection to the deed of 1787, from Samuel Lloyd Chew to his mother, Elizabeth Chew, is, that the description of the land conveyed is so uncertain as to render the deed void. The plaintiff excepted to the introduction of this deed, unless the plat therein referred to as made by Brown was produced and its lines shown; but the court permitted the deed to be read, subject to the right of the plaintiff to exclude the same hereafter, if upon the closing of the testimony it should not have been legally and sufficiently applied by defendants to the maintenance of the issue on their part.

§ 1076. *Unless the uncertainty in the description in a deed be a patent ambiguity, or inherent in the essence of the description, rendering it incapable of being applied to the subject-matter, the deed is admissible in evidence, subject to the effect of it as to title when all the evidence is in.*

Now, unless the deed is so fatally defective as that no subsequent competent evidence could make it good in point of description, the court did not exceed its just discretion in permitting it to be read. In other words, if the uncertainty was a patent ambiguity, an uncertainty which inhered in the essence of the description, rendering it incapable of being applied to the subject-matter, then the deed was void absolutely, and should not have been admitted. Otherwise it was well admitted.

But this does not seem to us to be the character of the instrument. All the boundaries given are well known and easily identified, except one. This one is to separate the southwestern half of the manor from the other half. The division is to be into moieties exactly equal in quantity. Now, it is entirely clear, that if you give a surveyor the number of acres of the whole tract, and the point on the Northwest creek where the division line is to commence, he can then determine mathematically the course, the distance, and the terminus of a straight line running an easterly direction which will divide the manor equally.

It may be conceded that if there was nothing referred to in the deed by which the commencement of this line, or any other part of it, could at the date of the deed have been fixed, that it would have presented a patent ambiguity. But if there was anything by which either the beginning or the end of the line could have been located, then the whole of it could have been located. On this point the deed seems sufficiently clear in two particulars. First, the line was to be run agreeable to the plat of land made by William Brown, of Anne Arundel county. Second, it was, with this aid, to be run under the direction of John Thomas, of said county. Now what is the meaning of this, fairly construed? It is that the grantor conveys one-half in quantity of the land. It is to be divided by a line running from the creek eastwardly, and there is a plat of this land made by William Brown, which shows this line, which is to be run out on the ground according to the plat, under the direction of John Thomas. The deed, therefore, refers perspicuously to the means which renders certain the description. "*Ambiguitas patens*," says Lord Bacon, "is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."

So here the deed on its face presented no apparent uncertainty. It is only when we come to apply it, and are unable to find or identify the plat made by Brown or the line run by Thomas, that there is any difficulty. The cases

relied on by counsel for the plaintiff to show that the courts of Maryland have established a different doctrine are not inconsistent with what we have said.

In *Fenwick v. Floyd's Lessee* [1 Harr. & G., 172], the land was described as "part of Resurrection Manor, containing two hundred and fifty-one acres more or less." Resurrection Manor was a large tract of four thousand acres, and the sheriff levied on and sold two hundred and fifty-one acres of it, with no other description than that just stated. Nothing else was shown by which this quantity could be located or identified, and the description was clearly a patent ambiguity on which the levy and sale was rejected as evidence.

In *Thomas' Lessee v. Turvey* [1 Harr. & G., 437], three levies and execution sales were rejected, the schedules of which described the land as "part of Borough Hall, containing the supposed quantity of one hundred and thirty acres of land, more or less." Borough Hall was a tract of five hundred acres, and there was nothing by which the location of the one hundred and thirty acres could be shown, nor any evidence that it had ever been located.

In *Hammond's Lessee v. Norris* [2 Harr. & J., 130], the description in the deed was, "all these two parcels of land, being parts of a tract of land called Wood's Enclosure, and sold to said John Howard by Joseph Wood, one parcel containing eighty-six acres, the other ninety-four acres, as by deed duly made and recorded in Frederick county appears." The court overruled plaintiff's objection, and permitted the deed to be read in evidence, but, as it subsequently appeared that there was no such deed as that referred to on record in Frederick county, and as no other satisfactory proof was made of the location of these tracts within the larger tract of Wood's Enclosure, the court finally held that it conveyed no title. That is just in accordance with the action of the court on this case in admitting the deed to be read in evidence, subject to the effect of it as to title, when all the evidence should be in.

This leads us next to inquire whether defendants have shown by satisfactory and competent evidence that this northern line had an existence, so as to enable us to determine what is the south half of the manor.

§ 1077. *Where a deed calls for a plat to show a boundary line, the existence of such line and its location can be shown by other evidence.*

Upon this point it does not seem to us there can be any doubt, for though the plat of William Brown is not produced, nor is it proved expressly that the line was ever run under the direction of Mr. Thomas, yet there is as much evidence as can possibly be expected to be produced after the lapse of eighty years, that such a line was run, and that, with such slight changes as the holders of the title on each side of it made by consent and for their mutual convenience, a fence has been standing along that line ever since.

And this does not depend solely upon parol evidence. The map in the chancery suit in Maryland, filed in 1802; the deeds produced, and the proof made by the ancient witness, with the other testimony produced, we think quite sufficient to show that the line mentioned in the deed of Samuel Lloyd Chew to his mother was run and established; that with the change made by Tait and Samuel A. Chew for convenience, it has remained the line to the present time, and that the parties claiming the north and south parts of the manor have recognized that fence for over thirty-five years as the line dividing their estates. We add further, that as this testimony is uncontradicted, it is conclusive against the claim set up by plaintiff of any title derived from Samuel A. Chew, and of her case. *Sargent v. Adams*, 3 Gray, 72; *Bertsch v.*

The Lehigh Coal Co., 4 Rawle, 139; Munroe v. Gates, 48 Me., 463; Reed v. Proprietors, etc., 8 How., 289; Noonan v. Lee, 2 Black, 499.

It is unnecessary to inquire into the effect of the mortgage given by plaintiff on her title, as we have already stated that she had none on which the jury could have found a verdict in her favor, and the error, if there was one in the instructions of the court on that subject, could work her no injury. Ryder v. Wombwell, Law Rep., 4 Exch., 32; Giblin v. Mullen, id., 2 Privy Council Appeal, 317.

Judgment affirmed.

SHEFFIELD v. PAGE — SAME v. FOSTER.

(District Court for Massachusetts: 1 Sprague, 285-289. 1855.)

STATEMENT OF FACTS.—Libels by a mate for wages, and for a wrongful discharge at Calcutta. Two sets of articles were produced, only one of which contained the libelant's name. The respondents alleged a voyage from San Francisco to Calcutta, and the articles signed purported to be for a voyage from San Francisco to Calcutta and contained no rate of wages. Libelant offered parol evidence that he shipped for a voyage from San Francisco to Boston, *via* Calcutta, and at a specified rate of wages.

Opinion by SPRAGUE, J.

Several questions arise in this case. 1st. Were any articles signed by the libelant? 2d. If so, for what voyage? And 3d. If for the voyage alleged by the respondents, can parol evidence be admitted to show that the parties contracted for a voyage to Boston, *via* Calcutta; and what effect shall be given to that evidence? On the whole, I think there is satisfactory evidence that the articles were signed; and I think the articles signed were for a voyage to Calcutta, as claimed by the respondents. Is parol evidence, then, admissible to show a contract for a voyage to Boston? The argument urged is that the articles do not contain the whole contract and are not inconsistent with evidence of a contract to continue the voyage to Boston, after arriving at Calcutta. And there is certainly plausibility in this view. The cases upon this subject are so numerous and so various that perhaps it is not easy to reconcile all of them; yet the true principle is not difficult of discovery.

§ 1078. *A written contract cannot be varied by parol; but an agreement distinct from the written contract may be proved by parol.*

An agreement, distinct from that contained in the writing, can, of course, be proved by parol; but nothing can be introduced to change the written contract; and if the whole matter is one contract, made at one time, parol evidence that a part was omitted is not admissible, for that would be inconsistent with and would affect the writing.

§ 1079. *When a writing purports on its face to contain the whole agreement, to add anything to it is to alter and vary it.*

When the writing purports on its face to contain the whole agreement relative to its subject-matter, to add anything to it is to alter and vary it. Suppose a farmer were to hire a laborer, at a specified rate of wages, for six months, from the 1st day of April, by a contract in writing; could the laborer prove by parol that the agreement was for twelve months, and thus get the higher rate of wages during the winter? Such evidence would change the contract as it appeared in the writing, and would make it less favorable to one of the parties than the written agreement. Now, the case before us is

substantially the same. Wages were higher at San Francisco than at Calcutta; and to permit the mate to prove a contract to Boston would make the owner pay a higher rate from Calcutta, and would thus injuriously vary his contract. So, if the reverse were the case, the mariner's contract would be changed to his injury, by parol evidence of an agreement to go farther, at the lower rate.

§ 1080. — *but when a written contract is incomplete on its face, and tacitly refers to parol evidence, such evidence may be admitted.*

But, in this case, another principle is applicable. Here there is a palpable defect in the written contract. It does not appear to contain the whole agreement. When the written contract is incomplete on its face, and tacitly refers to parol evidence, such evidence may be admitted. By the shipping articles, the libelant agrees to go, as first mate, to Calcutta, but no wages are specified. Does that mean that he is to go for nothing? That certainly is not the inference to be drawn in case of mariners' articles. When services are contracted for, and there is no expectation that the seaman will be better off, at the end of the voyage, it is not to be inferred that his services were to be gratuitous. Compensation was to be made.

§ 1081. *Where a mate signed articles for a voyage from San Francisco to Calcutta, no wages being specified, he was permitted to prove by parol that the voyage was from San Francisco to Boston, via Calcutta, for a certain rate of wages per month.*

But that part of the agreement which determined the amount was not reduced to writing and may be proved by parol. It may be said that by the agreement, as proved, the mate was to receive \$50 a month, and, therefore, we may allow that amount until the vessel arrived at Calcutta, without admitting parol evidence of the voyage to Boston. But that would not be a true view of the evidence. The rate of wages at San Francisco was more than \$50 to Calcutta, but less from that place to Boston. And a part of the compensation to the mate, for going to Calcutta, was the promise of the same rate of wages to Boston. And this part of his compensation is provable, at the same time and by the same evidence, as the other; both being embraced in one contract. Wages to Boston were an essential part of the consideration; and if the parol evidence come in at all, it must come in to show the exact consideration. Such evidence being then admitted, it is proved very clearly that the contract was, as is alleged by the libelant, for a voyage from San Francisco, *via* Calcutta, to Boston.

§ 1082. *Where a mate was wrongfully discharged in a foreign port, and came home before the mast, on another vessel, the court decreed him his wages and expenses until his return home, without deducting what he earned before the mast.*

The libel is sustained, and I decree wages to Boston, with the expenses incurred in Calcutta, and interest up to the date of the decree. I shall not deduct the money earned by the libelant on his return. It is true, a mariner discharged, under such circumstances, is not at liberty to aggravate the damages for which the owners are liable, by incurring unnecessary expenses or refusing to earn wages on his homeward passage, when proper opportunity is offered. If this libelant could have had the situation of mate in a vessel home, he might have been bound to accept it; but he was under no obligation to serve as a common sailor, and the owners had no claim to a deduction by reason of wages so earned. Indeed, he might have taken a cabin passage at their expense. Allowing him wages and his expenses up to the time of his reaching Boston will not be more than an indemnity.

The libel against the master depends on the same state of facts, and rests on the ground that a wrong has been committed, for which the libelant is entitled to a remedy against the master, but not against the owners.

§ 1083. *Where a mariner recovers wages and damages against the owners for a wrongful discharge by the master, he has no further claim against the master.*

The question, then, comes to this: Can he recover anything against the master which he could not recover against the owners? What is there against the master? Nothing but the violation of the contract. The master said the contract was at an end, and that the libelant should remain at Calcutta, and left him to take the consequences. But it was not at an end, and being a contract with the owners, made through their agent, they are liable for all the damages sustained by its violation; and there is, in this case, no ground for any additional claim against the master.

I shall dismiss this libel, therefore, and, as it was unnecessarily brought, I shall decree sufficient costs to the respondent to compensate for the trouble of filing the answer, but no more. In the first suit, decree for the libelant for \$606, the amount claimed, and costs. In the second, libel dismissed with \$10 costs to the respondent.

LAFITTE v. SHAWCROSS.

(Circuit Court for Louisiana: 12 Federal Reporter, 519-522. 1883.)

Opinion by BILLINGS, J.

STATEMENT OF FACTS.—In this case the plaintiff had been the agent of the defendant in the purchase of cotton. His commissions ordinarily had been three-fourths per cent. upon the purchases. To recover these commissions upon that basis this suit is brought. It appeared in evidence that some difference existed between the plaintiff and defendant as to what the commissions should be for the months of September, October and November, 1880, and that on the 18th day of November the plaintiff handed to the defendant the following letter, signed by him:

“NEW ORLEANS, 18th November, 1880.

“R. SHAWCROSS, ESQ.:

“*Dear Sir*—Having conversed with you this A. M. upon your business, I will agree to charge you only three-eighths of one per cent. on all business done during the months of September, October and November, 1880.

“I am very truly yours,

“JAMES A. LAFITTE.”

This letter having been pleaded as a remission of all beyond the three-eighths per cent., and its writing and delivery having been admitted by the plaintiff, he offered to introduce parol evidence tending to show that during the conversation in which the agreement, as evidenced by the letter, was made on his part, and as the consideration of the same, the defendant agreed to continue him as his agent, which last agreement the defendant had violated. The court excluded the evidence, and judgment was given for the defendant, with leave to the plaintiff to move for a new trial at the present term. The question is, can a party who executes a unilateral contract in writing, which does not recite the consideration, prove that the consideration of the contract was another and distinct verbal agreement or undertaking on the part of the person seeking to enforce the written contract?

§ 1084. *Parol evidence admissible to supplement a unilateral written contract, as to show that the writing was only a memorandum of part of a more general parol contract. Cases cited.*

I shall first consider the question in the light of the common law authorities. The rule is universal that parol evidence is not permissible to contradict or vary the terms of a written instrument; but when, as here, the writing is confined to one undertaking by one party, although a presumption arises, in the absence of proof to the contrary, that the parties expressed the *whole* of their intention in respect of the subject-matter, yet that presumption may be rebutted by express evidence that what was so written was intended as a mere memorandum of one part or branch only of a more general agreement, or it may be shown that a parol contract was made independently, wholly collateral to and distinct from a written one made at the same time. Starkie, Ev., part 4, marginal paging 1049 and 1050. The case cited in the note is Russell v. Dunskey, 6 Moore, 233, where there was a written adjustment under a policy of insurance, and parol testimony was admitted of a contemporaneous agreement to refund. The rule in England is well stated by Chief Justice Erle, in Lindley v. Lacey, 17 Com. B., 586 (112 Eng. Com. Law), as follows:

“If the instrument shows that it was meant to contain the whole bargain between the parties, no extrinsic evidence can be admitted to introduce a term which does not appear there; but if it be clear that the written instrument does not contain the whole, and the jury find that there was a distinct collateral verbal agreement between the parties, not inconsistent with the written contract, the law does not prohibit such distinct collateral agreement from being enforced.”

In Tisdale v. Harris, 20 Pick., 9, where the plaintiff had given a written agreement to buy property, the court admitted parol evidence to show upon what conditions the defendant was to sell. In Campbell v. McClenachan, 6 S. & R., 171, the court held that parol evidence may be given of what passed between the parties at and immediately before the execution of a written instrument by one party, where a verbal promise made by the other party induced him to execute the instrument. In The Alida, 1 Abb. Adm., 179, Judge Betts, after a consideration of the authorities, lays down the principle to be that the written instrument was binding, so far as it went; but that, as to such parts of the contract as were not embraced within the writing, parol evidence was admissible. In Potter v. Hopkins, 25 Wend., 417, the court say: “Where a contract rests part in writing and part in parol, oral proof is admissible to supply the deficiencies in the part written, if the contract be of such a nature as is not required to be in writing.” I think that it is clear from these authorities that, at the common law, the testimony is admissible.

The decisions in Louisiana are but an exposition of article 2276 of the Civil Code of Louisiana, which provides as follows: “Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them, nor since.” The rule thus laid down has been rigidly enforced in Lynch v. Burr, 7 Rob. (La.), 100; Henderson v. Stone, 1 Martin (N. S.), 641; Gould v. Bridgers, 3 Martin (N. S.), 692; Wilson v. Phillips, 4 La. Ann., 159; Macarty v. Gasquet, 11 Rob., 275; and in Selby v. Friedlander, 22 La. Ann., 381.

It is difficult to reconcile these cases with Klein v. Dinkgrave, 4 La. Ann., 540; Delabigarre v. Second Municipality, 3 La. Ann., 235; and Saramia v.

Courrege, 13 La. Ann., 25. These last three cases hold that parol testimony may be introduced to show, as between the parties, the cause (*i. e.*, the consideration) of the contract, even when they add to its terms. See, also, the views of the court in *Robertson v. Nott*, 2 Martin (N. S.), 125.

§ 1085. *Where a written contract expresses no consideration, the consideration may be proved by parol.*

What the plaintiff here asks to prove is the consideration, which was a separate undertaking. A careful study of all the authorities would lead me to the conclusion that if the consideration had been expressed in the written papers, under our law nothing could be added to the writing. But as no consideration is expressed, and the letter purports to be and is pleaded as a remission of a portion of a claim, to ascertain whether it be operative, the court must ascertain whether it was in fact founded upon a consideration; for, according to Civil Code, article 1893, an obligation without a cause can have no effect. Though an agreement may be valid without any expressed cause, a sufficient cause must be shown to exist, or the letter would be of no effect. This necessitates the admission of the evidence as to the consideration of the promise or remission contained in the letter. A new trial must, therefore, be granted.

HALSEY *v.* HURD.

(Circuit Court for Michigan: 6 McLean, 102-106. 1854.)

Opinion by the COURT.

STATEMENT OF FACTS. — The partnership of the plaintiffs, and also that of the defendants, is admitted. The action is brought on a contract to deliver wheat. It is dated the 30th of January, 1852, at Detroit, and is as follows:

“Mr. R. & H. Halsey Bo’t of J. L. Hurd & Co. the following lots of pure white Michigan wheat, first quality, sound and merchantable, to be delivered free on board vessel on opening of navigation:

Five thousand bushels at 72 cents.	\$3,600 00
Five thousand bushels at 73 cents.	3,675 00
	\$7,275 00

“Received on account of the above \$100, signed,

“J. L. HURD & Co.”

Samuel Lewis, a witness, was present at an interview between the plaintiffs and Stewart, one of the defendants. The bill for the ten thousand bushels of wheat was in the handwriting of Stewart. Halsey told Stewart that he had come prepared to pay for the wheat; Stewart said that he should not, and did not intend to deliver it; Halsey said he had the money in the hands of Lewis & Graves, of Detroit; Stewart said he had not the wheat. Navigation was then open. Before the navigation was open, Halsey said to Stewart that the money was in the hands of the above firm. It was received by them the 13th of February, and they retained it until the middle of July.

§ 1086. *When the time of payment is not specified, parol evidence is admissible to prove time of payment on a contract evidenced by a written agreement.*

The defendants’ counsel asked the witness what time the money was to be paid. This was objected to, as changing the legal effect of the contract. That by the legal effect of the contract the wheat was to be paid for when it was delivered; and that parol evidence is inadmissible to change the terms of the contract, or in any respect to vary the legal effect of it. But the court said that the evidence offered did not alter, in any respect, the written terms of the con-

tract; that the time of payment was not specified, and in such case the construction would be, that the payment was to be made when the article was delivered. But this was an inference of law, which the agreement of the parties might vary, by fixing a different time for payment. That on such contracts it was customary to advance the money, in order that the seller might purchase the article on better terms. And this, not being a part of the written contract, may be proved by parol. It does not, in the sense of the books, contradict or vary the written agreement. If the time of payment be stated in the written agreement, and the vendor give further time for payment, and it be made within the extended time, it constitutes a good defense.

§ 1087. — *cases cited.*

In the *Susquehanna Bridge Co. v. Evans*, 4 Wash., 480, the judge says, "the reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments do not apply to those contracts implied by operation of law, such as that which the law implies with respect to the indorser of a note of hand."

In *Hill v. Ely*, 5 Serg. & R., 362, it is held parol evidence is admissible, in a suit by the indorsee against the indorser of a note indorsed in blank, to show that at the time of the indorsement the indorsee received it under an agreement that he should not have recourse upon it against the indorser. In *Battles v. Fobes*, 21 Pick., 239, parol evidence was held admissible to prove the time at which a specialty was actually executed, contrary to the date. In *Bradley v. Washington Steam Packet*, 13 Pet., 99 (§§ 1059-63, *supra*), the court held, "that in giving effect to a written contract by applying it to its proper subject-matter, extrinsic evidence may be admitted to prove the circumstances under which it was made, whenever, without the aid of such evidence, such application could not be made in the particular case."

In *Davenport v. Mason*, 15 Mass., 85, it is said, "parol evidence may be admitted to establish an independent fact, or to prove a collateral agreement incidentally connected with the stipulations of a deed or other contract." In *United States v. Leffler*, 11 Pet., 86, it was held that a surety in a joint and several bond may show that he signed it on condition that others, besides those whose names are to it, would execute it, and that their signatures were not procured.

Lewis, a witness, said, at the time the contract was made, it was agreed that the money should be paid as soon as it could be forwarded by express, and the defendant said that a few days would make no difference. Mr. Fargo, agent of the express at the above time, states that the travel of the express was then by land, and it was from seven to nine days, and sometimes longer, in traveling from Buffalo by Cleveland to Detroit. The money was received by Lewis on the 13th of February.

Some four or five days before the money was received Stewart called on Lewis for the money, who informed him it was expected daily; and on calling again two or three days afterwards, saying he had some notes to pay in bank, witness offered to loan the money to him, which he declined. After this the witness met Stewart in the street, and proposed to advance him the money on railroad certificates, that the wheat was in the warehouse; but Stewart refused, saying he had bought wheat in the interior; but as Halsey had failed to advance the money, he would not comply with the contract.

From the time the contract was made to the receipt of the money by Lewis thirteen or fourteen days elapsed, which exceeded by four or five days the

time within which the money was expected to be transmitted from Ithaca. The navigation of the lake opened from the 10th to the 15th of May. Several witnesses proved the price of wheat, at Detroit, at the time the navigation opened. There was some discrepancy in the statement of one or two witnesses called by the defendant and the witnesses of the plaintiff.

The court instructed the jury that from the parol evidence the defendants agreed to the mode of payment stipulated, through the express, the defendants observing a few days would make no difference. After the contract Halsey was to return to Ithaca, in New York, his place of residence, and from which the money was to be transmitted to Mr. Lewis, his agent at Detroit. It was supposed that this could be accomplished in some seven or eight days. But it was thirteen or fourteen days before the money was actually received. In the month of February it was shown that the road the express traveled in many places was almost impassable, and that it was liable to be delayed by high waters and various casualties.

§ 1088. *Where no time of payment is expressly stipulated, delay occasioned by bad roads, etc., will not avoid a contract.*

If it appear, gentlemen, from the evidence, that there was no delay on the part of Halsey, but that he forwarded the money by the express, as he agreed to do; and the delay was principally, if not entirely, owing to the badness of the road traveled by the express, he is not chargeable with any laches which would discharge the defendants from the obligations of their contract. In consenting to receive the money through the express, it is reasonable to say that they incurred the chance of a short delay, which amounted to no more than a few days, and which they said would make no difference.

§ 1089. *Measure of damages upon breach of contract to deliver a commodity.*

That the defendants were desirous of avoiding their contract is manifest from the fact that, at the time navigation opened, wheat was somewhat higher than the prices stipulated in the contract. The money was ready for the defendants three months before the navigation opened, which would seem to be a reasonable time within which to make their purchases. If you are satisfied, gentlemen, that the plaintiffs have substantially complied with their agreement, they are entitled to recover the damages they have sustained by reason of the failure of the defendants. These damages arise from the fact that at the opening of navigation, when the wheat was to be delivered, it bore a higher price, at Detroit, than the price stipulated to be paid in the contract. This difference, together with the hundred dollars advanced by the plaintiff, at the time of the contract, with the interest thereon, will form your verdict, if you find for the plaintiff.

ROBINSON v. UNITED STATES.

(13 Wallace, 363-366. 1871.)

ERROR to U. S. Circuit Court, District of California.

STATEMENT OF FACTS.—Robinson & Co. contracted to furnish a quantity of barley to the United States. There were several specifications as to quality, etc., in the contract, but none as to the packages, sacks, or the like. They delivered some in sacks, and afterward tendered some in bulk, which was refused, and they thereupon threw up the contract. Suit was brought by the United States, and judgment rendered for the plaintiff.

§ 1090. *Oral proof of a custom may be received to explain a written contract, because the parties are supposed to contract with reference to it; but such proof is inadmissible if it contradicts or is inconsistent with the written contract.*

Opinion by MR. JUSTICE DAVIS.

In *Barnard v. Kellogg*, 10 Wall., 383, this court decided that proof of a custom or usage inconsistent with a contract, and which either expressly or by necessary implication contradicts it, cannot be received in evidence to affect it; and that usage is not allowed to subvert the settled rules of law. But we stated at the same time that custom or usage was properly received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, and that such evidence was thus used on the theory that the parties knew of the existence of the custom or usage, and contracted in reference to it. This latter rule is as well settled as the former (1 Smith's Lead. Cas., p. 386, 7th ed.), and under it the evidence was rightly received.

It is obvious, by the steps which the plaintiffs took to perform their contract, that there are two modes in which barley may be delivered, for they delivered part in sacks and tendered part in bulk. And it is equally obvious, on account of the additional cost, that they would not have delivered the barley in sacks for a period of six months if the contract on its face was satisfied by a delivery in bulk. The contract, by its terms, is silent as to the mode of delivery, and although there are two modes in which this can be done, yet they are essentially different, and one or the other, and not both, must have been in the minds of the parties at the time the agreement was entered into. In the absence of an express direction on the subject, extrinsic evidence must of necessity be resorted to in order to find out which mode was adopted by the parties; and what extrinsic evidence is better to ascertain this than that of usage? If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.

The evidence in the present case did not tend to contradict the contract, but to define its meaning in an important point, where, by its written terms, it was left undefined. This, it is settled, may be done.

§ 1091. *A custom or usage of a trade may be proved by a single witness.*

It is objected that the usage was proved by a single witness. But we cannot assert, as a rule of law governing proof of usages of trade, that, if a witness have a full knowledge and a long experience on the subject about which he speaks, and testifies explicitly to the antiquity, duration and universality of the usage, and is uncontradicted, the usage cannot be regarded by the jury as established. On the contrary, the authorities are that in such a case it may be. See 1 Smith's Lead. Cas., 782, 7th ed.; *Vail v. Rice*, 1 Seld., 156; *Marston v. Bank of Mobile*, 10 Ala., 284; *Partridge v. Forsyth*, 29 Ala., 200.

Judgment affirmed.

PARTRIDGE *v.* INSURANCE COMPANY.

(15 Wallace, 573-580. 1872.)

ERROR to U. S. Circuit Court, District of Missouri.

STATEMENT OF FACTS.—Partridge, through certain negotiations through agents of the Phoenix Mutual Life Insurance Company, obtained employment as agent of the company in the state of Missouri, but without any definite understanding whether he was general agent for the state or not. His business was to solicit insurance, obtain renewals and collect premiums, receiving as his compensation twenty per cent. of the premium on first insurance, and seven and one-half per cent. on renewals. On receiving letters from the company which indicated that he was not regarded as a general agent, he wrote to the company for information as to his *status*, receiving in reply an assurance that he was simply working up a business for himself, and was paid the highest commissions paid by the company, but that the company had no idea of giving him the exclusive control of the state.

Another agent was sent out by the company, and, difficulties arising, Partridge was discharged, having in his hands at the time a sum of money collected as premiums. In a suit against the company he claimed that by virtue of his correspondence with the company, and a general usage in force at St. Louis, he was entitled to be paid a commutation at a certain rate. The company pleaded a set-off. At the trial the plaintiff offered to prove that the language of the company's letter, defining the *status* of the plaintiff, had a technical meaning as used among insurance men different from the ordinary meaning of the terms used. The evidence was rejected. Judgment was rendered for the company on its set-off.

§ 1092. *Evidence of usage or custom is not admissible to vary the terms of a written contract, the language of which is neither technical nor ambiguous, and therefore not needing the aid of such usage or custom in its construction.*

Opinion by MR. JUSTICE MILLER.

The question did not arise whether the custom which the plaintiff offered to prove could have been proved as the measure of his compensation, in the absence of any express contract, because the plaintiff had introduced in evidence a letter from the defendant in reference to this compensation, under which he said he had acted in taking the policies for which he now claimed the additional commission. There was no question as to the amount, or percentage, or premium, which was to be paid under this letter. The plaintiff stated that he had retained a certain percentage, which was that allowed by the company. The testimony was not offered to show what was the highest commission paid by the company.

It appears to us, as it did to the circuit court, that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff. The language of the letter was neither ambiguous nor technical. It required and needed no expert, no usage, to discover its meaning. To have admitted the usage offered in evidence in this case would have been to make a contract for the parties differing materially from the written one under which they had both acted for some time.

The tendency to establish local and limited usages and customs in the contracts of parties, who had no reference to them when the transactions took place, has gone quite as far as sound policy can justify. It places in the hands

of corporations, such as banks, insurance companies, and others, by compelling individuals to comply with rules established for the interests alone of the former, a power of establishing those rules as usage or custom with the force of law. When this is confined to establishing an *implied* contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to or vary or contradict the well-expressed intention of the parties made in writing. No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts.

§ 1093. *Defendants can in the federal courts avail themselves of the laws prevailing in the state where the court is held, concerning the right of set-off generally.*

A question is raised in this court not raised in the circuit court, as to the right of the defendant to recover, by way of set-off or cross-action against the plaintiff, a sum of money in his hands as agent of the plaintiff, which was admitted to be due, if plaintiff's claim was not established. The amount was admitted by plaintiff, and no objection was made to pleading it as a set-off. Therefore none can be made here. But if the point were open to inquiry, it is settled by the case of *West v. Aurora City*, 6 Wall., 139, that defendants in the circuit courts of the United States can avail themselves of the laws which prevail in the state concerning the right of set-off generally. It would be a most pernicious doctrine to allow a citizen of a distant state to institute in these courts a suit against a citizen of the state where the court is held, and escape the liability which the laws of the state have attached to all plaintiffs, of allowing just and legal set-offs and counter-claims to be interposed and tried in the same suit and in the same form.

Judgment affirmed.

BAILEY v. RAILROAD COMPANY.

(17 Wallace, 96-109. 1872.)

ERROR to U. S. Circuit Court, District of Missouri.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Certificates of stock, described in the bill of complaint as common or unpreferred stock, amounting to \$3,000,000, were issued by the respondents, divided into shares of \$100 each, which constituted their capital stock. Pecuniary obligations were contracted by the company in constructing the road, much beyond their means of payment, which consisted of three classes of bonds, issued by the company at different times, in aid of the construction and equipment of the road, and which were secured by three several mortgages, and were known as land bonds, convertible bonds and second mortgage bonds. Embarrassment necessarily ensued, as the stock of the company had become of no value in the market; and as the respondents were unable to pay the interest on their bonds or to make any dividends, they issued to the holders of the bonds a circular or plan for extricating the company from their difficulties and for improving their securities. By that plan they proposed to the several holders of the bonds that they should exchange the same in part for other bonds and in part for pre-

ferred stock of such a nature that its holders should have the right to receive "seven per cent., not cumulative, but to share with the common stock any surplus which may be carried over and above seven per cent. *upon both* in any one year." Measures were adopted to send that circular to all the holders of the bonds, and it appears that a large majority of the bondholders approved and accepted the terms and conditions of the proposed arrangement, and as evidence thereof signed an instrument by which they agreed to surrender the mortgage bonds which they held, and receive, in exchange therefor, new bonds and preferred stock in accordance with the provisions of the plan for extricating the company from its present difficulties and for improving their securities; that the respondents thereupon appointed a committee with power to carry it into effect; that the committee prepared an indenture to accomplish that end; that they subsequently, by order of the directors, submitted the same to a meeting of the stockholders convened for that purpose, and that the stockholders did then and there accept and ratify the action of the directors and of the committee, and ordered that the indenture should be duly executed and delivered.

Authority was also conferred upon the directors, at the same meeting, to adopt, in behalf of the company, such certificates in relation to the preferred stock to be issued under the agreement "as may be necessary to carry the same into effect," and to cause the same to be executed, in behalf of the company, as they may think best. They, the directors, accordingly prepared and adopted, in behalf of the company, the form in which all of the certificates of the preferred stock were for a time issued by the respondents, which contains the recital that the holder "shall be entitled to receive all the net earnings of said company which may be divided pursuant to said indenture in each year, up to \$7 per share, and to share in any surplus beyond \$7 per share which may be divided upon the common stock." Certificates of preferred stock were issued in that form until the legislature passed the act authorizing the company to convert their bonds secured by mortgage into preferred stock, when the certificates issued in that form were recalled and a new form was adopted; but inasmuch as it contains the same provision in respect to the right of the holder to participate in the yearly net earnings of the company, it need not be reproduced, except to say that the certificates in the second form, as well as in the first, purport, on their face, to be issued subject to the terms and conditions of the indenture between the company and the trustees, which the stockholders directed should be executed and delivered to carry the plan sent to the stockholders into effect. Pursuant to that order it was executed, and it contains the following provision: "That said preferred stock shall be entitled to a dividend of seven and one-half per cent. from the net earnings of said road in each year, whenever a dividend of said net earnings shall be made, before any dividend shall be declared upon other unpreferred shares of said corporation, and to an equal dividend with said other shares of the net earnings of the company beyond said seven per cent., but shall at no time be entitled to an accumulated dividend in any subsequent division of said net earnings." Eight hundred shares of the preferred stock are owned by the complainant, and he filed the bill of complaint claiming that by the true construction of the indenture the preferred stock is entitled, not only to a dividend of seven per cent. from the net earnings of the road in each year, before any dividend is declared in favor of the unpreferred stock, but also to an equal dividend with the unpreferred stock in the net earnings of the same year

beyond the amount required to discharge the dividend of seven per cent. secured to the preferred stock.

Shares of the preferred stock, it is conceded, are entitled to a dividend of seven per cent. from the net earnings of the road in each year whenever a dividend of net earnings is made, before any dividend can be claimed for the shares of the unpreferred stock, as that is a matter of priority created by the indenture; but it is insisted by the respondents that the priority does not extend beyond the seven per cent.; that when that priority is satisfied the preferred stock is not entitled to any further dividend in that year until the unpreferred stock shall receive a seven per cent. dividend from the net earnings of the road in the same year.

Ten and a half per cent. net having been earned by the road in one year, the directors, adopting the views of the respondents, made a dividend of seven per cent. upon the preferred stock, and having satisfied that priority, they made a dividend of three and a half per cent. from the residue of the net earnings beyond the seven per cent. upon the unpreferred stock, and the complainant, insisting that the fund of three and a half per cent. was to be shared equally between the preferred and the unpreferred stock, filed the present bill of complaint and prayed for an injunction to restrain the company from paying any such dividend upon the unpreferred stock. Proofs were taken, and the parties having been heard, the court entered a decree for the respondents, dismissing the bill of complaint.

§ 1094. *Evidence of what was the general understanding of a number of persons is not competent to control the construction of a written contract.*

Evidence was introduced showing that all the parties understood the transaction, from its commencement to its final consummation, as it is understood by the respondents; but it is insisted by the complainant that such evidence is inadmissible, as its tendency is to explain and qualify what is in writing, and the court is inclined to concur with the complainant in that proposition. Such evidence cannot be admitted in the case except for the purpose of connecting the several written instruments together, and of showing that they are all parts of one transaction; nor is it admitted that the evidence is necessary in this case, even for that purpose, as the instruments themselves contain the most persuasive evidence to establish that fact; and inasmuch as it appears that they were all introduced, either by the complainant or by the respondents, without objection, they are properly before the court. Such being the fact, it is quite clear that they must all be regarded as instruments *in pari materia*, and that as such they are the proper subjects of consideration, in order to ascertain and determine what is the true nature of the transaction and the true construction of the contract between the parties. All of these writings were executed as means to the same end, which was to enable the company to find relief from the impending dangers and great embarrassments with which they and all interested in their affairs were surrounded. They could command nothing, nor were the bondholders in much better condition, as a foreclosure would not, in all probability, accomplish much except to sacrifice the interests of all concerned. Everything connected with the enterprise was in jeopardy except the interest of the state, whose loan of \$3,000,000 was secured by a first mortgage, covering the franchise, road-bed, and all the rolling stock of the company, whose lands, franchise, road-bed, and other property were also incumbered by the other three mortgages before mentioned, amounting to \$8,000,000.

No attempt was made to negotiate with the state, but the relief sought was

obtained by the arrangement with the holders of the bonds issued by the company, and which were secured by the three mortgages aforesaid which were subject to the mortgage given to the state, as follows: (1) Holders of bonds under the first of the three mortgages were to surrender thirty per cent. of their bonds and all their unpaid coupons, and to accept preferred stock for the amount. (2) Persons holding bonds under the second mortgage were to surrender forty per cent. of their bonds and all their unpaid coupons, and they were to accept preferred stock as stipulated in the indenture. (3) Those holding bonds under the third mortgage were to surrender the whole of their bonds and unpaid coupons, and were to accept preferred stock for both bonds and coupons.

Priority was thus secured by the bondholders over the unpreferred stock amounting to a lien, as against the holders of the latter stock, for a yearly dividend of seven per cent., if the net earnings of the road were sufficient for that purpose, as conceded by both parties. Prior stockholders yielded them that preference, but they insist that no just construction of the contract will give them any more in any one year until the net earnings of the road will also give to the holders of the unpreferred stock a dividend for the same amount, and the court is inclined to adopt the same conclusion.

Test the question by the circular addressed to the bondholders, which they all signed as the preliminary step to the arrangement, and the inquiry is too clear for argument, as the statement is that the preferred stock shall "be seven per cent., not cumulative, but to share with the common stock any surplus which may be carried over and above seven per cent. *upon both* in any one year," which means as plainly as language can express the idea, that the preferred stock shall share in the surplus arising from the net earnings of the company in any one year, beyond what is necessary to pay a dividend to the whole stock, preferred and unpreferred, of seven per cent. Nothing more favorable could be expected by the bondholders, as they signed the circular and agreed to surrender the number of bonds set against their respective names, and to receive in exchange therefor new bonds and preferred stock in accordance with the provisions of the plan for extricating the company from their present difficulties and for improving their securities, showing that their attention had been called to the plan and that they were satisfied with its terms and conditions. *Sturge v. Railway*, 7 De G., M. & G., 158. Beyond doubt the directors understood the matter in the same way, as they invested the committee which they appointed with the power to make such expenditures as to them should seem discreet to carry out the plan, which was sent to all the bondholders for their approval.

§ 1095. *Several writings relating to the same subject-matter may be read in evidence together and taken to explain each other.*

Suppose that is so, still it is insisted that the indenture is the only evidence of the contract between the parties, but it is too late to advance that proposition, as all the other instruments are before the court without objection, and several of them were introduced by the complainant as exhibits to the bill of complaint. Seasonable objections, however, could not have availed the complainant if they had been made, as it is well settled law that several writings executed between the same parties substantially at the same time, and relating to the same subject-matter, may be read together as forming parts of one transaction; nor is it necessary that the instruments should in terms refer to each other if in point of fact they are parts of a single transaction. *Cornell v.*

Todd, 2 Denio, 133; Jackson *v.* Dunsbagh, 1 Johns. Cas., 91; Stow *v.* Tiftt, 15 Johns., 463; Railroad *v.* Crocker, 29 Vt., 542; Sturge *v.* Railway, 7 De G., M. & G., 158; Jackson *v.* McKenny, 3 Wend., 233; Hull *v.* Adams, 1 Hill, 601. Until it appears that the several writings are parts of a single transaction, either from the writings themselves or by extrinsic evidence, the case is not brought within the rule, as it may be that the same parties may have had more than one transaction in one day of the same general nature. Doubt upon that subject, however, cannot arise in this case, as the due relation of the several writings to each other is conceded by both parties. Cornell *v.* Todd, 2 Denio, 133.

Standing alone it may be admitted that the indenture furnishes some support to the views of the complainant, but it is clear that all ambiguity disappears when it is read in connection with the writings which preceded and followed it in respect to the same subject-matter. Ample justification for that remark is found in the plan which preceded it and which was approved and signed by all the bondholders, and in the form prepared for the certificate of the preferred stock which was adopted subsequently to the execution of the indenture, and which was accepted by all the holders of the preferred stock as a complete fulfillment of the arrangement between them and the company. Holders of preferred stock, as there provided, are entitled to receive all the net earnings of the company which may be divided pursuant to the indenture in each year up to \$7 per share, and to share in any surplus beyond \$7 per share which may be divided upon the common stock, which in substance and legal effect is the same regulation as that contained in the circular or plan, and all the other writings upon the subject which were given in evidence at the final hearing. Bailey *v.* Hann. & St. Joseph R. Co., 1 Dill., 176.

Viewed in any reasonable light, the court is of the opinion that the decision of the circuit court is correct, and that there is no error in the record.

Decree affirmed.

SPECHT *v.* HOWARD.

(16 Wallace, 564-566. 1872.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The defendants in error were the plaintiffs in the court below. The action was upon a promissory note made by Jehl & Brother to Specht, and by him indorsed to Howard, Sanger & Co., the plaintiffs. The makers and indorser lived in Memphis. The indorsees lived in the city of New York, and the note was made and indorsed there. No place of payment was mentioned in the note. At its maturity the makers were sought in the city of New York, and not being found, the note was protested for non-payment, and notice was given by mail to the indorser. Upon the trial, after proof of the protest and notice, the plaintiffs offered to prove that, at the time the note was drawn, it was agreed between the makers and Howard, Sanger & Co. that it should be made payable in the city of New York, and that the place of payment was omitted by the mistake of the draughtsman. Specht objected to the admission of the testimony. The objection was overruled and he excepted. The agreement and mistake were proved. Specht then offered to prove that he had not consented that the note should be made payable in New York. The testimony was rejected and he excepted. He then asked the court to rule that the plaintiffs' evidence showed such a change in his con-

tract of indorsement as discharged him from liability. The court refused so to rule, and he excepted. The court then withdrew from the jury the evidence relating to the parol agreement, and ruled that the proof of demand and notice was insufficient to create any liability on the part of the defendant. Specht excepted to the withdrawal of the evidence as to the parol agreement. The plaintiffs then proved that, after the maturity of the note, Specht, with a full knowledge of the defective demand and notice, promised to pay the note. No objection was made to the admission of this testimony, nor to the charge of the court upon the subject. The jury found for the plaintiffs and judgment was rendered accordingly.

The error complained of is, that the court withdrew from the jury the evidence touching the parol agreement as to the place of payment made contemporaneously with the drawing and execution of the note. The plaintiff in error insists that, being a surety, it altered and discharged his contract.

§ 1096. *An oral agreement, entered into at the time of the making of a note, between the maker and one who subsequently becomes an indorsee, fixing the place at which the note shall be payable, is a nullity, and does not affect the payee's liability.*

The evidence was improperly admitted and was properly withdrawn. The agreement was a nullity and could not in any wise affect the rights of either of the parties. "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add to, or subtract from, the absolute terms of the written contract." Parsons on Notes and Bills, 501. An agreement between the creditor and principal must, to exonerate the surety, be one "binding in law upon the parties." M'Lemore v. Powell, 12 Wheat., 554.

Judgment affirmed.

FORSYTHE v. KIMBALL.

(1 Otto, 291-294. 1875.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The case made by the bill is as follows:

The appellant, John Forsythe, negotiated a loan of \$5,000 from the insurance company. He had four brothers. For \$4,000 of the amount loaned, he and each of his brothers gave a separate note of \$800. Ten notes of \$200 each, signed by all the parties, were given for the interest, which was to be paid semi-annually, at the rate of ten per cent. per annum. The notes all bore date on the 5th of January, 1869. Those for the principal were to be paid at the end of five years. At the same time, Robert H. Forsythe, one of the brothers, gave for the residue of the loan his note for \$1,000, of the same date with the five notes of \$800 each. He also then gave his ten notes of \$50 each for the interest, which was at the same rate as that upon the notes of \$800, and payable at the same times. The notes were all made payable to J. Y. Scammon, or order.

Four thousand dollars of the money loaned was invested in real estate, and the title taken to the five brothers who had executed the five notes of \$800. They secured those notes and the ten interest notes by a mortgage on the premises. The \$1,000 for which Robert H. Forsythe gave his notes was in-

vested in land which was conveyed to him, and he secured his notes by a mortgage upon it. Scammon was an active officer of the insurance company. When the loan was negotiated and consummated, the appellant, as an inducement to the company to make it, assumed and promised by parol to pay all the notes above mentioned, both for principal and interest. Upon receiving the securities, Scammon indorsed and transferred them to the insurance company. The appellant insists that the \$5,000 was lent by the company, and not by Scammon, and that the loan was to him, and in no part to the other parties who executed the notes. The appellant paid all the interest notes, amounting to \$1,250, which fell due prior to the 9th of October, 1871. His brothers are irresponsible, and paid nothing. On the day last named the great Chicago fire occurred. He held fire policies issued by the company upon buildings which were consumed. The company thus became indebted to him to the amount of \$11,000. His losses were settled and adjusted at that sum. No part of it has been paid. On the 28th of April, 1873, his four brothers conveyed to him their rights and titles to the several mortgaged premises.

He seeks to have the amount due to him from the insurance company set off against all the notes, so far as shall be necessary to satisfy and extinguish the latter. The answer of the assignee denies that the money in question was borrowed from the insurance company, and avers that the company bought the notes from Scammon for a valuable consideration. The court decreed that the appellant was entitled to a set-off as claimed for the amount of his note of \$800, and for his proportionate share of the several interest notes which he had executed. From this decree he appealed to this court. Upon looking into the record, we find that no testimony was taken upon either side but that of the appellant, which was taken for himself.

In his deposition are the following questions and answers:

“Q. Did you borrow any sum of money from the Mutual Security Insurance Company in the year 1869? If so, state when you borrowed the money, and the amount.

“A. I borrowed the sum of \$5,000 from said company on or about the 5th day of January, 1869.

“Q. What officer of the Mutual Security Insurance Company besides Scammon did you have any conversation with in reference to this loan, if any?

“A. Scammon was the only officer of the company.

“Q. Do you know whether the money that was paid for this land originally was the money of the company, or the money of Scammon?

“A. Scammon paid over the money; but whether it was the company's money or Scammon's, that I don't know.

“Q. Why were the notes made payable to Scammon?

“A. Because the officers of the company wanted Scammon to take the responsibility of making the loan. He was managing the notes of the company; and he was willing to indorse the notes, knowing all the parties, and looking to me to be the responsible party.

“Q. Did you make any agreement or promise to pay these notes, or any part of them? and, if so, what agreement or promise did you make about it?

“A. I agreed with Scammon that I would pay the notes, and be responsible for them.

“Q. How much of them?

“A. All of them.”

This is all the deposition contains which is material to the points in contro-

versy between the parties. The burden of proof rests upon the appellant. His own testimony is weak and inconclusive. The case fails upon the evidence. It must fail also upon a well settled principle of law.

§ 1097. *Parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note cannot be permitted to vary, qualify or contradict, or add to, or subtract from, the absolute terms of the written contract.*

If it were clearly proved, as alleged, that the entire sum of \$5,000 was lent to the appellant, and that he expressly agreed at the time the securities were executed to pay back himself the entire amount at the end of five years, and to pay the interest in the meantime as stipulated, such proof would be wholly inconsistent with the contract of the parties as reduced to writing, and would, therefore, be unavailing either for or against him. "It is a firmly settled principle, that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making or indorsing of a bill or note cannot be permitted to vary, qualify or contradict, or add to, or subtract from, the absolute terms of the written contract." 2 Pars. on Bills & Notes, 501; *Specht v. Howard*, 16 Wall., 564 (§ 1096, *supra*). It is not claimed that there was either fraud, accident or mistake touching the securities that were executed.

Under these circumstances, the rule is the same in equity as at law. 2 Story's Eq., sec. 1531. It is neither alleged nor proved that the mortgage given by the appellant and his brothers was not sufficient to secure him against their shares of the notes executed jointly by him and them. Their shares of the premises have been conveyed to him. The indemnity is, therefore, in his own hands. All was given below to the appellant to which in any view of his case he can be deemed entitled. The decree of the circuit court is affirmed.

BROWN v. WILEY.

(20 Howard, 442-448. 1857.)

ERROR to U. S. District Court, District of Texas.

Opinion by MR. JUSTICE GRIER.

STATEMENT OF FACTS.—Wiley & Co., plaintiffs below, declare on a bill of exchange drawn by Taylor Brown on Messrs. Campbell & Strong, of New Orleans, to order of plaintiff, dated 23d of March, 1854, and payable on the 1st of May, 1855. It was presented for acceptance on the 10th of June, 1854, and was protested for non-acceptance, of which the drawer had due notice. It is admitted the bill was given for full value; but the defendant set up by way of special plea, and offered to prove to the jury, a parol agreement between him and the plaintiffs that this bill should not be presented for acceptance till after a certain other draft, payable in May, 1854, was provided for by placing funds in the hands of the drawees, who had agreed to accept the last bill after funds had been received to meet their acceptance of the first.

§ 1098. *Parol evidence is inadmissible to show an agreement by payee of bill of exchange to delay presenting it for acceptance.*

It is the rejection of this defense by the court below that is the subject of exception. It presents the question, whether parol evidence should have been received to vary, alter or contradict that which appears on the face of the bill of exchange. When the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties. This is not only a positive rule of the common law, but it is a general

principle in the construction of contracts. Some precedents to the contrary may be found in some of our states, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule. There is no ambiguity arising in this case which needs explanation. By the face of the bill the owner of it had a right to demand acceptance immediately, and to protest it for non-acceptance. The proof of a parol contract, that it should not be presentable till a distant, uncertain or undefined period, tended to alter and vary, in a very material degree, its operation and effect. See *Thompson v. Ketchum*, 8 John., 192.

Any number of conflicting cases on this subject might be cited. It will be sufficient to refer to the decisions of this court, those of Texas, where the suit was brought, and of Louisiana, where the contract was made. In *The Bank of the United States v. Dunn*, 6 Pet., 56, this court have declared "that there is no rule better settled or more salutary in its application than that which precludes the admission of parol evidence to contradict or substantially vary the legal import of a written agreement." The case of *Rockmore v. Davenport*, 14 Tex., 602, a case precisely similar to the present, adopts the same rule. The case of *Robishat v. Folse*, 11 La., and of *Barthet v. Estebene*, 5 La. Ann., 315, and several others, acknowledged the same doctrine, thereby overruling some early cases in Louisiana which had departed from it.

This being the only point urged by plaintiff in error as a ground of reversal, the judgment of the court below is affirmed.

BUCHTEL *v.* MASON LUMBER COMPANY.

(Circuit Court for Michigan: 1 Flippin, 640-651. 1877.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—The questions presented by the motion for a new trial in this case are purely legal ones. Evidence offered by defendant was not admitted, and as it constituted the sole ground of defense, a verdict was rendered for the plaintiff. Error in excluding the offered evidence is the sole ground of the motion.

That the verdict operates as a hardship upon defendant is apparent, and in such cases a court naturally seeks for some lawful way to afford relief. The evidence rejected at the trial was defendant's offer to prove a parol contract of warranty by plaintiff, made contemporaneous with the written contract of guaranty made by defendant to plaintiff. The facts developed at the trial and the manner in which the question arose will appear from a statement of the case. September 23, 1874, plaintiff contracted in writing to sell to the Big Rapids Improvement and Manufacturing Company, a corporation doing business at Big Rapids, Michigan, of which Stephen Bronson was vice-president and agent, eight descriptions of land, comprising six hundred and eighty-one and eighty-five one-hundredths acres, and to give conveyance after full payment of the purchase price. The Big Rapids Improvement and Manufacturing Company agreed to pay therefor \$12,273.84, as follows: \$3,068.46, January 1, 1875, with interest, and the balance in three equal annual instalments, the first thereof on the 23d day of September, 1875, with interest, etc. The contract contained this stipulation, viz.: "No timber is to be cut or removed from said land without the written permission of first party indorsed on

this contract;" Buchtel, the plaintiff, being the party of the first part. It may be assumed that the object of the purchase was mainly the timber supposed to be on the land; this we think is apparent from the terms of the guaranty subsequently given by defendant, and which formed the subject of this suit.

On the 25th of September, two days after the date of the contract, Bronson and Buchtel were at Muskegon, Michigan, and the following instrument of guaranty was executed, by which the Big Rapids Improvement and Manufacturing Company assigned said land contract to the Mason Lumber Company, defendant in this suit, and the latter company, which is a corporation doing business at Muskegon, of which Lyman G. Mason is president and agent, guaranteed payment to Buchtel of the purchase price of the land, Buchtel joining in the instrument for the purpose of giving permission to enter upon the lands, and cut and remove timber therefrom.

The instrument is as follows:

"MUSKEGON, MICH., September 25, 1874.

"In consideration of the sum of \$1, the receipt of which is hereby acknowledged, by the Big Rapids Improvement and Manufacturing Company, and for other valuable considerations, the Big Rapids Improvement and Manufacturing Company hereby assigns the contract hereto attached, of date September 25, 1874, between William Buchtel of Akron, Ohio, and said Big Rapids Improvement and Manufacturing Company. The said Buchtel hereby assenting to this assignment with the understanding that said Mason Lumber Company hereby guarantees the payments as stipulated in said contract, upon which guaranty permission is hereby given to enter upon, cut and remove the timber upon the lands embraced in said contract hereto attached. It being understood and agreed that as fast as the timber is cut and removed from said land, or any part thereof, the purchase price shall be due and payable, that is to say, for all said land which may be cut before the 23d day of September, 1875, the full purchase price shall be paid on that date."

Signed, "Big Rapids Imp. and M'f'g Co., by S. Bronson, Vice-President."

"WILLIAM BUCHTEL."

"Mason Lumber Co., by Thos. Munroe, Sec'y."

The suit was upon this guaranty. Plaintiff, to prove his case, read in evidence the land contract of September 23, 1874, between himself and the Big Rapids Improvement and Manufacturing Company; the assignment thereof, which, though the Mason Lumber Company is not named as the assignee therein, was treated as the assignee; the guaranty of defendant and plaintiff's permission therein contained that the timber on the lands described in the contract might be cut and removed; also a stipulation filed in the cause admitting that the timber on the contract-lands was all cut and removed in 1874 and 1875, prior to the commencement of this suit and prior to September 23, 1875; and lastly, a judgment with the records and files in a suit in this court brought by plaintiff against defendant upon said guaranty, to recover the first instalment of the purchase price of said lands, stipulated in said land contract of September 23, 1874, of \$3,068.46, and interest due January 1, 1875, and in which suit plaintiff recovered judgment.

In that suit defendant, under the plea of the general issue, gave notice and offered proof, as appears by the records and files in the case, of "false and fraudulent representations, undertakings and promises" by plaintiff in procuring the guaranty; and the referee who tried the case found there were no

fraudulent representations; hence such judgment was offered and received as *res judicata* on the question of alleged fraud on the part of plaintiff in connection with the instrument of guaranty. Plaintiff claimed the judgment was also *res judicata* upon the question of warranty interposed in this suit by way of defense, but we held that the referee did not decide that question, and therefore limited the effect of the former suit to the question of fraud.

In the present suit defendant, by way of notice, has pleaded as a defense to the action, that plaintiff, knowing the inducement for defendant's executing the guaranty, was to obtain the amount of timber which was represented to be on said lands, viz., five million seven hundred thousand feet, and, to induce defendant to make said guaranty, warranted that said representations were true, and that said lands would yield five million seven hundred thousand feet of merchantable pine, whereas they only yield one million one hundred thousand feet; by reason of which representations and warranty by plaintiff defendant was induced to and did execute said guaranty, which representations were untrue, etc., by reason whereof defendant has sustained damages, which he will recoup in this action, etc.

Under this notice defendant then offered to prove by Stephen Bronson, that at the time of the execution of said contract of guaranty, plaintiff, by parol, warranted to defendant that there were five million seven hundred thousand feet of pine timber on said lands. For the purpose of proving such warranty, defendant offered to show by the witness that the written assignment by the Big Rapids Improvement and Manufacturing Company of said land contract to defendant was intended only as security; that the leading inducement for defendant's guaranty was the quantity of timber represented as being on said lands; and further offered in evidence a plat of said lands, upon the particular descriptions of which were figures indicating the quantity of timber thereon, aggregating five million seven hundred thousand feet, and offered to prove that said plat was present at the time of the negotiations, was used to show the quantity of timber on the lands; that said plat belonged to plaintiff and constituted his representations. But it was conceded that the plat had not been in plaintiff's possession for a year or more, and that Bronson produced it on the occasion of said negotiations, and that the figures on the plat had been changed since it left plaintiff's possession. Defendant also offered to prove the actual quantity of timber upon said lands at the date of the contract of guaranty.

We held the evidence not admissible, upon the well settled rule that parol contemporaneous evidence cannot be allowed to contradict, add to, or vary the terms of a valid written instrument, and that the evidence offered would, if admitted, both contradict and vary the written contract of guaranty.

Because of such ruling this motion has been made for a new trial, and it is urged, first, that as a contract of warranty need not be in writing, parol evidence of such contract is admissible, and especially if the warranty constitutes or is a part of the consideration for the written contemporaneous contract; second, that it is competent for the purpose of showing the consideration upon which the contract of guaranty was made, and that there has been a failure of consideration.

The authorities upon both sides have been very fully presented by learned counsel, and examined and considered. Were they not so numerous, we should take pleasure in giving an analysis of and our views upon them. We have not the time now, inasmuch as an early decision is desired, before the time shall

expire for filing a *supersedeas* bond on a writ of error to the supreme court, should either party desire a review.

§ 1099. *Where from the nature of the instrument the whole contract is presumed to be reduced to writing, parol proof of any contemporaneous agreement is inadmissible if it contradicts, adds to, or varies the written contract.*

We understand the law to be well settled that where, from the nature of the instrument and what it contains, the whole contract must be presumed to have been reduced to writing, parol proof cannot be given of what was said, or of any oral agreement made previously or at the same time, which would have the effect to contradict, add to, or vary, the written contract; the presumption being in such cases that the writing contains the entire agreement of the parties as finally concluded between them, and they are estopped from denying it. This rule does not, however, prevent the parties from showing fraud in securing the contract. 1 Greenl. Ev., sec. 275; *Van Ostrand v. Reed*, 1 Wend., 424, 431; *Mumford v. McPherson*, 1 Johns., 414; *India Rubber Co. v. Adams*, 23 Pick., 257; *Smith v. Dallas*, 35 Ind., 255-260; *Robinson v. McNeil*, 51 Ill., 225; *Helmrics v. Gehrke*, 56 Mo., 79; *Randall v. Rhodes*, 1 Curt., 90; *Dean v. Mason*, 4 Conn., 428; *Martin v. Hamlin*, 18 Mich., 354; *Vanderkarr v. Thompson*, 19 Mich., 82.

In *Oelricks v. Ford*, 23 How., 49 (CONTRACTS, §§ 1303-5), which presented the question, whether it was admissible to show, by parol evidence, an understanding of the parties that the contract was made subject to a certain usage, the supreme court of the United States, at page 64, say, "any conversations and verbal understandings between the parties at the time were merged in the contract, and parol evidence is inadmissible to engraft them upon it."

§ 1100. *A contract not required by law to be in writing may be proved by oral evidence.*

The matter sought to be shown by defendant, in the case at bar, was parol warranty. It is argued that warranty may be shown by parol because it is not a contract required to be in writing. This general rule is not disputed. Again, it is contended that the parol warranty may be proved for the purpose of showing failure of consideration.

Cases are cited in support of this proposition, but mainly they come within the category of cases where the instrument was executed, not as the contract of the parties, but in execution of some of the terms of a contract—as a deed, mortgage, note, or the like,—and which do not purport to state the agreements and understanding of the parties. In contracts of sale between vendor and vendee, warranty may be shown, either to limit the amount of recovery, or to defeat the action altogether, depending upon whether warranty and breach show total or partial failure of consideration. But nevertheless, a parol warranty cannot be shown for any purpose, in the absence of fraud or mistake, if the effect will be to contradict, add to, or vary the terms of a written contract between the parties made at or previous to the time of entering into it—certainly not unless the warranty and breach amount to a total failure of consideration. The courts of Pennsylvania have, however, permitted parol evidence to show the entire agreements of the parties, when the writing does not contain them, in a class of cases, and perhaps it is difficult to say where they draw the line.

Such was the rule held in *Powelton Coal Co. v. McShain*, 75 Penn. St., 245, which was a suit for carrying goods. Defendant set up, by way of defense, that the freighting was done under a written contract, and introduced and

proved the contract. Plaintiff then showed that the original contract was an oral one, and that subsequently plaintiff's agent reduced it to writing, and it was signed by the parties. But defendant proved that a material stipulation as to the time when the coal was to be delivered to be carried was omitted, and instead were inserted words which permitted the company to deliver the coal at such times as it might desire. That defendant when signing the contract discovered the change and called attention to it, when plaintiff's agent replied, "that is understood," and said the company intended to furnish the coal within the time. The court held that evidence to show what the oral agreement was, was admissible, on the ground that to take advantage of the omission in the contract, as reduced to writing, was a fraud on the defendant. If it was a fraud on defendant, then the case is within the rule which is always applied to defeat fraud in contracts.

The case of *Weaver v. Wood*, 9 Penn. St., 220, is cited by defendant. *Weaver* held a lease of *Wood's* premises and gave a written surrender of the lease for the expressed consideration of one dollar, and a release from payment of rent. At the same time *Wood* agreed, by parol, that he would build another hotel on the same premises to replace one burnt, and give *Weaver* another lease of the premises at a fair rental. *Wood* built and leased to a stranger. *Weaver* sued on the parol agreement for a lease. The court held that "the executed contract and the executory one are distinct and without connection, further than that the former is the consideration of the latter," and that *Wood* could not insist that his promise was controlled by the consideration of the surrender. Whatever may be said of the reasoning of the case and its conclusions, we do not think it should be allowed as authority for permitting a written contract, which purports to give the agreements of parties, to be contradicted or varied by a parol contemporaneous contract.

Defendant also cited *Basshor v. Forbes*, 36 Md., 154. A corporation purchased, by one of its officers and stockholders, a steam-engine of plaintiffs, it being agreed that plaintiffs would alone look to the corporation for payment, but subsequently sought to hold the stockholders individually liable, as they had not paid in full their subscribed stock. The court held plaintiffs bound by their agreement to look to the corporation alone, and that they could not recover from the stockholders. The ground of the decision was, that the oral agreement was as to collateral matters about which the written contract was silent. The oral agreement did not tend to contradict, add to, or vary the written contract for the sale of the property, for there was no contract liability of the individual stockholders. They were liable, if at all, upon general principles which hold owners of unpaid stock for the obligations of the corporation to the extent of such unpaid stock.

The court say, "it is well settled by the most unquestionable authorities, that proof is admissible of any collateral parol agreement, or independent fact, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter." The case in nowise supports defendant's case, and is not in conflict with the rule we have stated.

The case of *Lockwood v. Canfield*, 20 Cal., 126, cited by defendant, is not in conflict with that rule. The court held that the testimony did not tend to contradict or vary the terms of the written instrument of assignment. They say, "the principle upon which the evidence was admitted rests upon an exception as well established as the rule itself." And further, that "the principle involved is the same as that which permits the introduction of similar evidence,

to prove that a deed, absolute on its face, was intended as a mortgage." We shall not attempt to go further by way of comment on the cases cited by defendant.

It may be conceded that the general rule is, that a defendant may show any matter which reduces, limits or defeats a recovery by way of failure of consideration, total or partial, or that the contract has not been fully performed, or a breach of some stipulation of the contract or warranty, and breach and misrepresentation and fraud at the inception of the contract. But nevertheless, where there is a written contract which purports to give the agreements of the parties, the rule is equally well settled that that is not only the best, but the only, evidence of the agreement of the parties. This rule is one "which is intended to give stability to the transactions of life by enabling men to put their acts and agreements in a form that shall be beyond the reach of the uncertainty incident to oral testimony, and would be of comparatively little value if witnesses could be called to prove that stipulations which have been omitted were, notwithstanding, meant to be as binding as if they had been set forth in terms." 2 Smith's Lead. Cases, 729, 780.

§ 1101. *An oral guaranty, made contemporaneously with a written agreement, and relating to the same subject-matter, is inadmissible to vary the written contract.*

What right, then, has defendant to say that the contract of guaranty shall not be enforced according to its terms?

The only reason given is, that there was a contemporaneous oral agreement on the part of plaintiff which has not been kept. In other words, that he warranted there were five million seven hundred thousand feet of timber on the contract lands, whereas there were but about one million feet, and that this amounts to a failure of consideration.

There was not a total failure of consideration, even under the claim of defendant as to what constitutes the consideration; because it is admitted by the pleadings that there were over a million feet of timber, and that all the timber has been cut and removed under the license given by plaintiff. There was, then, adequate consideration. There is no question of fraud in the case, and if the consideration for the guaranty was the timber which defendant expected to realize from the land, then at best the claim can be regarded as only a partial failure of consideration. But, in our view, the question is not one of partial failure of consideration. The consideration stated in the written contract for the guaranty is the license given by plaintiff to cut and remove the timber. On the contract thus made and its stipulations plaintiff had a right to rely. To permit parol evidence of warranty as to the quantity of timber to be shown, and that such warranty constituted the consideration for the guaranty, would be to contradict and vary the terms written and signed by the parties.

Defendant purchased the land contract from the Big Rapids Improvement and Manufacturing Company. All that the Mason Lumber Company bargained for with plaintiff was the license to cut and remove the timber from the lands. For this license, according to the contract of guaranty, defendant promised to pay plaintiff the purchase price of the lands stipulated in the land contract. Plaintiff held as security for that purchase price the provision in the land contract against cutting and removing timber. This security he surrendered for defendant's guaranty.

All this is apparent from the face of the two written contracts. We hold,

therefore, that nothing can be shown which contradicts the stipulated agreements of the parties, whether it touches the consideration or otherwise, so long, at least, as the proposed evidence does not tend to show total failure. The license given by plaintiff in any event must be conceded to enter into the consideration for the guaranty; hence, again, it is obvious there can be no claim of total failure of consideration. Whether parol warranty could be shown for the purpose of establishing partial failure of consideration, under a proper notice of that defense, depends upon whether defendant can maintain a cross-action for his damages on account of the alleged breach on the part of plaintiff. *Mumford v. McPherson*, 1 Wend., 414; *Withers v. Greene*, 9 How., 213 (BILLS AND NOTES, §§ 1430-34). If defendant could maintain such cross-action, then he is entitled to set up the warranty and breach and recover his damages in this suit. But upon the principle which we have stated, that to do so would contradict the written contract, we hold a cross-action could not be maintained. The motion is therefore denied.

THE TRITON.

(District Court for New York: 1 Blatchford & Howland, 282-285. 1832.)

STATEMENT OF FACTS.—Libel *in rem* against the owners of a vessel for wages. The claimants claimed that the shipping articles had been altered after being signed, and offered oral evidence to prove this.

§ 1102. *Oral evidence is not admissible to alter shipping articles in favor of owners.*

Opinion by BETTS, J.

There is a disaccordance in the statements of the claimants' witnesses, which weakens the force of their testimony. It is also contradicted, in some important particulars, by the evidence on the part of the libelants; and, upon the proofs before me, supposing the claimants' depositions to be admissible, I cannot say that the articles, if altered at all, were altered on the return voyage of the ship, and not before she left Havana. But, if the articles have been altered, is it competent for the owners to impugn them as against the seamen? The statute enjoins upon the master the duty of having written articles subscribed with his seamen, fixing the voyage and wages. The English act, from which ours is borrowed, declares the contract to be "conclusive and binding;" but those terms are not introduced into our statute, though the provision that the contract and log-book shall be produced, to ascertain the wages due, is tantamount to them in effect. The interpretation of the contract, accordingly, has been, in this country, that a seaman is concluded by a written agreement as to the amount of wages, and cannot recover more than is stipulated in the contract (*Bartlett v. Wyman*, 14 Johns., 260; *Johnson v. Dalton*, 1 Cow., 543); and it is believed that no case can be produced in which a seaman has been permitted to disregard the written contract, unless he has satisfied the court it was executed through fraud or imposition practiced upon him. Though it is out of his custody, and in that of those opposed in interest to him, the courts will listen to no proof, however clear and full, setting up an agreement different from the written one, until that is shown to be void as against the seaman. The objection to such testimony, when offered by the owner or master against a seaman, would be of still greater force. They are the parties who propose, prepare and hold the contract. Alterations can, therefore, be rarely made in it, without their knowledge or to their prejudice. On the contrary, the men

cannot be presumed to have access to it after their signature, nor to have capacity to change its terms, or annex new agreements to it, even if disposed to do so; and it would be subversive of every precaution and safeguard designed for the protection of the crew, to permit the owner to curtail or vary, by parol proof, the engagements of the written articles, or substitute different stipulations in their place. This would, in effect, nullify the act of congress, for the obligation upon the master and owner, to enter into a written contract with their crew, would be useless, if they might afterwards efface it by parol evidence. When, therefore, the owner produces the written contract in court, it must have the effect "to ascertain the matter in dispute," unless he is enabled to prove that it has been fraudulently changed by the seamen.

In the present case, the agreement was deliberately entered into, and the owners now insist upon all the provisions that are binding on the seamen, as in full force against them, and have also excepted to, and procured the exclusion of, evidence offered by the seamen to show that the real contract for wages was different from that inserted in the articles. They furthermore claim a forfeiture of wages because of a breach of the articles by the seamen. There would be something revoltingly incongruous in adjudging, for the benefit of the owners, the contract to be conclusive against the mariners, as to wages or other privileges, and yet in exonerating the owners from one of its most important provisions in favor of the seamen, upon loose oral proofs that that provision was not originally part of the agreement. The rules of the common law in regard to parol proof in contradiction of a written contract ought not to be relaxed, in behalf of an owner or master, with respect to shipping articles. When proceeded upon in courts of law, they are construed with all the strictness of other agreements, even as against sailors. *Webb v. Duckingfield*, 13 Johns., 390. Applying the like principle in favor of the seamen, the ship-owner cannot substitute an oral agreement in place of one required by law to be in writing (*Starkie on Ev.*, pt. 4, p. 999), nor vary the written contract by any species of parol evidence (*id.*, p. 1001), except in cases of fraud or duress.

I shall, accordingly, decree wages to the libelants for the home voyage, according to the shipping articles as presented in court, with costs.

§ 1103. *In general.*—A written contract, perspicuous in its terms and free from ambiguity, must be viewed as the exponent of the intention of the parties to it, and cannot be varied or contradicted by extrinsic evidence. *McNamara v. Gaylord*, 1 Bond, 164; *Scott v. Steamboat Dick Keyes*, 1 Bond, 164; *Phelps v. Clasen*, 1 Woolw., 204; *Eddy Street Iron Foundry v. Hampden Stock & Mut. F. Ins. Co.*, 1 Cliff., 300.

§ 1104. Parol evidence cannot be admitted to alter or vary a written agreement. *Findlay v. Bank of United States*, 2 McL., 44.

§ 1105. Especially where the writing has been acted on and confirmed, and there is no fraud. *Ibid.*

§ 1106. In an action against a newspaper for libel, charging the plaintiff with adultery, in order to explain the words "Still Another," with which the article began, the court allowed the introduction of a similar article immediately preceding the libel, entitled "A Terrible Charge against a Methodist Preacher." *Gibson v. Cincinnati Enquirer*, 2 Flip., 121.

§ 1107. Oral evidence of the contents of a written contract is inadmissible. *Susquehanna Bridge & Bank Company v. Evans*,* 4 Wash., 482.

§ 1108. The intention and understanding of the parties to a written contract cannot be proved by parol. *Hurliki v. Bacon*,* 1 Cr. C. C., 340.

§ 1109. Parol evidence bearing upon written contracts and papers ought not to be admitted without the production of the written contracts and papers, so as to enable both the court and the jury to see whether or not the admission of parol evidence in any manner will trench upon the rule excluding parol evidence varying and contradicting written contracts or papers. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet., 448.

§ 1110. When the terms of a written contract, in the light of all the circumstances, do not convey a clear meaning, but remain unintelligible, parol evidence is inadmissible to show what the meaning of the parties was. *Phelps v. Clasen*, 1 Woolw., 204.

§ 1111. — **conversations.**— If the parties have put their contract in writing, evidence of conversations leading to the contract, and tending to explain or vary it, cannot be received. *Gilpin v. Consequa*, 3 Wash., 184; *Pet. C. C.*, 85.

§ 1112. The clear import of an unambiguous written contract cannot be changed in any respect by evidence of remarks made by the parties while negotiating respecting it. *Stanley v. Whipple*, 2 McL., 35.

§ 1113. Where parties have reduced their contracts to writing, conversations controlling or changing their stipulations are, in the absence of fraud, no more admissible in a court of equity than in a court of law. *Willard v. Tayloe*, 8 Wall., 557.

§ 1114. **Illustrations — Not admissible — To vary or contradict.**— If a policy of insurance admits of a satisfactory construction, the order for insurance cannot be resorted to. *Hogan v. Delaware Ins. Co.*, 1 Wash., 419.

§ 1115. Parol evidence of the real value of a vessel insured is not admissible in an action upon a valued policy. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cr., 206.

§ 1116. Where a charter-party contained no statement of the carrying capacity of the vessel, except that she was "of the burden of four hundred and twenty-seven tons, or thereabouts," it was held, in a suit to recover the charter money, that evidence of false and fraudulent representations as to the carrying capacity of the vessel, made by the libellant, in order to induce the respondents to enter into the charter, was inadmissible, for the reason that, the charter-party being in writing, any stipulation or agreement as to the carrying capacity of the vessel, which was not found in the written contract, must be considered as having been waived by the respondents. *Baker v. Ward*, 3 Ben., 499.

§ 1117. In a suit to compel the specific performance of a written contract relating to lands, it is not competent to show by parol that payment was to be made in some other way than that specified in the written instrument. *Richardson v. Hardwick*, 16 Otto, 252.

§ 1118. In the absence of fraud, the contract of the master of a whaling ship with the owners cannot be varied by parol evidence. *Slocum v. Swift*, 2 Low., 212.

§ 1119. Where the rate of wages of the mate is stipulated in the shipping articles, it cannot be shown by parol evidence that the master agreed to allow him in addition "three tons privilege in the vessel." *Veacock v. McCall*, Gilp., 329.

§ 1120. Where the voyage described in shipping articles was explained to seamen before signing, they cannot be allowed to vary the voyage, so described, by parol evidence—there being no evidence of fraud. *The Quintero*, 1 Low., 38.

§ 1121. While it is true that in some classes of cases a contract between persons not parties to the suit may, when introduced, be contradicted or varied by parol testimony, the principle can have no application to a contract concerning real estate, which the statute requires to be in writing to make it valid. *Stitt v. Huidekopers*, 17 Wall., 384.

§ 1122. Parol evidence to show a gift of a share in a ship, held in trust, is inadmissible to contradict a conveyance of the share in writing made at the same time. *Lee v. Luther*, 3 Woodb. & M., 519.

§ 1123. — **to limit.**— If an assignment is made of an entire survey of land, it cannot be varied by parol evidence that the vendor reserved a portion of it or the surplus over the nominal acreage of the survey. *Dunlap v. Dunlap*, 12 Wheat., 574.

§ 1124. Where a release in writing was given of the right to pass over land, for the purpose of constructing a road, parol evidence is not admissible to show that the release was to be binding only if the road was located on a particular route. *Kennedy v. Erie & Wattsburgh P. R. Co.*,* 4 Am. L. Reg., 440.

§ 1125. In an action for interest due on coupon bonds, issued by a county in payment for its subscription to the stock of a railroad company, it cannot be shown by parol that they were issued upon an agreement with the company from which they were purchased, that the county should not be called upon to pay interest on them, but that the same was to be paid by the company. *McCoy v. Washington County*, 3 Wall. Jr., 381.

§ 1126. One who is a party to a negotiable note cannot by his testimony invalidate it; *a fortiori* if he is also a party to the record. *Smyth v. Strader*, 4 How., 404.

§ 1127. In a suit by a builder upon a contract to build a house, the defendant cannot show by parol that a clause in the written contract providing for the forfeiture of ten per centum on the amount of the contract price, on the failure to complete the work by a given day, was intended to liquidate the damages for such failure. *Van Buren v. Digges*, 11 How., 461.

§ 1128. In an action at law upon a bond, the principals in the bond cannot show by parol that they were bound as securities only. *Bank of Mount Pleasant v. Sprigg*, 1 McL., 178.

§ 1129. An instrument purporting on its face to be the contract of one person cannot be

shown by parol to be the obligation of another. *Shankland v. Corporation of Washington*, 5 Pet., 390.

§ 1130. Where one partner in his own name enters into a contract, parol evidence is inadmissible to show that it was for the benefit of the partnership. *Smith v. Hoffman*,* 2 Cr. C. C., 651.

§ 1131. The selling agents of a watch company, who were factors or agents for no other person or corporation, and who were also manufacturers of watches on their own account, procured a policy of insurance, in their own names, payable to themselves, whereby they were insured against loss by fire "on watches, jewelry and other merchandise, their own, or held by them in trust or on commission." By a fire, occurring subsequently, property of both the watch company and the agents, covered by the policy, was damaged. In an action by the agents on the policy, parol evidence was held inadmissible to show that the property of the watch company was not intended to be insured, and to show that it was intended only to insure the interest of the agents. *Robbins v. Fireman's Fund Ins. Co. of San Francisco*, 16 Blatch., 122.

§ 1132. Where a letter of attorney authorizing an agent to purchase a certain boat of certain persons authorizes him to contract with one of the owners only, parol evidence cannot be received to show that it was not the intention of the party to limit him to contract with that person only. *Peckham v. Lyon*, 4 McL., 45.

§ 1133. — to enlarge.—Parol evidence of an agreement to extend the time limited by the arbitration bond for the delivery of an award will not be received. *Goldsborough v. McWilliams*, 2 Cr. C. C., 401.

§ 1134. Parol evidence cannot be received to show that, by an independent oral agreement, made previous to or at the time of the execution of a conveyance and defeasance, the estate was to be held as security for debts beyond the terms of the defeasance. *Randall v. Phillips*, 3 Mason, 378.

§ 1135. An undertaking for the duty of another being required by the statute of frauds to be in writing, that writing cannot be added to or varied by parol testimony, nor can it be so far explained by parol testimony as to affect its import with regard to the supposed undertaking. *Clarke v. Russell*, 3 Dall., 415.

§ 1136. — to explain.—Where two parties entered into a written agreement that each should manufacture spikes of such character as he saw fit, oral evidence of the intent of the parties at the time was excluded. *Troy Iron and Nail Factory v. Corning*, 1 Blatch., 467.

§ 1137. A letter of credit, addressed to John and Joseph Naylor & Co., there being no such firm at the place, will not support *assumpsit* by John and Jeremiah Naylor & Co., to whom it was delivered; and parol evidence is not admissible to prove that the letter was intended to be addressed to plaintiffs and was misdirected by mistake. *Grant v. Naylor*, 4 Cr., 224.

§ 1138. Where a bill of lading of a cargo of coal from New York to Havana, the only written contract between the parties, was silent as to the number of days within which the coal should be discharged, it was held that the delivery of the coal must be governed by the custom and usage of the delivery of cargoes of that description at the port of Havana, and that parol evidence could not be admitted to prove an agreement that the vessel was to be detained not exceeding twelve running days in the discharge of her cargo. *Higgins v. United States Mail Steamship Co.*, 3 Blatch., 282.

§ 1139. Where there is no stipulation in a charter-party as to the precise amount of cargo to be carried, parol evidence is not admissible to show that amount. *The Eli Whitney*, 1 Blatch., 360.

§ 1140. If there is no ambiguity in a written contract of hiring a steamboat, oral evidence is not admissible to show that the parties to the contract expected that the event upon which the hiring would terminate would happen earlier than it actually did. *Steam Packet Company v. Bradley*,* 5 Cr. C. C., 397.

§ 1141. Where a lessee, who, after taking the lease, becomes bankrupt, covenanted to pay all taxes assessed during the term, and the term began June 1, 1868, and ended September 1, 1869,—taxes being assessed as of the 1st of May,—it was held that the petitioning lessor was entitled to prove for one year's taxes only, and parol evidence to show that both parties understood that the taxes for the other year were to be paid by the tenant was inadmissible. *Ex parte Houghton*, 1 Low., 554.

§ 1142. Parol evidence cannot be received to prove an understanding that the vessel might return without performing the voyage described in the shipping articles. *Thompson v. Ship Oakland*,* 4 Law Rep., 349.

§ 1143. Where B. had borrowed the note of A., and given a receipt therefor promising to provide for its payment at maturity, in an action by A. against B. and another, parol evidence was held to be inadmissible to show that the other defendant was a partner of B. in the business in which the proceeds of the note were used, in order to charge him for the failure of B. to provide for the payment of the note. *Smith v. Hoffman*, 2 Cr. C. C., 651.

§ 1144. Where C., by a policy of insurance, is insured in his dwelling-house and the furniture therein, payable, in case of loss, to S., "as his interest may appear, it being stipulated that if the insured shall hereafter procure any other insurance on the property, without the consent of the company, the policy shall become void," and C. procures such other insurance on his interest in the property as mortgagor, it being the construction of the first policy that C. is the insured, it cannot be varied by extrinsic evidence that it was procured by S., the mortgagee, for the purpose of insuring his own interest. *Sias v. Roger Williams Ins. Co.*, 8 Fed. R., 187.

§ 1145. In a suit *in rem* in admiralty for a breach of a charter-party, when its meaning is clear, it is inadmissible to show a mistake in it. *The Hermitage*, 4 Blatch., 474.

§ 1146. Where a bill of lading offered in evidence does not appear upon its face to be the contract of the defendant, the plaintiff cannot be permitted by parol evidence to prove that it is the defendant's contract. *Dixon v. Columbus & Indianapolis R'y Co.*, 4 Biss., 137.

§ 1147. Where a negotiable note was made payable to "Samuel Jaudon, Esq., cashier, or order," and was not indorsed by him, parol evidence was held inadmissible to show that the bank of which Samuel Jaudon was cashier was the real payee, and that it was given for a debt due the bank, in order to support an action on it by the bank. *Bank of United States v. Lyman*, 1 Blatch., 297. See § 1042.

§ 1148. O. P., of Dodge county, Wisconsin, located a tract of government land in that state and county for his father, O. P., of New York. The patent was issued to "O. P., of Dodge county, Wisconsin," and delivered to him, and he took possession, and subsequently mortgaged the land. The father, after notice of the mortgage, permitted him to remain in possession, and, on subsequently selling the land, directed the purchase money to be paid to the son. On foreclosure of the mortgage judgment was rendered against the defendant. In an action by the purchaser from the father against the father for breach of warranty, it was held that parol evidence was not admissible to show that O. P., of New York, was the real patentee. *Babcock v. Pettibone*, 12 Blatch., 354.

§ 1149. In a suit brought upon a bill of lading to recover damages for the failure to deliver in time the goods shipped, it cannot be proved that the defendants had a right to disregard the bill of lading because of representations said to have been made by the drayman who delivered the goods to the steamboat, to the steamboat clerk, following which the goods were stowed as through freight to a point beyond their destination, and not as way freight, so that when the proper landing was reached, the goods could not be handled without great trouble and delay. *The Golden Rule*, 9 Fed. R., 334.

§ 1150. Where an official bond refers to a holding of office at a particular date, the law determines that date to be the time when the bond took effect; and when it is ascertained upon the facts that the officer was at that date holding under a second appointment, extraneous or oral evidence cannot be received to show that the bond was not intended to apply to the second appointment. *United States v. Le Baron*, 19 How., 73.

§ 1151. On the dissolution of a partnership consisting of two members, one purchased the stock of goods from the other, and in consideration therefor executed, together with third persons, a note for the price. This note was made payable to the two partners, one of them being thus made both an obligee and an obligor. In a suit by the other against the third persons, it was held that, if the third persons were only sureties, parol evidence could not be received to show that the note was made payable to both the partners by mistake, and that the plaintiff was intended to be the only payee. *McMicken v. Webb*, 6 How., 292.

§ 1152. In an action upon a sealed instrument in a court of law, evidence is not admissible, between privies to the deed, that the agreement was procured by the fraudulent representation of one of the parties. *Hartshorn v. Day*, 19 How., 211.

§ 1153. Parol evidence is admissible in a criminal case to show the intent with which a deed was made. *United States v. Thomas*,* 2 Cr. C. C., 36.

§ 1154. Where certificates of stock in a corporation have been assigned by the original owner, the corporation may introduce evidence to show the true character of the contract of assignment, although it is absolute upon its face. *Becher v. Wells Flouring Mill Co.*, 1 McC., 62.

§ 1155. — **prior conversations, declarations, agreements, etc.** — Where the rights of the parties as to the delivery of the goods are fixed by the bill of lading, evidence of conversations prior to the date of it cannot have any effect to vary its provisions. *O'Rourke v. Tons of Coal*, 1 Fed. R., 619. See § 1111.

§ 1156. Where the terms of a policy are clear and definite and without mistake, and contain numerous express conditions upon the happening of which it is to become void, oral evidence cannot be admitted to show an agreement alleged to have been made prior to the issuing of the policy, and not inserted therein, that upon the happening of a certain event the policy should become void. *Candee v. Citizens' Ins. Co.*, 4 Fed. R., 143.

§ 1157. Where a member of a society of communists called the "Harmony Society," whose

laws provided that a withdrawing member could not claim anything from the society as a matter of right, but might receive a donation at the discretion of the superintendent, withdrew from the society, and signed a receipt to the effect that he had withdrawn and had received "two hundred dollars as a donation, agreeably to contract," it was held that this writing must be treated as a contract of dissolution, and that evidence of prior declarations or antecedent conduct could not be admitted to vary or contradict it. *Baker v. Nachtrieb*, 19 How., 126. *Contra*, *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr., 66 (CHURCHES, §§ 52-57). See HARMONY SOCIETY.

§ 1158. A written contract of assignment of recognizances as security for a debt cannot be explained by evidence of conversations preceding and contemporaneous with the contract, showing that the writing does not contain the whole agreement. *Kemmil v. Wilson*, 4 Wash., 308.

§ 1159. — **contemporaneous agreements.** — A memorandum of the sale of a vessel, stating the fact of sale, describing the vessel sold, and stating the price and the terms of credit, and making no mention of a warranty, excludes evidence to show that letters written by the vendor during the treaty for the sale, of which no mention is made in the memorandum, contained a warranty. *Randall v. Rhodes*, 1 Curt., 90.

§ 1160. In an action brought by the assignee of a bond, against the assignor, upon a written assignment in general terms, the plaintiff cannot give parol evidence to show that the defendant expressly guarantied the payment of the bond. *O'Hara v. Hall*, 4 Dall., 340.

§ 1161. Parol evidence is inadmissible to contradict the contract of an indorser of negotiable paper, by showing that at the time he indorsed the paper he was assured by the agent of the plaintiff that he ran no risk by so indorsing. *Bank of the United States v. Dunn*,* 6 Pet., 51.

§ 1162. In a suit on a negotiable promissory note against an indorser, it cannot be shown by parol that he placed his name on the note under a representation and with the understanding that the maker had pledged property for its payment, that the indorser would not be looked to for payment until the security pledged had been exhausted, and that the indorsement was a mere matter of form. *Ibid.*

§ 1163. In an action on a promissory note by the holder, the transferee of the payee, against the maker, parol evidence cannot be received to show that by an agreement contemporaneous with the making of the note, it was not intended to be a promissory note, and was not to be sued upon or paid as such, but was to be held by the payee as a memorandum, not of any fact or agreement stated therein, but of an understanding wholly inconsistent with and repugnant to its terms. *Courtright v. Burnes*, 3 McC., 60.

§ 1164. In an action against the maker on a promissory note, he cannot show that, at the time of the execution thereof, it was understood and agreed between him and the plaintiff that it should not be paid at maturity, but should be returned to the defendant upon the execution and delivery of a note and mortgage for a larger amount, which amount the plaintiff had agreed to loan to the defendant, the note in suit being given merely as a memorandum of the receipt of a part of the sum agreed to be loaned, and that the defendant has tendered the note and mortgage agreed to be given. *Bank of Hallowell v. Baker*,* 1 Minn., 261.

§ 1165. In an action against the maker on a promissory note, by a *bona fide* holder for value, who took it before maturity and without notice of any facts impeaching its validity between the antecedent parties, parol evidence cannot be received to show that, by an agreement between the maker and the payee at the time of the making of the note, it was to be paid and taken up by the payee at maturity. *Brown v. Spofford*, 5 Otto, 474; 1 MacArth., 223.

§ 1166. In a suit on a promissory note for the payment of a certain sum of money at a certain day, though the suit be between the original parties to the same, it cannot be shown by parol that, at the time of making the note, it was agreed that the plaintiff should look to the real estate, for the purchase money of which the note was given, for the amount of the said note, and the note surrendered, if buildings were placed upon the land, which condition had been fulfilled. *Linville v. Holden*,* 2 MacArth., 329.

§ 1167. If a life insurance policy contains the condition that it shall become void if the annual premiums shall not be paid on the day when they severally become due, or if the notes given in payment of premiums shall not be paid at maturity, it cannot be proved that the insurance company orally agreed, at the time of receiving the premium notes, that the policy should not become void on the non-payment of the notes alone at maturity, but at the instance and election of the company. *Thompson v. Insurance Co.*, 14 Otto, 252.

§ 1168. The maker of certain notes, by a contract in writing, assigned to the payee, as collateral security for their payment, a judgment against a third person, the contract authorizing the payee, on failure of the maker to pay, to sell the judgment at the maturity of the notes, or at the maturity of the time for which they might be renewed, after certain notice given to the maker, and apply the proceeds in payment. It was held that parol evidence could not be received to show that it was agreed between the parties at the time, as a part of the transaction,

that the payee was to issue execution upon said judgment and proceed to collect the same whenever the money could be made thereon. *Bast v. Bank*, 11 Otto, 93.

§ 1169. It is not competent, in an action against an indorser by his immediate indorsee, upon an indorsement made in blank upon a negotiable promissory note, to prove as a defense that as part of the transaction it was agreed between the parties, but not in writing, that it should merely have the effect of an indorsement expressed to be without recourse. *Martin v. Cole*, 14 Otto, 30; 3 Colo. T'y, 113.

§ 1170. In an action on a written contract, the defendant, who appears as principal in the contract, cannot, for the purpose of exonerating himself, introduce evidence to prove that he disclosed his agency and mentioned the name of his principal at the time the contract was executed. *Nash v. Towne*, 5 Wall., 689.

§ 1171. The defendant had assigned to the plaintiff the time of service of a servant. The written contract, which was assigned in writing, stated the time which the servant had to serve was a certain length of time. *Held*, that this could not be varied by parol evidence of what the assignor stated the time to be at the time of the assignment. *Smallwood v. Worthington*, 2 Cr. C. C., 431.

§ 1172. A clean bill of lading, that is, one that is silent as to the mode of stowing the goods, imports that they are to be safely and properly stowed under deck, and evidence of conversations between the shippers and the master, before or at the time the bill of lading was executed, cannot be admitted to prove an agreement that the goods might be stowed on deck. *The Delaware*, 14 Wall., 579; *The Wellington*, 1 Biss., 279; *The Waldo*, Dav., 161.

§ 1173. In a suit in admiralty for the recovery of damages for injuries to goods shipped, where the bill of lading is in the usual form, evidence is admissible to show that by mistake the words "in cabin state-room" were omitted in the bill of lading, which, when inserted, imported an obligation to carry the goods in that part of the vessel. *Star of Hope*, 2 Saw., 15.

§ 1174. It may be shown that a part of the goods included in a bill of lading were not shipped and that the bill was signed by the master under a mistake. *Sutton v. Kettell*, 1 Spr., 309.

§ 1175. Where parties have made a written agreement to compromise a suit, and nothing is contained therein as to payment of costs, it is admissible to show in evidence a separate oral agreement that one of the parties is to pay the costs, for this is a distinct contract from the one under seal. *Morancy v. Quarles*, 1 McL., 194.

§ 1176. A corporation engaged in furnishing coal to steamboats having been accustomed to furnish to a passenger boat coal as she needed it for each trip, the owner of the boat made an agreement with the corporation for a future supply of coal, a written memorandum being made, stating that the owner had purchased of the corporation a certain amount of coal, at a certain price, to a certain date; and also a further amount, at a certain price, to be delivered by carts. From this time on the delivery of the coal continued in the manner practiced before. The memorandum contained nothing further as to the time and mode of delivery and payment. It was held that this writing did not exclude parol evidence showing the previous course of dealing between the parties to establish their intention as to these points. *The Alida*, Abb. Adm., 173.

§ 1177. Where a military officer, in time of war and in the enemy's country, orders that a part of the contract price of wood, cut and delivered by the claimant, be withheld from him and paid to the owner of the land from which it was cut, parol evidence is admissible to show that at the time of making the contract there was an agreement that the claimant should pay the owner of the land for her wood. *Lockwood's Case*,* 5 Ct. Cl., 379.

§ 1178. Where the place of demand is not expressed on the face of a negotiable note, parol evidence may be received to show that all the parties thereto agreed that demand for payment should be made at a particular bank. *Brent v. Bank of the Metropolis*, 1 Pet., 89.

§ 1179. Where a note is indorsed after dishonor, an agreement that the indorser shall be liable only in case of the insolvency of the maker may be proved by parol. *Taylor v. Scholfield*,* 2 Cr. C. C., 315.

§ 1180. — *miscellaneous.*— A statute of Louisiana of 1858 enacts that "parol evidence shall not be received to prove any acknowledgment or promise of a party deceased, to pay any debt or liability against his succession, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed; but in all such cases the acknowledgment or promise to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney in fact." The principle of this statute is that no verbal declaration of a deceased man shall be given in evidence to prove against him an acknowledgment of the debt, which would otherwise be barred by the statute of limitations; and that no written evidence shall be offered unless signed by him or his agent. Oral conversations and admissions of a decedent, tending to prove an acknowledgment of a debt, as due, within the period of prescription, and indorsements by him of payments on the

bond evidencing the debt, are, therefore, not admissible under this statute, in a suit against his estate. *Adger v. Alston*, 15 Wall., 555.

§ 1181. If, at the time of the execution of a written contract of insurance, the applicant knew that the vessel insured had already been lost, he cannot prove by parol that the contract of insurance was actually made before the loss, though executed and delivered and paid for afterwards, although he declares on the prior oral contract of insurance. *Insurance Company v. Lyman*, 15 Wall., 664.

§ 1182. — to explain terms.— Parol evidence is not admissible to show the construction of the words, "if in funds," used in an order drawn on A. to pay to B. a certain sum, if in funds. *Kemble v. Lull*, 3 McL., 272.

§ 1183. The phrase "steamboat debts," when used in a contract, is not such a technical term as, by the rules of evidence, may be limited in its meaning by parol testimony as to its use. *Moran v. Prather*, 23 Wall., 492.

§ 1184. The members of a firm agreed in writing, styling themselves creditors of a steamboat, to release P., one of the part owners of the boat who had disposed of his share, from all indebtedness due them from the boat, so far as P. was concerned. And in a further instrument they bound themselves to defend and save him harmless from any and all claims and demands that might "arise or be brought against the said steamboat, excepting those above signed." It was held that parol evidence was not admissible to show that the words "steamboat debts" constituted a well-known term among those dealing with steamboats at that place, and meant such debts as constituted a lien on the boat for necessary supplies, materials, repairs and wages; and that they did not include debts which could not be enforced against the steamboat by any of the conservatory laws of the state. *Ibid.*

§ 1185. Where a person domiciled in Pennsylvania, though a resident in England during the greater part of his life, made his will in that state, devising all his property, real and personal, to his "heir-at-law" or "lawful heir," it was held that the term "heir-at-law," as thus explained, presented no such ambiguity as to its meaning in Pennsylvania as to admit extrinsic evidence to show that the testator used the term in the sense of the English common law and not in the sense of Pennsylvania statutory law. *Aspden's Estate*, 2 Wall. Jr., 368.

§ 1186. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties used particular terms, but not to alter or modify the plain language which they have used. Thus, where one had contracted to deliver to a government post eight hundred and eighty cords of wood, "more or less," as should be determined to be necessary by the commander of the post for the fiscal year, and a few days after the contract was signed the commander gave him notice that but forty cords would be necessary, it was held that the fact that the contract was awarded to him on his bid more than a month before it was signed, and that on the faith and expectation that the quantity named would be wanted he had cut eight hundred and eighty cords before the contract was signed, was irrelevant matter, and could not be considered for the purpose of altering the plain language of the agreement. *Brawly v. United States*, 6 Otto, 168.

§ 1187. In an action on a written contract, oral evidence may be introduced of the meaning attached by the parties to the word "cost," which is capable of having a larger or more limited meaning according to the intention of the parties. *Gray v. Harper*,* 1 Story, 587.

§ 1188. In a memorandum containing the following words: "By my purchase of your $\frac{1}{2}$ E. B. wharf and premises, this day, as agreed on between us, \$7,578.63," it was held that the initials "E. B." could be explained by parol evidence, since it could be done by a medium of explanation suggested on the face of the instrument, and on evidence which, while it neither added to, detracted from, nor varied the note in writing, would supply every exigency of the statute of frauds. *Barry v. Coombe*, 1 Pet., 640.

§ 1189. In a suit on bonds given for the purchase of slaves after the proclamation of emancipation, in that part of Virginia from which the authority of the national government was excluded by the rebel armies, the bonds to be paid in one and two years, in the bankable currency of the day, it was held competent to prove that, at the time and place of the making of the agreement and of the bonds, the only currency in circulation or bankable was Confederate currency, the value of which in relation to gold was as one to nineteen or twenty; that slaves were not being sold at all for gold; and that these slaves were not worth more than the stipulated price computed in Confederate currency, and would never, even before the war, have been worth more than a fifth of that price in gold. *Rines v. Duke*, 15 Otto, 132.

§ 1190. Evidence may be received to show that a promise, made in one of the states of the Confederate government during the rebellion, and expressed to be for the payment of dollars, without qualifying words, was made for the payment of Confederate notes. *Thorington v. Smith*, 8 Wall., 1.

§ 1191. Confederate notes being in general use in the insurgent states during the rebellion,

parol evidence is admissible to prove that a contract made in those states during the war, and payable in "dollars," was in fact made for the payment of Confederate dollars, and to prove the value of such notes at the time the contract was made. In the absence of such evidence, the presumption would be that, by the term "dollars," the lawful currency of the United States was intended. But the ordinance of North Carolina of October, 1865, and the act of 1866 of that state, create a contrary presumption. *The Confederate Note Case*, 19 Wall., 548.

§ 1192. — **usage and custom.**— If a policy of insurance is susceptible of a reasonable construction on its face, without the necessity of resorting to extrinsic aid, evidence of a custom or usage cannot be given. Thus, where an open or running policy was held by the court to have a well defined meaning in reference to the rate of premium, it was held not to be competent to set up a usage that the premium named in such a policy was in all cases a nominal one, and might be varied by the company when the risk was reported. *Insurance Companies v. Wright*, 1 Wall., 456. See § 538.

§ 1193. A policy of insurance, where its terms are ambiguous, may be explained by parol evidence of the usages of trade. But no evidence of any usage or custom can be admitted to explain, alter or impair the terms of the contract. *Hearn v. New England Mutual Marine Ins. Co.*, 3 Cliff., 318.

§ 1194. A usage that the rating of a vessel mentioned in a policy of insurance must have exclusive reference to the rating on the books of the insurance company is not admissible, when the vessel has no rating on such books so recent as to be recognized by insurers as a valid rating. *Insurance Companies v. Wright*, 1 Wall., 456.

§ 1195. Where the terms of a policy of insurance on a vessel were, "at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge," parol evidence of a usage was held inadmissible to show that the vessel might go to one port to discharge, and to a second for a return cargo. *Hearn v. New England Mutual Marine Ins. Co.*, 3 Cliff., 318.

§ 1196. In an action upon an insurance policy, it is not competent to show an alleged custom of insurance companies, alleged to have been known to the agent of the plaintiff, that upon the happening of a future event the policy should become void, which condition was not inserted among the numerous, detailed and clearly-expressed conditions of the policy, it being inconsistent with the written terms of the contract, and excluded therefrom by the implication arising from the fact of other conditions being inserted. *Candee v. Citizens' Ins. Co.*, 4 Fed. R., 143.

§ 1197. The legal effect of a written indorsement of a bill of exchange cannot be contradicted by either parol proof or custom. *White v. National Bank*, 12 Otto, 658.

§ 1198. Evidence that it is the custom of other railroad companies to terminate all contracts for special rates at the end of the year cannot be given in a suit arising out of the breach of a special contract with a railroad company for the transportation of a definite quantity of hay at a certain rate, without mentioning any time. *Martin v. Union Pacific R. Co.*,* 1 Wyom. T'y, 143.

§ 1199. It seems that when a bill of lading gives the shipper an option of reconsignment, parol evidence of a usage is inadmissible to so far vary the written contract as to extend the option to the consignee. *McGovern v. Heissenbuttel*, 8 Ben., 46.

§ 1200. A usage or custom may be admitted to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of particular words in the instrument, when the words have various senses according to the subject-matter to which they are applied. But to vary or contradict the positive stipulations of a written contract, evidence of a usage cannot be given. Thus, the contract contained in a bill of lading by which the carrier agrees to deliver the goods in good order and condition, "dangers of the seas only excepted," cannot be contradicted or varied by evidence of a custom or usage of the vessels engaged in trade between the two places that the owners of vessels are liable only for damage occasioned by their neglect. *The Schooner Reeside*, 2 Sumn., 567.

§ 1201. Evidence of a usage to explain a clause in a policy of insurance is proper. But the usage can only be resorted to where the law is doubtful and unsettled; and even then the construction must be determined by the usage, and not by the opinions of the witnesses. The usage admitted in this case was one which prevented the selling on board of any part of the cargo at any intermediate point at which the vessel was permitted to call. *Winthrop v. Union Insurance Co.*, 2 Wash., 7.

§ 1202. Parol evidence of a custom or agreement cannot be admitted to change the conditional obligation of an indorser of a promissory note into an absolute one. *Bank of Alexandria v. Deneale*, 2 Cr. C. C., 488.

§ 1203. Oral evidence cannot be admitted to show that by the customs of the river the words

"dangers of the river," used in a bill of lading as limiting the liability of the owner of the vessel, is usually understood to include fire. *Garrison v. Memphis Insurance Co.*, 19 How., 312.

§ 1204. Parol evidence of a usage of trade, to the effect that demurrage is payable where the freight is payable, cannot be admitted to vary the language of a charter-party, whose construction is not doubtful. *Ladd v. Wilson*, 1 Cr. C. C., 293.

§ 1205. A written contract of sale, by which the vendors in Glasgow agree to ship the goods "as soon as possible," cannot be varied by parol so as to read "as soon as possible *by sail*." Proof of a custom of merchants to ship by sail, unless specially directed to ship by steam, is not admissible. Nor can it be shown by parol what, in the opinion of merchants and business men in Glasgow, the contract means. *Pope v. Filley*, 3 McC., 190.

§ 1206. Where, by a written contract, one party agrees to deliver a given number of barrels of flour on certain days, at a certain price per barrel, in consideration of which the other party agrees to receive the flour and pay the price, parol evidence is not admissible to show that by a usage in that market the buyer has a right to demand of the seller in such cases a deposit of a margin as security, and a right to rescind the contract if refused. Nor can it be shown that the parties entered into the contract with the understanding that it should be subject to such a usage. *Oelricks v. Ford*, 23 How., 49.

§ 1207. One who had been the local agent of a foreign insurance company sued the company to recover commissions, or commuted value thereof, for renewals of policies after he ceased to be the agent. He served under a letter from the company which stated: "You are there working up a business for yourself, and are to be paid the highest commissions we pay to any agent." It was held (1) that the whole sentence must be taken together, and that the plaintiff could not introduce the parol testimony of insurance men or agents to show that the words, "work up a business for yourself," had a peculiar meaning to the effect that he should be entitled to continuing or future commissions after he ceased to be agent, and of which he could not be deprived by being discharged from the service of the company; and (2) that while the plaintiff could show by parol what were the highest commissions paid by the company to any of its agents with like duties with the plaintiff, he could not show that there was a usage among other companies doing business there to pay commissions for renewals, or the commuted value thereof during the whole existence of the policy, and after the agent had ceased to act for the company. *Partridge v. Life Insurance Company*, 1 Dill., 139. See §§ 1092-93.

§ 1208. Parol evidence of a usage, though generally admissible to enable the court to arrive at the intention, where the written contract is ambiguous, cannot be admitted to vary, contradict or defeat express stipulations or provisions restricting or enlarging the customary right. *Hart v. Shaw*, 1 Cliff., 358.

§ 1209. Evidence of a usage cannot be given to limit the legitimate scope and operation of an instrument of guaranty whose terms are plain and unambiguous. *Moran v. Prather*, 23 Wall., 492.

§ 1210. Evidence to establish a custom of the place, allowing tenants to remove buildings erected by them upon the leased premises during the term, is admissible in an action for waste by the landlord against the tenant for the removal of such a building. And such proof may be by parol. *Van Ness v. Pacard*, 2 Pet., 137.

§ 1211. The usage of trade may be proved by parol, whether or not it originated in an edict or in instructions given by the government to its officers, and whether or not the trade was prohibited by such edicts or instructions. *Livingston v. Maryland Ins. Co.*, 7 Cr., 506.

§ 1212. An agreement, giving the cook of the vessel a right to sell the slush may be shown by parol, although the shipping articles contain no such agreement. *Parker v. The Ship Caliope*, 2 Pet. Adm., 272.

§ 1213. Evidence of a usage to receive natives temporarily on board a vessel, paying them for their services at the discretion of the master, is admissible to determine the liability of the owner, when sued for wages by a native so employed. *Sunday v. Gordon*, Bl. & How., 569.

§ 1214. In an action to recover the freight money for the transportation of goods upon the Ohio river, under the usual bill of lading containing the words "privilege of reshipping," where the vessel had been delayed at the falls on account of low water, and the respondent claimed the right to set off damages arising from the failure to deliver the goods within a reasonable time, it was held competent to prove that, by a well known usage of commerce upon the Ohio, the words "privilege of reshipping," when used in shipments from any point below to a point above the falls, did not import an obligation of reshipping, but that in case of inability to pass the falls from low water, the carrier incurred no liability for the detention. *Broadwell v. Butler*, 6 McL., 296; S. C., Newb., 171.

§ 1215. Where the original shipping articles for a whaling voyage did not express the time to which the voyage was limited, but it was proved that the usage in this fishery was not to exceed thirty months, and that that was actually the understanding in this case, and the

copy of the articles certified by the collector, which was taken in the ship, was so written out oral evidence was admitted to supply the omission. *The Antelope*, 1 Low., 130.

§ 1216. **Limitations of the general rule.**—Parol evidence, not inconsistent with a written instrument, is admissible to apply such instrument to its subject. *Noonan v. Lee*, 2 Black, 499.

§ 1217. Parol evidence of the declaration of an auctioneer cannot be received to contradict the written terms of the sale; but if consistent with the terms of sale, the evidence is admissible. *Wright v. Deklyne*, Pet. C. C., 199.

§ 1218. In order to let in parol evidence of the meaning of a written contract, it must appear that some expression in the contract is equivocal, and that the evidence is introduced to explain that equivocal expression. *Auld v. Hepburn*,* 1 Cr. C. C., 122.

§ 1219. In an action to set aside a written contract and securities given in pursuance of it, the court may go behind the writing to ascertain the real intent and meaning of the parties, and if it appears that the writing does not express the real intent of the parties, but is merely colorable, and used as a cloak to cover a gambling transaction, the court will interfere, on grounds of public policy, to set it aside. *Clarke v. Foss*, 7 Biss., 540.

§ 1220. Reducing an agreement to writing does not prevent a party from showing that it was induced by fraudulent representations. *Boyce v. Grundy*, 3 Pet., 210.

§ 1221. Parol evidence may be received to show a consideration different from that recited in a written contract, whether it be signed by both of the contracting parties or one only. *Phelps v. Clasen*, 1 Woolw., 204.

§ 1222. In construing a grant, the attendant and surrounding circumstances, at the time it was made, are competent evidence for the purpose of placing the court in the same situation, and giving it the same advantages for construing the paper, as were possessed by the actors themselves. *Cavazos v. Trevino*, 6 Wall., 773.

§ 1223. When a written contract does not suggest what the meaning of the parties was, and when the language is susceptible of more than one meaning, and it is uncertain which is the proper construction, parol testimony is admissible to show all the circumstances, such as the relations of the parties, their knowledge of the subject-matter of the contract, the state and condition thereof, and all other facts which shed any light on their intention and meaning. *Phelps v. Clasen*, 1 Woolw., 204.

§ 1224. In cases falling within the general rules of the common law, and not within the statute of frauds, oral evidence is admissible to show a subsequent agreement, made before the breach of the contract, and upon a new and valuable consideration, extending the time of performance of a written contract. *Emerson v. Slater*, 22 How., 28.

§ 1225. When there is a question whether a written agreement is merely a partial performance of a prior oral agreement, or is a substituted contract, intended by the parties to replace the oral agreement, oral evidence bearing on this question, and also evidence of the oral agreement, are admissible. *M'Culloch v. Girard*,* 4 Wash., 292.

§ 1226. Where an agreement is manifestly incomplete and intended to define not the entire contract, but only one or two of its items, the circumstances of the case, and especially the previous course of dealing between the parties, may be resorted to for the purpose of supplying those parts of the contract which are not within the scope of the memorandum, as well as in determining the sense of uncertain and ambiguous words. Parol evidence is not excluded in such a case. *The Alida*, Abb. Adm., 173.

§ 1227. The court refused to instruct that a written agreement to return certain property on demand could not be controlled by an oral agreement that the possessor should retain it for a certain purpose. *McIntosh v. Summers*, 1 Cr. C. C., 41.

§ 1228. A parol condition, made and assented to at the time a special contract was signed and delivered, admitted in evidence. *Corcoran v. Dougherty*,* 4 Cr. C. C., 205.

§ 1229. A new agreement upon a distinct consideration may be proved by parol evidence as a substitute for, or as in addition to, a written contract. *Piatt v. United States*, 22 Wall., 496.

§ 1230. Extrinsic evidence is competent to show the existence and the nature and extent of such appurtenances as pass with the principal thing granted by a deed. *Donnell v. Humphreys*,* 1 Mont. T'y, 518.

§ 1231. Oral evidence is admissible to show that an agreement was made by which the indorser of a promissory note was to be discharged on the happening of a certain event. The reasons which forbid the admission of parol evidence to alter or explain written agreements and other instruments do not apply to those contracts implied by operation of law. *Susquehanna Bridge & Bank Company v. Evans*,* 4 Wash., 481.

§ 1232. Courts of equity afford relief in cases of mistake of facts, and allow parol evidence to vary and reform written contracts and instruments, when the defect or error arises from accident or misconception, as properly forming an exception to the rule which excludes parol testimony offered to vary or contradict written instruments. *Walden v. Skinner*, 11 Otto, 577.

§ 1233. An agreement in writing, or an instrument carrying an agreement into execution,

cannot be varied by parol testimony, stating conversations or circumstances anterior to the written instrument. This rule is recognized in courts of equity as well as courts of law, but courts of equity grant relief in cases of fraud and mistake, and carry into execution the intention of the parties where the written agreement fails to express that intention. *Hunt v. Rousmanier*, 8 Wheat., 174.

§ 1234. Though there are no technical estoppels in a court of equity, it is a well settled rule in equity, as well as at law, that parol evidence is inadmissible to contradict or substantially vary a written instrument. Thus, one bound in a single bill as principal cannot give evidence to show that he is only a surety. But, in cases of fraud and mistake, a court of equity may carry into execution the intention of the parties, where the written agreement fails to express that intention. *Sprigg v. The Bank of Mount Pleasant*, 14 Pet., 201.

§ 1235. Parol proof will suffice to reform a written contract upon the establishment of mistake, if clear and satisfactory. *Snell v. Insurance Co.*, 8 Otto, 85.

§ 1236. On a bill to enforce the specific performance of an agreement to convey a house and land, payment or part payment of the purchase money, coupled with possession of the house and land, voluntarily given and received in pursuance of the contract, are a part performance, which will authorize the court to admit oral evidence. *Dudley v. Hayward*, 11 Fed. R., 543.

§ 1237. In Texas, where trusts are not embraced in the statute of frauds, a trust may be proved by parol as at common law. *Osterman v. Baldwin*, 6 Wall., 116.

§ 1238. On a bill for the specific execution of an assignment of a judgment, parol evidence is admissible to rebut or explain the equitable interest claimed by the plaintiff. *Rhodes v. Farmer*, 17 How., 464.

§ 1239. **Miscellaneous cases in which parol evidence was admissible.**—In a suit on a parol agreement between the first and second indorsers of a note, for the accommodation of the maker, made at the time of the indorsements, to share equally any loss, there can be no objection that parol evidence is offered to vary a written contract, the suit not being upon the note. *Phillips v. Preston*, 5 How., 278.

§ 1240. Where the president of a locomotive company subscribed to the stock of a railroad company, payable in cash on the delivery of the last of twelve engines by the said locomotive company, *held*, in a suit for the amount of the subscription, that it was competent to put in evidence a contract for the delivery of twelve engines, and to prove by parol that that was the contract referred to, and not another contract for the delivery of fourteen engines, which contract had been complied with. *Rutland & Burlington R. Co. v. Crocker*,* 4 Blatch., 179.

§ 1241. If there are two separate and distinct shipping contracts, for separate voyages, made by a seaman, at the same time, and only one is reduced to writing, the other may be proved by parol. Thus, if shipping articles are signed for a voyage from San Francisco to Calcutta, the seaman may prove by oral evidence that at the same time a contract was made for service from the latter port to Boston. *Page v. Sheffield*, 2 Curt., 377. See §§ 1078-83.

§ 1242. In an action to recover a sum agreed to be due by a stated account, and the amount of certain bills of exchange drawn by the defendant and accepted and paid by the plaintiff's intestate, the defendant offered to prove, under a plea of set-off, that, at the time of the settlement in which the settled account was made, the intestate acknowledged himself to be indebted to the defendant in a certain sum, arising out of a separate matter, and promised to pay it as soon as he could, after deducting therefrom the balance admitted to be due by the stated account. *Held*, that the evidence was proper, as it did not tend to explain or contradict the settled account. *Vuyton v. Brenell*, 1 Wash., 467.

§ 1243. So far as a bill of lading is a contract it cannot be contradicted by parol; but as to the amount of goods received it is merely a receipt, and on this point it may be contradicted by parol testimony. *The Lady Franklin*, 8 Wall., 325.

§ 1244. A bill of parcels, given to show to what object the receipt for the note given for the purchase money of the goods applied, is not the contract of sale, and may be explained by extraneous evidence. *Harris v. Johnston*, 3 Cr., 311.

§ 1245. It is competent to give in evidence, in explanation of a written memorandum of a sale, a bill of parcels of the same transaction subsequently furnished by the vendor. *Salmon Falls Manufacturing Co. v. Goddard*, 14 How., 446.

§ 1246. On a libel by a shipper against a vessel for failure of the master to execute the contract contained in a bill of lading, the owner, who has hired the vessel to the master upon an agreement by which the latter was to have entire control of her and furnish the men and provisions, the owner taking a portion of the earnings as his hire, may, on filing his claim, contradict the bill of lading by parol evidence, because he is no party to the contract which it contains. *The Phebe*, 1 Ware, 263.

§ 1247. Parol evidence is admissible to show that a person to whom a deed has been made as trustee never accepted the trust. But if once accepted, parol evidence is not admissible to

show a release of title to the trust property. In this case, a disclaimer by the person to whom the deed was made, not under seal or under oath, made ten years after the execution of the deed, stating that, immediately on hearing of the deed, he refused to accept or act under the trust, and that he had not at any time since accepted or acted under it, was held admissible, the person being dead and his signature being proved. *Armstrong v. Morrill*, 14 Wall., 120.

§ 1248. In an action by an indorsee against the maker of a negotiable note, made payable to several persons, it may be shown that one of the persons named as payee inceptively refused to be a payee, and was treated by the drawer and the other payees, both in the delivery and negotiation of the note, as no party and as having no interest in it, and that it was transferred by the indorsement of the real payees. *Pease v. Dwight*, 6 How., 190.

§ 1249. A deed purported to convey certain ditches known as the Silver Bow Ditch Company's ditches, conveying water from Silver Bow creek to the placer mines at Butte City, and more particularly known as the Humphreys and Allison ditches. It was held that extrinsic evidence was competent to show that a certain ditch called the Park ditch was one of the ditches known as the Silver Bow Ditch Company's ditches, or the Humphreys and Allison ditches, and necessary for the conveyance of water from Silver Bow creek to the placer mines at Butte City, in order to aid the court in construing the language of the deed, and to show that the Park ditch passed as a part and parcel of the subject-matter of the conveyance. *Donnell v. Humphreys*,* 1 Mont. T'y, 518.

§ 1250. In an action upon a guaranty, the plaintiff may give evidence to prove that he made advances or gave credit upon the faith of it. Evidence that he treated it as a continuing guaranty is not an attempt to explain the written contract by oral evidence, but is admissible to show that the plaintiff made advances or gave credit upon the faith that it was such, if it is in point of law held entitled to that character. *Douglass v. Reynolds*, 7 Pet., 113.

§ 1251. **Uncertain and ambiguous contracts.**—Where a policy of insurance is filled up in the name of agents for account of the owners, it does not contradict the policy to show who are the owners intended to be insured. Since the term "owners" cannot be explained by anything appearing upon the face of the instrument, it must be open to explanation by extrinsic evidence. *Catlett v. Pacific Insurance Co.*, 1 Paine, 584.

§ 1252. If a deed describe the grantee as a trustee, without stating for whom and for what purpose, parol evidence is admissible to show these things. *Railroad Co. v. Durant*, 5 Otto, 576.

§ 1253. It is doubtful whether evidence is admissible to show that one who appears by the terms of the note to be a principal is a surety. But when the effect of the indorsement is doubtful, the intent with which it was made may be shown by parol. *Dibble v. Duncan*, 2 McL., 553.

§ 1254. Where a corporation sues on a note made payable to the order of its agent, as agent, and not indorsed by him, in order to maintain the action it may prove itself to be the owner of the note by parol. *Pacific Guano Co. v. Holleman*, 12 Fed. R., 61.

§ 1255. The "*special instructions*" of the commissioner of the land office being a part of every contract for the survey of the public lands, where the terms of a contract contained one description of the tract to be surveyed and the "*special instructions*" another, extrinsic evidence was admitted to show the extent of the subject-matter as actually intended by the parties. *Bowles' Case*,* 7 Ct. Cl., 454.

§ 1256. Where a testator devised a lot on Third street in the occupation of R. H., and it appeared that he had no lot on Third street, but had one on Fourth street, and that it was in the occupation of R. H., it was considered as a latent ambiguity which might be explained by parol. *Allen v. Lyons*, 2 Wash., 475.

§ 1257. The number of Indians being left indefinite in the contract made with the government for subsisting and emigrating the Cherokee Indians, it was a case of latent ambiguity, which parol evidence was admissible to explain. *Accounts for Removing Cherokees*,* 3 Op. Att'y Gen'l, 731.

§ 1258. When no time for its execution is mentioned in a written contract for the manufacture and delivery of certain articles, the law fixes a reasonable time as that intended by the parties, and parol evidence is inadmissible to prove that a specific time for the completion and delivery of the articles was verbally agreed on by the parties. But such evidence may be admitted for the purpose of showing what the parties considered to be a reasonable time when they made the contract, and as a fact tending to show what is a reasonable time. But the judge stated in this case that, for special reasons, he would leave it for the jury to say whether a specific time was orally agreed upon by the parties. *Cocker v. Franklin Hemp & Bagging Co.*, 1 Story, 332; 3 Sumn., 530.

§ 1259. **Date of instrument.**—The date of a written instrument, though forming a part of it, may be contradicted by parol evidence whenever it is material to the issue to do so. And if the instrument have no date, the time of its execution may be proved by parol or other competent testimony. *Gardner v. The Collector*, 6 Wall., 499.

§ 1260. The time of the delivery of a deed or mortgage may be shown by parol. *Mayburry v. Brien*, 15 Pet., 21.

§ 1261. **Proof of surrounding circumstances.**—The parol evidence which is to control the plain legal import and construction of a written instrument, if admissible at all (which perhaps it may be in showing cause against a decree for specific performance), should be very clear, strong and explicit, and not dependent on mere inferences drawn from equivocal expressions recollected some years after the transaction. *Robinson v. Cathcart*, 3 Cr. C. C., 377.

§ 1262. The intent in executing a power is a matter which may be established by evidence *in pais*; and all the evidence conducing to establish it is to be considered by the jury in connection. The inquiry is not limited to the acts done in execution of the power, but extends to extrinsic circumstances. *Crane v. Morris*, 6 Pet., 598.

§ 1263. Although a written agreement cannot be varied by proof of the circumstances out of which it grew, and which surrounded its adoption, yet such circumstances may be resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Thus, where a policy of insurance states that the risk is "to be suspended while the vessel is at Baker's Island loading," such circumstances may be admitted to show the meaning to be that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not. *Reed v. Insurance Co.*, 5 Otto, 23.

§ 1264. Where the note of a member of a firm had been indorsed by the firm before it was delivered to the payee, whether the firm is to be considered as an absolute promisor or maker, or guarantor or indorser, depends on the intention of the parties, and this may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. *Rey v. Simpson*, 22 How., 341.

§ 1265. Parol evidence is admissible to prove that a purchase of land made by a partner was made for partnership purposes and paid for with partnership funds, although the title was taken in the name of the purchasing partner. *Scruggs v. Russell*, *McCahon*, 39; *Powell v. Monson, etc., Manuf. Co.*, 3 Mason, 347.

§ 1266. In the case of a joint purchase, where each purchaser is to have an interest in proportion to his advances, parol evidence is admissible to establish the trust, as well as to rebut, control or vary it. *Jenkins v. Eldridge*, 3 Story, 181.

§ 1267. In a suit by the payee of a note against a person who indorsed it before it was delivered to the plaintiff, it is competent to prove the intention of the defendant in indorsing the note, as understood by himself and the maker and the payee. This question is not affected by the statute of frauds. *Pierse v. Irvine*,* 1 Minn., 369.

§ 1268. Parol evidence, though inadmissible to contradict or vary the terms of a deed, is competent to show the situation of a party in relation to parties and things around him; thus, if the language of a written instrument is applicable to several persons, parol evidence is admissible of any extrinsic circumstances to show what person or persons were intended. *Friedman v. Goodwin*, *McAl.*, 142.

§ 1269. It is not a contradiction or varying of an indorsement which reads "pay to A. or order for account of B.," the indorser, to prove that, in the delivery of the paper to A., he and B. were under a mistake as to the effect of it, or that A. paid the value of the draft to B. without any consideration, or that he advanced the money in the idea that he was to be reimbursed out of the draft when collected. *White v. National Bank*, 12 Otto, 658.

§ 1270. Oral evidence may be admitted to rebut circumstances relied upon to destroy the validity of a written instrument. Thus, if a bond is objected to as being a forgery upon its face, the terms of the contract, independent of the bond, may be shown in order to rebut the objection. *Walton v. Coulson*, 1 McL., 120.

§ 1271. In an action of covenant by the assignee of a lessor against the assignee of the lessee, the plaintiff may give parol evidence of possession by the defendant, and his payment of rent to the plaintiff, as evidence of an assignment by the lessee to the defendant. *May v. Sheehy*, 4 Cr. C. C., 135.

§ 1272. In an action for breach of indemnity given by the defendants, as creditors of a steamboat, to the plaintiff, a part owner, on disposing of his share, binding themselves to defend and save him harmless from the existing debts against the boat, evidence that the interest in the boat was sold for less than the market value, and that it was understood at the time that the purchaser should defend the plaintiff from all the existing debts against the boat, is admissible as showing the surrounding circumstances at the time the bill of sale was executed, and the circumstances which induced the purchaser to give the indemnity which the defendants executed. *Moran v. Prather*, 23 Wall., 492.

§ 1273. A libel against the steamer *Arrow* alleged that her captain had contracted with the libellant to carry his horse from Sandusky, Ohio, to Chatham, in Canada, and had failed to deliver the horse at the latter place. A receipt given to the libellant by the clerk of the *Arrow*,

after her return to Sandusky, was given in evidence, which read as follows: "Received of Thomas Butler, \$3.00, for transporting horse from Sandusky to Chatham, \$1.00 for the Ploughboy, and \$2.00 for the Arrow; the horse, by consent, was put on board the Ploughboy October 30, 1852." It was decided that parol evidence might be received to explain this receipt, and to show that the agreement was only to deliver the horse at Detroit, to the Ploughboy, and to pay the \$1 to the clerk of the latter boat, for conveying the horse thence to Chatham. *Butler v. Steamer Arrow*, 6 McL., 470.

§ 1274. Phelps, a partner in the firms of Jennings & Phelps and Phelps & Clasen, the latter being successor to the former, sold his interest in the latter firm, by a contract which stated that "it is further understood by the parties of the second part (the vendees), that the above sale is made subject to any indebtedness made by the purchase of any of the aforementioned goods, wares and merchandise, by Jennings & Phelps, and Phelps & Clasen, for which reference is made to an account of liabilities on the 1st day of April, 1867." It was held that as this clause did not contain or express any promise on the part of the vendees to pay those debts, it was material to know whether there were any liens on the goods, and that parol evidence was admissible to show this fact. *Phelps v. Clasen*, 1 Woolw., 204.

§ 1275. *Assumpsit* to recover a balance alleged to be due on sundry consignments made to defendant by plaintiff. Defendant claimed to be allowed in account the difference between a sum advanced by him to plaintiff's supercargo upon certain goods shipped on a certain vessel, and the net proceeds of those goods. Plaintiff contended that defendant had agreed by a contract to look to the goods only for his reimbursement. The clause in the contract relied on by him was as follows: "On which goods Mr. R. Dickson has advanced me in iron, window-glass, etc., shipped on board ship Dolphin, the sum of R. D. 58,331. 36.4, for which amount he will hold for reimbursement on the amount and net proceeds of the sales of said goods, which are only considered answerable for said amount advanced, as per our agreement; the remainder of the amount and net proceeds he will hold to the order," etc. The court, inclining to the opinion that parol evidence of the circumstances under which the contract was made was admissible to aid in its construction, admitted such evidence, reserving the right to direct the jury with regard to it, but afterwards told the jury that the agreement contained an express contract on the part of the defendant to look solely to the goods as security for the advances. *Peisch v. Dickson*, 1 Mason, 9.

§ 1276. A mill company gave the following receipt: "Received of P. McK. five hundred and fifty bushels of No. 1 hard wheat, at his risk in case of fire, and free of storage until sold." It was held that although the receipt was *prima facie* one for storage, it did not exclude all parol evidence to show the character of the transaction, and to show by the acts and conduct of the parties that the wheat was bought for the purpose of being manufactured into flour, and was so manufactured soon after it was received, with the consent of the other party. This evidence was held not to be excluded by the provisions of the act of the legislature of Minnesota of March 3, 1876, authorizing the depositor of grain for storage to demand and receive a receipt therefor; making it criminal to issue a fraudulent receipt; making the receipt negotiable, and to stand for the grain, so that whoever owns the receipt owns the grain; making it criminal to neglect or refuse to deliver the grain, or to dispose of it without consent of the owner and the surrender of the receipt; and making the contract for storage to exclude any implied right arising from custom or usage to sell or dispose of or deliver the grain out of the warehouse. *McCabe v. McKinstry*, 5 Dill., 509.

§ 1277. The defendants hired a vessel of the plaintiffs for the importation of a cargo of guano from the Chincha Islands, agreeing to pay \$25 per ton as freight, and that the plaintiffs might have the benefit of any advance which might occur in guano freights before the vessel had finished loading. Such advance in guano freights could only be made by the defendants, as they were the only persons in the United States authorized by their government to contract for its transportation. The plaintiffs attempted to show, in an action by them for the freight, that the defendants had made such advance, by the introduction of charter-parties made by them allowing an advance of \$5 per ton. But the defendants claimed that these charter-parties were for the use of the vessels on the outward voyages also. In order to show that this was a device to avoid the effect of the advance clause in the charter in controversy, and that the privilege of using the vessels on their outward voyages was not intended to be exercised by the defendants, it was held that parol evidence of the declarations and statements of the agents of the defendants, upon whom full authority had been conferred to negotiate for the vessels whose charters were introduced by the plaintiffs, made at the time the charters were presented to the owners of the vessels for execution, was admissible. It was further held that the rule excluding parol evidence to vary or contradict a written contract did not exclude the admission of this evidence for the purpose of showing that the real service for which this advance was paid in the subsequent charters was for the importation of guano and not for the use of the vessels on their outward voyages. *Barreda v. Silsbee*, 21 How., 146.

§ 1278. The plaintiff made a written contract with the government to furnish and deliver a certain quantity of hay to the military station at Tongue river, in the Yellowstone region, on or before a specified day, the contract making no mention of the source from which he was to procure the hay. Having failed to deliver it on the day agreed upon, it was furnished by others at increased expense, and the government claimed a right to deduct from an amount due the plaintiff for wood furnished the increased cost of the hay. The plaintiff complained that the hay which he relied on for cutting had been given to other persons, and he had at the same time been charged for the increased expense of getting it. It was held that parol evidence of surrounding circumstances was admissible to show that the parties contemplated the hay to be cut in the Yellowstone Valley, and especially at Big Meadows near the mouth of the Tongue river. *United States v. Peck*, 12 Otto, 64.

§ 1279. **Contract by agent.**—Parol evidence is admissible to show that a person executing a written instrument acted as agent. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat., 326. See § 411.

§ 1280. If an agent makes a written contract in his own name, without disclosing the name of his principal, the latter, in an action thereon, may show by parol that the contract was made for him, the principal. *Ford v. Williams*, 21 How., 287.

§ 1281. Upon *assumpsit* for not delivering goods according to a contract made between the agents of the parties, it was held that although the agency did not appear in the contract, inasmuch as the contract contained allusions strongly indicating the parties in interest, parol evidence of agency might be given. The defendant having refused to deliver the goods the plaintiff need not prove a demand. Also an averment that the plaintiff was ready to receive the goods need not be proved, where the defendant had declared that he would not deliver. *Somers v. Tayloe*, 2 Cr. C. C., 138.

§ 1282. **To show the consideration.**—It may be shown by parol evidence that a receipt was given without consideration, and is not binding. *Shaw v. Thompson, Ole.*, 144.

§ 1283. Between the immediate parties to a note parol evidence is admissible to show that there was no consideration, and that the defendant did not indorse the note to give it credit. *Corcoran v. Hodges*, 2 Cr. C. C., 452.

§ 1284. Where a contract for the purchase of land has been executed, the consideration may be shown by parol. *Bissell v. Farmers' and Mechanics' Bank of Michigan*, 5 McL., 495.

§ 1285. Parol evidence is admissible to contradict a mortgage by showing the real debt intended to be secured by it. *Jones v. Guaranty and Indemnity Co.*, 11 Otto, 622.

§ 1286. Where a deed recites that its consideration is a previous agreement of the grantor to pay certain debts, and to indemnify the grantee against certain responsibilities, what these debts and responsibilities are may be shown by parol, where such does not appear upon the face of the deed. *Pomeroy v. Manin*, 2 Paine, 476.

§ 1287. Parol evidence to show that a mortgage is security for a debt other than the one which it appears to secure must be of the most satisfactory character. *Baldwin v. Raplee*, 4 Ben., 443.

§ 1288. The defendant agreed, by adding the word "agreed" and signing his name to a letter written to him by a third person, to ship, for account of the third person, certain sugars to the plaintiffs. The consideration moving from the plaintiffs, and which was a part of the transaction, though not expressed in the letter, was an authority given to the third person to draw on the plaintiffs for a certain sum. It was held that this consideration might be shown by parol, as it would not contradict the terms of the letter, nor contravene the section of the statute of frauds which declares that "no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party, or by any one by him authorized." *De Wolf v. Rabaud*, 1 Pet., 476; *Rabaud v. De Wolf*, 1 Paine, 580.

§ 1289. A memorandum of an agreement for the sale of lands, acknowledging the receipt of a certain sum of money on the transaction, raises, when the land is conveyed by deed to others in pursuance of a substituted parol agreement, only a presumption of a resulting trust, and may be contradicted by parol evidence that the money was not so paid. *Clark v. Burnham*, 2 Story, 1.

§ 1290. If a deed states the consideration to be "value received," it is competent to give evidence of a money consideration. *Munro v. Robertson*, 2 Cr. C. C., 262.

§ 1291. A deed in the usual and ordinary form is not such an instrument that the parties to it cannot show by proof *aliunde* the actual consideration different from the one named in the deed. *Fraley v. Bentley*,* 1 Dak. T'y, 25.

§ 1292. **To prove a deed a mortgage.**—A deed absolute upon its face may be shown by parol evidence to have been intended as a mortgage. *Dow v. Chamberlin*, 5 McL., 281; *Amory v. Lawrence*, 3 Cliff., 523; *Howland v. Blake*, 7 Biss., 40; *Andrews v. Hyde*, 3 Cliff., 516; *Bentley v. Phelps*, 2 Woodb. & M., 426. See CONVEYANCES.

§ 1293. Any evidence, written or oral, tending to show an absolute deed to be a mortgage, is admissible. *Peugh v. Davis*, 6 Otto, 332.

§ 1294. It is competent in equity to show by parol evidence that a transaction which upon its face is an absolute sale is really only a transfer as security for money loaned. *Brick v. Brick*,^{*} 8 Otto, 514.

§ 1295. There is nothing in the statute of frauds to render such evidence inadmissible. *Amory v. Lawrence*, 3 Cliff., 523.

§ 1296. But where a mortgage is given and afterwards foreclosed, and the mortgagee is the purchaser and an absolute deed is made to him, the equity of redemption being foreclosed by judicial proceedings, the proof ought to be just as strong, if not stronger, to make the second deed a mortgage, as it would have been in the first instance. *Howland v. Blake*, 7 Biss., 40.

§ 1297. Parol evidence is admissible for the purpose of showing that a deed, absolute upon its face, was intended as a mortgage, and that the defeasance was omitted from mutual confidence between the parties. *Wyman v. Babcock*, 2 Curt., 386; *Andrews v. Hyde*, 3 Cliff., 516.

§ 1298. But the evidence to prove the agreement ought to be clear and satisfactory. Where the issue depends entirely on the credit of the grantor, in a case where he is not corroborated by any act or word done or spoken by the other party, but is contradicted by another witness, and has himself given false and contradictory accounts of various matters material to the issue, and the claim has been long delayed and made after the death of the grantee, the deed should not be treated as a mortgage. *Andrews v. Hyde*, 3 Cliff., 516.

§ 1299. A deed of real estate in fee, without conditions, and made in that form, according to an agreement of the parties at the time, may be proved to have been a mortgage by parol evidence establishing that a defeasance was a part of the agreement when the absolute deed was executed, but that it was left out by design. (*CATRON and CAMPBELL, JJ., dissented.*) *Babcock v. Wyman*, 19 How., 289.

§ 1300. To prove that a deed, absolute upon its face, was intended as a mortgage, it may be shown that the grantor retained possession after the deed for a long time; that the relation of borrower and lender existed between the parties prior to and after the date of the deed; that the grantor exercised acts of ownership over the premises after the execution of the conveyance, and that the grantee exercised none or few; that the property was more valuable than the consideration set up for the sale; the payment of interest upon the mortgage debt; the actual execution of a defeasance, and the admissions of the grantee that the deed was intended as a mortgage, and was so considered by him. *Bentley v. Phelps*, 2 Woodb. & M., 426.

§ 1301. The relations between the parties, and the facts and circumstances surrounding the transaction, may be shown to prove that a conveyance, absolute upon its face, was intended as a mortgage; but loose conversations and statements made by the parties at the time of the deed, as to what their intentions were, are not competent evidence to change the character of the document. *Jenkins v. Einstein*, 3 Biss., 128.

§ 1302. On a bill to redeem, the complainant may show by parol evidence that the deed, though absolute in form, and appearing by the memorandum given as a part of the transaction to be a conditional sale for an agreed price, was intended as a mortgage. *Russell v. Southard*, 12 How., 139.

§ 1303. A bill of sale of a vessel, absolute in its terms, may be shown by parol to be only a mortgage, except as to third persons who have actually been misled by its form. The recording of the bill of sale, the enrolling of the vessel in the name of the transferee as one of the owners, the participation of the transferee with the others in taking out insurance on the vessel, and the fact that he took no note for the amount advanced, will not overcome positive testimony that the transaction was a mortgage. *Morgan v. Shinn*, 15 Wall., 105.

§ 1304. A true construction of the statute of frauds of Rhode Island, which is like the English statute of 29 Car. 2, ch. 3, § 4, does not exclude parol evidence to show that a deed absolute upon its face was intended as a mortgage. *Taylor v. Luther*, 2 Sumn., 228.

§ 1305. **That shipping articles were illegal.**—It is competent for a seaman to show by parol that the shipping articles which he signed do not declare the voyage or voyages for which he was shipped, and that they thus violate the law; when this is shown, the written contract is no longer binding as respects the description of the voyage. *Page v. Sheffield*, 2 Curt., 377. See § 674.

§ 1306. **As to contract of insurance.**—In an action on an insurance policy, where the answers to the questions propounded to the applicant were written down by the agent, and signed by the applicant, which answers were by express agreement declared to be warranties, which, if false, would avoid the policy, it may be shown by the testimony of those who were present that an answer written down by the agent as made by the applicant was not the answer made by him. *Insurance Company v. Mahone*, 21 Wall., 152. See §§ 631, 910.

§ 1307. It may be shown by parol that a representation in an application for life insurance was inserted by the agent of the company, and that the assured did not intend to make the

representation when he signed the application, and did not know that he was doing so. It is the representation of the insurance company, and they are estopped from setting it up. *Insurance Company v. Wilkinson*, 13 Wall., 222.

§ 1308. The answers of an applicant for insurance, as construed, interpreted and inserted by the agent of the company in the application, may be shown by oral evidence not to have been the answers made by the applicant, although the application is signed by him. *New Jersey Mut. Life Ins. Co. v. Baker*, 4 Otto, 610.

§ 1309. Although the written agreement of the parties, as embodied in a policy of insurance and the indorsement thereon, as well as the premium notes and the receipt given therefor, are to the express purport that a failure to pay the notes at maturity will avoid the policy, a waiver of this stipulation may be shown, by parol, and it may be proved that the local agent of the insurance company is in the habit of extending the time of payment of the premium notes, and that his acts are ratified by the company. *Insurance Co. v. Norton*, 6 Otto, 234.

§ 1310. **Facts and circumstances in aid of an agreement.**—Extraneous facts which preceded and accompanied a letter of guaranty, though they cannot be used to vary the contract, are admissible to show its meaning. *Bell v. Bruen*, 1 How., 169.

§ 1311. If a policy of insurance requires that the vessel shall not rate below "A 2," and contains nothing to indicate the source to be looked to for the determination of the rating of the vessel, resort may be had to any evidence showing its condition. *Insurance Companies v. Wright*, 1 Wall., 456.

§ 1312. Where a check is drawn by a person who is cashier of an incorporated bank, payable to the teller of the bank or order, and on paper bearing the corporate name of the institution, and is signed in his name without adding the word "cashier," parol evidence is admissible to show that it was an official act. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat., 326.

§ 1313. The court admitted parol evidence to explain the expression "certain controversies and accounts" in a written submission. *Faw v. Davy*, 1 Cr. C. C., 440.

§ 1314. Where, in a submission to arbitration, the terms were, "of a controversy of several accounts and contracts existing between us," oral evidence was admitted to show what accounts and contracts were meant. *Davy v. Faw*,* 1 Cr. C. C., 89.

§ 1315. Where a memorandum of the sale of goods is given, signed by the initials of the parties to the sale and containing the name of the purchaser, it is competent to show by parol, in order to make the contract good under the statute of frauds, that the seller signed for the firm of which he was a member, that the firm were acting as agents of the plaintiffs, a company engaged in manufacturing the goods which were the subject of the sale; and also to show that figures set opposite the bales and cases of goods meant so many cents per yard. *Salmon Falls Manufacturing Co. v. Goddard*, 14 How., 446.

§ 1316. The jury may consider extrinsic evidence to determine the fund out of which certain debts were, according to the understanding of the parties, to be paid, to render a guarantor liable on his written promise of indemnity against such debts, the writing being silent as to the fund. *Mauran v. Bullus*, 16 Pet., 528.

§ 1317. The natural objects called for in the description in a grant may be proved by extrinsic testimony not inconsistent with the grant. *Blake v. Doherty*, 5 Wheat., 359.

§ 1318. Parol evidence is admissible to show the notoriety and names of places mentioned in an entry of lands, but not to construe the words of the instrument. *Meredith v. Picket*, 9 Wheat., 573.

§ 1319. If property insured has been transferred by the owner, and a new policy issued to the purchaser "agreeably to the representations heretofore made by J. S.," the former owner, parol evidence is admissible to prove what those representations were. And the rule is the same where several renewals have been made with the same general reference to representations. *Clark v. Manufacturers' Insurance Co.*, 8 How., 235.

§ 1320. Where a policy of insurance does not profess to embody the representations which had been made, and which were to be binding, but merely alludes to them and makes their truth a condition precedent to any recovery, what those representations were may be shown by parol. *Clark v. Manufacturers' Ins. Co.*, 2 Woodb. & M., 472.

§ 1321. The practical construction which the parties by their conduct have given to an ancient grant of a large tract of land conveyed by general description is admissible, and is entitled to weight as the best evidence of the intention of the instrument. *Cavazos v. Trevino*, 6 Wall., 773.

§ 1322. **Suits by seamen for wages.**—In an action for wages by mariners, where the rate is not stipulated in the shipping articles, parol evidence of the amount agreed to be paid may be admitted. *The Warrington*, Bl. & How., 335. See § 698.

§ 1323. If a seaman signs shipping articles which, by a mistake of the master, and without any fault on the part of the seaman, omit the rate of wages for which he is to serve, it is com-

petent for either party to show by parol what the contract was in relation to wages. *Wickham v. Bright, Gilp.*, 452.

§ 1324. Seamen, in a libel for wages, may contradict the shipping articles. *The Cypress*, Bl. & How., 83.

§ 1325. **Bill of lading.**— A bill of lading cannot be contradicted by oral evidence as to the ownership of the goods. But it may be proved that the consignee had notice that the property belonged to another, and that a corrected bill of lading was forwarded. *Chapin v. Siger*, 4 McL., 378. See §§ 541, 867.

§ 1326. Of the kind and quantity of the goods, and the place to which they are to be carried, and the person to whom they are to be delivered, the bill of lading is the customary and appropriate evidence. While it conclusively establishes the employment of the carrier, and the essential stipulations of the contract, yet, as between the shipper and the carrier, it is only *prima facie* evidence of all matters descriptive of the cargo, and as to these it may be modified or contradicted by parol. *Cafiero v. Welsh*,* 8 Phil., 130; 1 Leg. Gaz. R., 121.

§ 1327. A bill of lading is not a written contract such that parol evidence cannot be admitted to enlarge its terms; it is a mere receipt for the goods. The burden, however, of proving a further agreement is on the party alleging it. *Knox v. The Ninetta*, 1 Crabbe, 534.

§ 1328. A bill of lading being a contract for the transportation and safe delivery of the goods shipped, and also a receipt for the goods shipped, in so far as it operates as a contract it is the exclusive evidence of the obligation of the parties; but in respect to those clauses which operate merely as a receipt for the goods, it is open to explanation and rectification by parol proof. And as between the parties to the bill of lading, evidence may be received to show a mistake in the statement of the bill as to the quantity of goods received. *Goodrich v. Norris*, Abb. Adm., 196.

§ 1329. When a contract of affreightment is the basis of a suit, a receipt given for the goods to be transported does not exclude parol evidence of the other terms of the contract. *Butler v. The Steamboat Arrow*,* 1 Newb., 59.

§ 1330. So far as a bill of lading partakes of the nature of a receipt, it is open to explanation between the parties to it; but as a contract, when legally executed by the proper party, in the proper and usual manner, a mistake in stating the destination of the property cannot be shown, unless fraud or imposition is practiced. But a bill of lading signed in blank by the master is without his implied authority and does not bind the owner or vessel; and the circumstances connected with the signing and transfer of such a bill of lading may be inquired into. *The Joseph Grant*, 1 Biss., 193.

§ 1331. A bill of lading is conclusive evidence of the cargo shipped unless fraud or mistake is shown. *Backus v. Schooner Marengo*, 6 McL., 487.

§ 1332. A bill of lading stating the property to belong to a certain person is not conclusive as to the ownership of the property. *Maryland Insurance Co. v. Ruden*, 6 Cr., 338.

§ 1333. The bill of lading is not conclusive evidence of the quantity of cargo shipped. *The Henry*, Bl. & How., 465.

§ 1334. The admission in a bill of lading that the goods were received in good condition, though strong *prima facie* evidence of the fact, may be contradicted by parol. *The Ship Martha*, Olc., 140.

§ 1335. **Statute of frauds.**— Under the act of Virginia of 1758, declaring that no gift of a slave was valid, unless made in writing and recorded, parol evidence of the existence of a deed alleged to be lost was held to be admissible to show the nature of the possession which accompanied the deed, but not to show title in the plaintiff. *Spiers v. Willison*, 4 Cr., 398.

§ 1336. An agreement to pay the debt of another on his making default cannot be added to by verbal evidence; nor by written either, if not signed by the guarantor, unless the written evidence is, by reference in the original writing, made a part of it. But correspondence and other evidence may be used to ascertain the true import and application of the agreement. *Bell v. Bruen*, 1 How., 169.

§ 1337. It is a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the statute of frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute, and parol proof was admitted in this case, where the party sought to be charged had carried the agreement in his pocket for two years, and tried to enforce it against the plaintiff. *Beckwith v. Talbot*, 5 Otto, 289.

§ 1338. The statute of Massachusetts providing that "no action shall be brought to charge any person, upon or by reason of any representation or assurance, made concerning the character, conduct, credit, trade or dealings of any other person, unless such representation or assurance be made in writing and signed by the party" or his agent, only requires the representation to be in writing; all the other facts which conduce to establish the liability may be shown by parol. Any evidence which tends to prove that the representation was false, and

that the defendant acted in bad faith in making it, is competent. *Iasigi v. Brown*, 17 How., 183.

§ 1339. **Contract by partner.**—A party alleging an authority or ratification from one partner to another to bind the firm by signing the firm name need not show such authority or ratification in writing. The proof may be by parol. *Moran v. Prather*, 23 Wall., 492. See § 597.

§ 1340. Parol evidence is admissible to show that a contract was made by a member of a firm as the agent and for the use of the firm. *Hutchinson v. Peyton*,* 2 Cr. C. C., 365.

§ 1341. **Forged papers.**—The rule that a party cannot discredit papers which he himself has produced in evidence has no application to a suit in equity to set aside and have canceled an alleged forged deed, where the plaintiff exhibits the forged deed described in the bill and proceeds to prove that the signature purporting to be his is a forgery, and that the person who executed it was not the plaintiff. *Bunce v. Gallagher*, 5 Blatch., 481.

§ 1342. **Erasures.**—Parol evidence is admissible to show that an erasure and alteration in a deed were made by the consent of the parties. *Speake v. United States*, 9 Cr., 28.

§ 1343. **Miscellaneous — Records — Official capacity, etc.**—The fact that one is a clergyman authorized to celebrate the rites of matrimony may be proved by parol like any other matter *in pais*. *United States v. Lambert*, 2 Cr. C. C., 137. See §§ 879, 955.

§ 1344. Parol evidence is not admissible to supply a defect in a record. *Miner v. McLean*, 4 McL., 138.

§ 1345. A record cannot be varied by parol. It cannot be proved by an officer of the court that his official certificate of probate, indorsed on a deed, did not conform to the true state of the proof. *Ross v. McLung*, 6 Pet., 283.

§ 1346. In an action for malicious attachment, the return of the officer is not conclusive, and the plaintiff may contradict it by parol, although he has produced the writ of attachment and its return in evidence. *Mott v. Smith*, 2 Cr. C. C., 33.

§ 1347. Parol evidence should not be received to make good a wholly uncertain levy, after conflicting rights to the land have grown up. *Gault v. Woodbridge*, 4 McL., 329.

§ 1348. Parol evidence is admissible to show the regularity of tax proceedings in order to support a tax title under the law of Ohio of March 14, 1831, as to all matters which the statute does not require to be of record. *Lamb v. Gillett*, 6 McL., 365.

§ 1349. Where a person claims under a decree of sale made upon prior judicial proceedings, and it is asserted that the description contained in those proceedings is so defective, by reason of the omission to name the meridian east or west of which the land is situated, that its terms are equally applicable to another tract in another county, and it is averred in the petition instituting such proceedings that the land in question belonged to a certain person, while no such fact appears as to the other tract, parol evidence is admissible to prove the ownership by that person of the tract sold, and to remove the ambiguity. *McNitt v. Turner*, 16 Wall., 352.

§ 1350. In an action of false imprisonment for the arrest of the plaintiff, upon an execution stating a judgment of a justice of the peace, parol evidence may be given to show that in fact no judgment had ever been rendered by the magistrate. *Delvin v. Gibbs*, 4 Cr. C. C., 626.

§ 1351. The authority and handwriting of a justice of the peace may be shown by parol. *Winter v. Simonton*, 2 Cr. C. C., 585.

§ 1352. Parol evidence may be admitted to prove that a person before whom a deposition was taken is a justice of the peace. *Dunlop v. Munroe*, 1 Cr. C. C., 536.

§ 1353. Whenever the form of the issue in a trial relied on as an estoppel is so vague that it does not determine what questions of fact were submitted to the jury under it, and passed on by them, it is competent to show by parol what they were. *Miles v. Caldwell*, 2 Wall., 35.

§ 1354. And it is not a sound principle that in cases where the action relied on as an estoppel was in tort, nothing will be held concluded by the verdict which was not put in issue directly by the pleadings. *Ibid.*

§ 1355. The effect to be given to the record of mining claims, under section 5 of the act of congress approved May 10, 1872, cannot be greater than that which is given to the registration laws of the states; and it does not exclude parol proof of actual possession, and the extent of that possession, as *prima facie* evidence of title. *Campbell v. Rankin*, 9 Otto, 261.

§ 1356. Where an act of congress confirms a title, with a proviso that the confirmation shall not extend to any land occupied by the United States for military purposes, such occupation may be proved or disproved by parol. *Morrow v. Whitney*, 5 Otto, 551.

§ 1357. Parol evidence is not admissible to show when a patent was applied for. *Wayne v. Winter*, 6 McL., 344.

§ 1358. Parol evidence is admissible to prove fraud in making entries or invoices of goods at the custom-house, or obtaining permits, after the goods have passed from the custom-house, and have undergone the regular inspection of the public officers. *Bottomley v. United States*, 1 Story, 135.

§ 1359. The title or ownership of a vessel as stated in the custom-house documents is not

conclusive as to the title of the respective owners in a suit by a seaman for wages. Whatever might be the case in a controversy between the respective parties to those documents, the true title or ownership may be shown to be different from that stated in them, by a third person, whenever his interest is concerned therein. *Chickering v. Hatch*, 1 Story, 516.

§ 1360. In a proceeding for the condemnation of a vessel for importing liquors subject to duty into this country without delivering the manifest to the collector of customs, as required by section 1 of the act of March, 1821, parol testimony cannot be given to show, contrary to the ship's manifest, that the liquors were intended for a Canadian port. *The Fame*, 1 Brown, 42.

§ 1361. Upon an application by the father of a boy under the age of eighteen years, for a writ of *habeas corpus* to discharge his son from confinement on a charge of desertion from the army of the United States, in which he had enlisted as a soldier, parol evidence may be admitted to show the age of the recruit, and the certificate of enlistment is not conclusive evidence of that fact, where the recruit did not take any oath as to his age at the time of his enlistment. *Seavey v. Seymour*, 3 Cliff., 439.

§ 1362. Where an indictment described a note "with interest at one per cent.," and the note produced bore interest at the rate of "one m per centum," parol evidence was admitted to show that the letter m meant mill. *United States v. Hardyman*, 13 Pet., 176.

§ 1363. In a proceeding for the forfeiture of property imported in violation of the revenue laws, although there is an information in writing, evidence may be given of a parol information more extensive than that contained in the written instrument. *Wescot v. Bradford*, 4 Wash., 492.

§ 1364. It is competent to show by parol that a patent under which a party claims is void, because the state had no title to the land when she made the conveyance, nor never has had. *Sherman v. Buick*, 3 Otto, 209.

§ 1365. An official survey of land, made in pursuance of a confirmation of a Spanish land title in Missouri, cannot be contradicted by extrinsic evidence. *Stanford v. Taylor*, 18 How., 409.

§ 1366. In an action upon a constable's bond for failing to take a delivery bond for property on which he has levied an execution, parol evidence of the value of the goods levied upon, where the return does not show such value, may be admitted on the inquiry of damages. That the return does not show the value of the goods is not conclusive evidence that they were of sufficient value to satisfy the debt. *Campbell v. Pope*, Hemp., 271.

§ 1367. Where an inquisition for the condemnation of land for the use of a canal company refers to a warrant supposed to be returned therewith, and no warrant is annexed, or referred to by any mark or other description by which it can be ascertained to which of the various warrants returned it refers, parol evidence of the clerk to whom it was returned, or the marshal who returned it, is competent to prove the fact of return, and to designate which warrant was returned with the inquisition. *Chesapeake & Ohio Canal Co. v. Union Bank of Georgetown*, 4 Cr. C. C., 75.

§ 1368. In reference to wills.—Where a testator in Louisiana bequeathed his property to two legatees, "to be divided equally between them," and only one survived the testator, the children of the other were not permitted to introduce parol evidence to show the good will and affection of the testator towards their father, for the purpose of demonstrating the intention of the testator in the bequest. *Mackie v. Story*, 3 Otto, 589. See § 440.

§ 1369. Parol evidence is inadmissible to affect the construction of a will, but it is admissible when considerations extrinsic of the will depend upon it, and require its introduction. *Gallego v. Gallego*, 2 Marsh., 285.

§ 1370. Evidence of a testator's unfounded belief that he was the owner of certain property devised to him cannot be received to show an intention different from that clearly expressed in his will. *Aspden's Estate*, 2 Wall. Jr., 368.

§ 1371. A legacy which is a plain and explicit one to one person cannot be shown by parol to have been intended for the benefit of him and another jointly. *Lyman v. Lyman*, 2 Paine, 11.

§ 1372. Receipts.—A receipt is only *prima facie* evidence of payment, and the terms on which it was given may be shown by parol. *Weed v. Snow*, 3 McL., 265. See § 958.

§ 1373. A receipt for so much money is only evidence of payment, and may be explained by parol or other evidence. *Maze v. Miller*, 1 Wash., 328.

§ 1374. A receipt, stating money to have been received under a certain contract, is *prima facie* evidence that it was received under the contract mentioned, and it is upon the party contradicting the receipt to show the contrary; but he is not bound to show how the misstatement in the receipt occurred. *United States v. Jones*, 8 Pet., 399.

§ 1375. A receipt in full is only *prima facie* evidence of what it purports to be upon the face of it; and upon satisfactory proof being made that it was obtained by fraud, or given by mistake of facts or in ignorance of legal rights, it may be inquired into and corrected in a court of law as well as in a court of equity. But if such proof is not made, the presumption in its favor will prevail. *Thompson v. Faussat*, Pet. C. C., 182.

§ 1376. A receipt in full is not conclusive, but is only *prima facie* evidence of what it purports. Proof may be made that it was unfairly obtained, or that it was given under a mistake of facts, or of the legal rights of the party giving it; and it is then open for examination of any errors which may be pointed out and proved. But if the claim of the party giving it be honestly contested, and a compromise agreed upon, the receipt is binding. The party who would impeach it, on the ground of unfairness or mistake, must maintain his allegation by proof. *Lawrence v. Schuylkill Navigation Co.*, 4 Wash., 562.

§ 1377. Where a receipt is produced in evidence, the whole document is in proof, and one part cannot be considered and the other rejected. *Butler v. Steamer Arrow*, 6 McL., 470.

§ 1378. A witness, in his deposition, proved the actual payment of money by plaintiff to defendant, and also stated that defendant signed his name in plaintiff's cash book, not as a receipt, but in order that witness might become acquainted with his signature. Defendant objected to the admission of the parol evidence of the payment on the ground that there was written evidence. *Held*, that the parol evidence of the actual payment was admissible. *Keene v. Meade*, 3 Pet., 1.

§ 1379. A bill of parcels, receipted, is *prima facie* evidence of an executed contract, and not evidence of a contract to deliver goods. *Richardson v. Peyton*,* 1 Cr. C. C., 418.

§ 1380. Where notes were taken and a receipt in full given therefor, the effect of the receipt may be rebutted by evidence that the attention of the parties was not called to the form of the receipt and that the notes were received, not in satisfaction, but as evidence of the balance due in settlement. *Sutton v. The Albatross*,* 1 Am. L. Reg., 91.

§ 1381. The receipt of payment by note is not conclusive, but only *prima facie*, evidence of payment of the debt, and such evidence may always be explained by other extraneous circumstances showing the intention of the parties when the receipt was given, and that there was in fact no actual payment. *Moore v. Newbury*, 6 McL., 472.

§ 1382. In *indebitatus assumpsit* for goods sold and delivered a receipt for a bond "in part pay" of the goods was held conclusive evidence that the bond was received in part payment, although the bond might have been unproductive and the obligor therein insolvent when the receipt was given. *Muir v. Geiger*, 1 Cr. C. C., 323.

§ 1383. A collector's receipt acknowledging the payment of duties is only *prima facie* evidence of payment. *Johnson v. United States*, 5 Mason, 425.

§ 1384. If a mechanic, who has made repairs upon a vessel, takes a note for the amount of his services and signs a receipt in full which is prepared by the clerk of the owner, the receipt is only *prima facie* evidence that the note was taken as a satisfaction of the debt, and therefore relinquished the lien which the law gives him upon the vessel. *Sutton v. The Albatross*, 2 Wall. Jr., 327.

§ 1385. A receipt is but *prima facie* evidence of payment, and may be explained, contradicted or varied by parol proof. This rule applies with special force in the case of seamen dealing with a master upon the consideration of a small advance of ready money for the discharge of their wages. *Piehl v. Balchen, Olc.*, 24.

§ 1386. A release under seal by a seaman of his claim for wages is, in admiralty, but *prima facie* evidence of payment. *The David Pratt*, 1 Ware, 495.

§ 1387. A receipt in full given for his wages by a seaman is not conclusive in admiralty. A receipt given for his wages by a seaman, annexed to the foot of a stated account, admitting the payment of the balance, is not conclusive of the truth even of the items in the account. *Harden v. Gordon*, 2 Mason, 541.

§ 1388. A seaman's receipt in full, given only for money actually due him, and with no additional consideration, is not conclusive in a suit for damages. *The Mary Paulina*, 1 Spr., 45.

§ 1389. A receipt in full, given by a seaman for his wages, is only *prima facie* evidence of payment; and if fraud or mistake can be shown the whole demand is open to investigation. *Whiteman v. The Neptune*, 1 Pet. Adm., 180.

§ 1390. Although a receipt in full of all demands is given by a seaman to the master or owners of a vessel, clear and convincing evidence of a valid outstanding claim is admissible to explain it. *Leak v. Isaacson*, Abb. Adm., 41.

V. PRESUMPTIONS.

SUMMARY — *When competent to establish a fact, and what inferences jury may draw*, § 1391.—
Must tend to prove or disprove a fact in issue; presumptions of fact, §§ 1392-93.

§ 1391. Where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence which the law authorizes a court to infer on a demurrer to the evidence; after a verdict in favor of

either party on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with a single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the rights of the party, on a part or the whole of his case. If, in its judgment, the appellate court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferable therefrom, in the same manner, and with the same legal results, as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause must be taken as negating all facts which the party against whom their verdict is given has attempted to infer from or establish by the evidence. *Hepburn v. Dubois*, §§ 1394-95.

§ 1392. Evidence which tends in any reasonable degree to establish the probability or improbability of a fact in controversy should go to the jury. *Insurance Co. v. Weide*, §§ 1396-97.

§ 1393. A presumption is an inference as to the existence of a fact, not actually known, arising from its usual connection with another which is known. *Ibid.*

[NOTES.— See §§ 1398-1748.]

HEPBURN v. DUBOIS.

(12 Peters, 345-377. 1838.)

Opinion by MR. JUSTICE BALDWIN.

STATEMENT OF FACTS.— This case was before this court on a writ of error, taken by the plaintiff below, to the district court for the western district of Pennsylvania, at the January term, 1836, and all the questions arising on the record, or made by counsel, were there fully considered. The court, however, took further time for consideration, and at the term of 1836 delivered their unanimous opinion, reversing the judgment of the district court on the merits of the case, as well on the questions of law as of fact, as will appear in the tenth volume of Peters, pages 17, 33. Pursuant to the judgment and mandate there rendered, the case was again tried, and now comes before us on a writ of error by the defendant below, after a verdict and judgment below against him, in the argument of which every point of law and question of fact which came up and was decided before has been noticed by counsel now.

§ 1394. *The deed of a feme covert does not pass her interest by force of execution and delivery; it operates only by virtue of acknowledgment under a statute.*

As relates to the questions of law arising on the great mass of deeds in the former and present record, they are not varied by anything which is now brought up for the first time; the want of any operative act by Mrs. Scarrow, which could confirm the alleged petition of 1825, before the duly acknowledged deed of confirmation by her and her husband in 1832, is not supplied. The counsel of the plaintiff in error have indeed contended that her deed of 1832 operates retrospectively to validate all the previous acts of her attorneys in fact, from 1811 to 1828. But the law is well settled to the contrary. The deed of a *feme covert*, conveying her interest in land which she owns in fee, does not pass her interest by the force of its execution and delivery, as in the common case of a deed by a person under no legal incapacity. In such cases, an acknowledgment gives no additional effect between the parties to the deed; it operates only as to third persons, under the provisions of recording and kindred laws. The law presumes a *feme covert* to act under the coercion of her husband, unless before a court of record, a judge, or some commissioner in England, by a separate acknowledgment out of the presence of her husband; and in these states, before some court or judicial officer, authorized to take and certify such acknowledgment. We are bound, therefore, in accordance to what we deem in the former case to be the legal result of all the deeds and facts on the record, to declare that Mr. Quay had in him such legal right to the premises,

on which we then held, and now deliberately hold, to be a scintilla of legal right, which is all that, by the laws of the state, is necessary to entitle the holder of such right to redeem lands sold for taxes.

§ 1395. *Where evidence conduces to prove a fact it is competent to establish that fact; whether it is sufficient or not is a question for the jury which cannot be examined in this court.*

In urging upon this court a review of the parol evidence in the record, we think the counsel of the plaintiff in error have asked us to transcend the limits prescribed to our action on questions of fact, by an uniform course of decision from the first organization of this court, which has been repeatedly defined during the present term, in our opinions, unanimous on the law, though sometimes differing in its application to particular cases. If our past course of adjudication has not sufficed to satisfy the bar as to what we have considered our most solemn duty, and if it is yet an open question as to what is the line which the law has drawn between those questions of fact cognizable only by the jury below, and questions of law arising on the joint action of the court and jury, in that court whose record we judicially inspect on error, it will be useless to attempt to close it by any opinion to be delivered in this case. This court is committed in language which it neither can nor desires to recall, because that power which we are bound to obey has spoken to us, and all the courts in the United States, in terms most imperative.

“The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.” “One of the strongest objections originally taken against the constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress, and which received an assent of the people so general, as to establish its importance as a fundamental guaranty of the rights and liberties of the people. This amendment declares that, ‘in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact trial by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.’” 3 Pet., 446.

If this court can comprehend what these rules are, or promulgate them in intelligible language, they are these: That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer on a demurrer to the evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part or the whole of his case. If, in its judgment, the appellate court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferable therefrom, in the same manner, and with the same legal results, as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause must be taken as negating all facts which the party against whom their verdict is given has attempted to infer from or establish by the evidence.

On the evidence in the former record, we held that it was competent in law

to make out, and for the jury to find the fact of an offer to refund the taxes, etc., so as to give a right of redemption; on the evidence and finding of the jury in the present record, we are bound to consider the fact of such offer as established, and to hold the facts so found to bring the defendant in error within the provisions of the laws of Pennsylvania, on which the case turns.

The judgment of the court below is therefore affirmed, with costs.

INSURANCE COMPANY *v.* WEIDE.

(11 Wallace, 438-442. 1870.)

ERROR to U. S. Circuit Court, District of Minnesota.

STATEMENT OF FACTS.—The Home Insurance Company issued a policy on the goods of Weide in the city of St. Paul. The goods were destroyed by fire and the company became liable to pay the loss. The question involved in the suit was the amount of their liability dependent on points of evidence. The defendant offered evidence of the general ratio of stock on hand at any time in a store, and the average yearly business of the store, to show that the plaintiffs claimed an improbably large stock to have been in their store at the time of the fire.

Opinion by MR. JUSTICE DAVIS.

Although we agree with Lord Ellenborough “that the rules of evidence must expand according to the exigencies of society” (*Pritt v. Fairclough*, 3 Campb., 306), yet it is not necessary to introduce any innovation upon these rules in order to hold that this evidence should have been admitted. It is true, there are no reported cases on the subject, but on principle its admissibility can be sustained.

§ 1396. *How far evidence conducing to prove probabilities is admissible.*

It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability or improbability of the fact in controversy, it should go to the jury. It would be a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides, presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it. *Hart v. Newland*, 3 Hawks, 122. Many of the affairs of human life are determined in courts of justice in this way, and experience has proved that juries, under the direction of a wise judge, do not often err in the reasoning which leads them to a proper conclusion on such evidence. And if they should happen to reach a wrong conclusion, the court has in its own hands the mode and measure of redress. In the nature of things, the officers of the insurance company were unable, by any direct proof, to contradict the testimony of the plaintiffs as to the value of the goods destroyed. If the loss were an honest one it was their duty to pay it, but if they had good reason to believe it to be exaggerated, it was equally their duty to refuse to pay it. As they had no direct evidence to produce bearing on the subject, they offered to prove a fact which, uncontradicted and unexplained, would lead the jury to the conclusion that the plaintiffs had overvalued the property destroyed by fire. It was neither opinion nor hearsay which they tendered to the court, nor was it a usage of trade they wanted to prove, but a matter of fact concerning the business in which the plaintiffs had been employed, which would render it extremely improbable that they had sustained the loss they claimed to have suffered. The plaintiffs testified when the fire occurred

the stock in their store was worth over \$60,000, and yet their sales during the year were only double that amount. The defendants said this could not be so, because the merchants of St. Paul, engaged in a like business, and to the same extent, did not at that time, nor at any other time during the preceding six years, have on hand on the average more than one-fifth of their annual aggregate sales.

If this state of case could be proved by the united testimony of this class of merchants, it would establish a fact connected with this kind of business, to wit, the uniform relation between the stock on hand and the annual sales, from which the existence of another fact could be reasonably inferred, which is, that the business of the plaintiffs rested on the same basis and was governed by the same rule of uniformity. Indeed, so strong would be this inference, that in the absence of any attempt to explain or contradict the evidence, the jury would be justified in adopting the conclusion which it tended to prove. A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known, and on this principle the jury should have been allowed to consider this evidence.

§ 1397. *A witness must not be asked what is the course of trade on a stated subject. The answer is either opinion or hearsay.*

As this case will have to go back for a new trial, and as the point was raised in the court below, it may be proper to observe that no witness can be asked what the course of trade is in reference to this particular business. This would be either opinion or hearsay. He can only be allowed to tell his personal experience on the subject about which he is called to testify. It is only through the aggregated testimony of all the witnesses that the fact can be proved, which so connects itself with the plaintiff's business as to require from him an answer. Judgment reversed, and a *venire de novo*.

§ 1398. **In general — Miscellaneous.**— Acts done which presuppose the existence of other acts, to make them legally operative, are presumptive proofs of the latter. *McNitt v. Turner*, 16 Wall., 352.

§ 1399. Presumptions of the existence of particular facts, from the evidence given in a cause, are in many cases, if not in all, mixed questions of law and fact. And if the evidence is irrelevant to the fact insisted upon, or be such as cannot fairly warrant the jury in presuming it, it is error for the court to instruct the jury that they may draw such a presumption. *Bank of the United States v. Corcoran*, 2 Pet., 121.

§ 1400. Presumptive evidence should be left to the jury. An instruction by the court, as to the weight to be given it, is error. *Chirac v. Reinecker*, 2 Pet., 623 (§§ 2621-28).

§ 1401. *Prima facie* evidence of a fact is such as in judgment of law is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose. *United States v. Wiggins*, 14 Pet., 347 (§§ 2632-37).

§ 1402. All presumptions as to matters of fact, capable of ocular or tangible proof, are in their nature disputable. Presumptions are indulged to supply the place of facts; they are never allowed against ascertained or established facts. When these appear presumptions disappear. *Lincoln v. French*, 15 Otto, 614.

§ 1403. In all proceedings *in rem*, unless the contrary appears, the *thing* is presumed to be in the custody of the law. *Jennings v. Carson*, 4 Cr., 2.

§ 1404. The federal courts are presumed to be acquainted with the local laws of the several states, and to know when a judgment of a state court is of a court of general jurisdiction. *Lincoln v. Tower*, 2 McL., 473.

§ 1405. There is no presumption in favor of the relinquishment of the taxing power which is inherent in every sovereignty. *Bailey v. Maguire*, 22 Wall., 215.

§ 1406. Coupons are *prima facie* evidence that the holder is also the holder of the bond from which they are cut, or else was so when they were separated. *McCoy v. Washington Co.*, 3 Wall. Jr., 381; 7 Am. Law Reg., 194.

§ 1407. The giving of a warrant to confess judgment by a mercantile firm does not raise a presumption of insolvency at the time. *In re Dibblee*, 3 Ben., 283.

§ 1408. Where defendants authorized a writing to be made and delivered in a certain way, whereby it was constituted an agreement, it will be presumed that they knew its character, and misconstruction of the law on that point will not avail them. *United States v. Learned*, 1 Abb., 489.

§ 1409. Where a pier running into a lake did not extend beyond the unnavigable water, and no positive law was violated in its erection, the presumption was held to be that it was not a nuisance nor an obstruction to navigation. *Dutton v. Strong*, 1 Black, 23.

§ 1410. Where a marine insurance policy contained insurance on "charter," and the vessel at the time was under two charters, one of which had the same termini as the voyage described in the policy, and the other was for that route and a distance beyond, there being no explanation between the parties, the first charter must be regarded as the one intended. *Ocean Ins. Co. v. Sun Mutual Ins. Co.*, 8 Ben., 275.

§ 1411. Where a steamer in the military service, under a charter-party naming no fixed period, passes into another military department, is paid at a different rate of compensation, and the receipts do not refer in any way to the original charter-party, while the claimant neglects to explain in what manner and by what authority the steamer passed from one department to the other, the presumption is that she is in the service of the second department under a new or implied agreement. *Sweeney's Case*,* 5 Ct. Cl., 285.

§ 1412. A state borrowed money to build a canal, issued bonds, and irrevocably pledged the canal as security. It borrowed other money at later dates for various purposes, sometimes pledging the canal. Finally it was enacted that the bonds composing the state's bonded debt should be surrendered and other securities substituted. In a case where the bonds of the first issue were not surrendered, it was held that the fact that some of a later issue had been surrendered raised no presumptive intention, either in law or in fact, of giving up the original security of the canal. *Trustees of the Wabash & Erie Canal Co. v. Beers*, 2 Black, 448.

§ 1413. From the fact that the plaintiff was in this country as a mechanic before the war, and continued to reside here until the action was brought, the jury were instructed that they might presume that the plaintiff was residing here under the license of the government, although he had not reported himself according to the proclamation. *Otteridge v. Thompson*, 2 Cr. C. C., 108.

§ 1414. Where two machines are similar in appearance, constructed to produce the same result, and practically identical in the means by which they reach that result, the *ex parte* deposition of a mechanical expert, stating his mere opinion that they are unlike in principle, will not overthrow the presumption that they are alike in principle. *United States Annunciator Co. v. Sanderson*, 3 Blatch., 184.

§ 1415. Where different witnesses describe a person so differently that the evidence cannot be reconciled on the theory that the descriptions relate to the same person, the court may assume that there were two persons by the same name. *Coulson v. Walton*, 9 Pet., 62.

§ 1416. The law presumes the undertaking to perform an implied contract. *Huston v. United States*,* Dev., 57.

§ 1417. With a public trust it is a presumption of law that the powers conferred may be executed by a part of the trustees, while with a private trust the presumption is that only the joint act of all is valid. *Sloo v. Law*, 3 Blatch., 459.

§ 1418. Where the facts which a witness, erroneously rejected as incompetent, offered to prove are not stated in the bill of exceptions, the court will not presume the testimony to have been immaterial. *Vance v. Campbell*, 1 Black, 427.

§ 1419. Where books, letters and other documents have been admitted on the trial, which, it is contended, were not by themselves legal testimony, and they are not set forth in the bill of exceptions, or in any way made a part of it, the presumption is that the ruling was correct, and the point is not open for re-examination. *Stockwell v. United States*, 3 Cliff., 284.

§ 1420. The law presumes, and the jury are bound to act upon the presumption, that a witness testifying under oath speaks the truth. But this presumption is not conclusive, and may be overcome in many ways. *United States v. Brown*, Deady, 566.

§ 1421. Courts of equity can go more on what is called presumptive evidence than courts of law. *Warner v. Daniels*, 1 Woodb. & M., 90.

§ 1422. A settled course of trade in violating the blockade, and the employment of a vessel before in the trade, are evidence of her intent on this voyage. *Schooner Wm. H. Northrop*, Bl. Pr. Cas., 235.

§ 1423. The absence of probable cause will amount to proof of malice. *White v. Nicholls*, 3 How., 266.

§ 1424. A suit by a corporation in its corporate name is, by presumption of law, a suit by citizens of the state which created it. *Ohio & Miss. R. Co. v. Wheeler*, 1 Black, 286.

§ 1425. The presumption is that a patent was originally filled up by the land register in the form in which it is found. *Lea v. Polk Copper Co.*, 21 How., 493

§ 1426. If the cashier of a bank, on leaving his office, fails to pay over or to account to the bank for any of the moneys of the bank received by him as cashier, the *prima facie* presumption is that he has wilfully wasted them or applied them to his own use. *Minor v. Mechanics' Bank of Alexandria*, 1 Pet., 64.

§ 1427. Where lands are purchased by a communistic society, and paid for with the proceeds of the joint labor of the members, it will be presumed that the individual claims of the members are equal unless the contrary appears. *Goesele v. Bimeler*, 5 McL., 223.

§ 1428. A man should not be presumed to have dedicated his property for the site of a school-house, as it is against his interest and is not demanded by justice. *Chapman v. School District No. 1, Deady*, 139.

§ 1429. Where a vessel is consigned to a certain port, and no other destination is mentioned for the cargo, it must be presumed to have been consigned to the same place. *The Fame*, 1 Brown, 42.

§ 1430. Testimony of a person officially taking an acknowledgment of a deed, that his uniform and unvarying practice was to take no acknowledgments unless seals were properly affixed, is admissible as tending to show that a deed acknowledged by him had, at the time of such acknowledgment, a seal affixed, though none is apparent at the time the testimony is given. *Follett v. Rose*,* 3 McL., 332.

§ 1431. Where a person enters a certain number of hogsheads of molasses as shipped from a certain island, and others are left in the bottom of the vessel, the presumption is that hogsheads entered were put into the vessel after those remaining in the bottom, and that the latter were therefore on board at the time the vessel sailed, and were brought from that place; and if so, it is also presumed that they were the product of that island. *United States v. Certain Hogsheads of Molasses*, 1 Curt., 276.

§ 1432. The minutes of a meeting of the board of directors of a corporation afford no presumption of knowledge of what took place at such meeting on the part of a director who had left the country before the meeting was held, and where the circumstances repel all inferences of personal knowledge. *The Emma Silver Mining Co. v. Park*, 14 Blatch., 411.

§ 1433. It is the *prima facie* presumption of law that all joint and several obligors in a bond are principals. *Sprigg v. Bank of Mount Pleasant*, 10 Pet., 257.

§ 1434. The mere possession and the receiving of profits, or offers to sell, or partial sales actually made, do not raise a presumption of ownership, since they may as well be the acts of a tortious possessor, or of an agent, or of one claiming title under the real owner. *Delancy v. McKeen*, 1 Wash., 354.

§ 1435. Where a demand for goods is made by an agent of the owner, and the party refuses to deliver them, either because the agent has no authority or declines to produce it, such a refusal is not evidence of a conversion. But if the refusal is put upon other distinct grounds which cannot in point of law be supported, such refusal is presumptive evidence of a conversion. *Watt v. Potter*, 2 Mason, 77.

§ 1436. Where a vessel was piloted by one who was not a pilot by profession, had never piloted any other vessel, and was engaged on this one simply as cooper, if accident occurs the presumption is that such a vessel was not properly managed. *The Washington*, 3 Blatch., 276.

§ 1437. Where an injury occurs to a passenger on a railroad car by reason of the giving way of a bridge under a passing train, proof of the casualty is *prima facie* evidence of negligence in the company. *Kansas Pacific Railway Co. v. Miller*,* 2 Colo. T'y, 442.

§ 1438. In an action against a collector of customs for losing goods deposited in the custom-house, negligence cannot be inferred from the mere loss of the goods. It must be proved by affirmative testimony. *Brissac v. Lawrence*, 2 Blatch., 121.

§ 1439. It is a presumption in cases of partnership that all the partners have access to the partnership books and might know the contents thereof. But this presumption arises from the ordinary course of business, and may be rebutted by circumstances which rebut the inference of access, such as distance of place, or the course of business in the particular partnership. *United States Bank v. Binney*, 5 Mason, 176.

§ 1440. If the traveling expenses of a partner while on business for the firm are charged against the firm on their books, the *prima facie* presumption is that the other partners have knowledge of such charges. And if they do not object to the charges, their assent to the allowance of them may be fairly presumed. *Withers v. Withers*, 8 Pet., 355.

§ 1441. If a letter is written by one partner alone, and not in the name of the firm, or by order of the firm, embracing topics belonging to his own private affairs as well as those of the firm, it cannot be presumed that the other partners had knowledge of its contents and sanctioned them, unless some proof to that effect is offered. *Rogers v. Batchelor*, 12 Pet., 221.

§ 1442. It is presumed, in the absence of proof to the contrary, that investments abroad made by a bank are such as banks usually make in doing a banking business, and that their legal *situs* is at the home office of the corporation. *Nevada Bank v. Sedgwick*, 14 Otto, 111.

§ 1443. Where, on the face of a note, the person to whom it was given was designated "cashier," and it was furthermore agreed in the case that such person was in fact cashier of Newbury Bank, it was held that the case was the same as if the words "cashier of Newbury Bank" had been written on the note. *Bank of Newbury v. Baldwin*, 1 Cliff., 519.

§ 1444. It is not necessary to show special authority in the cashier of a bank to transfer and indorse negotiable securities belonging to the bank, in its behalf. Such authority is *prima facie* implied. *Wild v. Bank of Passamaquoddy*, 3 Mason, 505.

§ 1445. If a bill payable at a particular bank is sent to the bank for collection, and the letter in which it is inclosed is lost after it is received at the bank and before it is opened by the cashier, the presumption is that the bank was negligent, and the facts and circumstances being peculiarly within the knowledge of its officers, the burden of proof is upon the bank. *Chicopee Bank v. Philadelphia Bank*, 8 Wall., 641.

§ 1446. In an action by a supercargo against the owners of a vessel to recover a sum of money paid by him to obtain the release of his vessel for violating the revenue laws of a foreign country by making short entries of the cargo, it having been proved that it was usual to make short entries at the port of lading, and that this practice was winked at by the revenue officers of that port, evidence that one of the defendants had instructed the plaintiff in former voyages to make short entries was offered and admitted, in order that the jury might draw the inference that orders to the same effect were given in the case at bar. *Peyton v. Veitch*,* 2 Cr. C. C., 123.

§ 1447. A command by a master to the crew to continue in the business of whaling is presumed to be a lawful one, *prima facie*. *United States v. Borden*, 1 Spr., 374.

§ 1448. The presumption is in favor of the ship-owner's lien on the cargo for freight money. *The Bird of Paradise*, 5 Wall., 545.

§ 1449. The fact that it is known to the seaman that the vessel is sailed by the master on shares, being under his exclusive control and management, is not by itself sufficient to raise a presumption that the seaman agrees to serve on the personal credit of the master, and not on the credit of the ship. *The Schooner Montauk*, 10 Ben., 455.

§ 1450. A bond to secure the payment of duties to the United States, taken under the revenue act of 1799, does not come within the general rule that *prima facie* a higher security taken from a debtor is presumed to extinguish the original debt. The bond is not taken as payment, and debt lies for the duties. *United States v. Lyman*, 1 Mason, 481.

§ 1451. Where importations are seized for false valuation in the invoices on which they were entered, the law presumes that there was, at the time and place of manufacture of the goods, an actual market value thereof; and no evidence can be received or considered to show the contrary. *United States v. Sixteen Cases, etc., containing Silk Ribbons*, 12 Int. Rev. Rec., 175; 3 Ben., 536.

§ 1452. In a proceeding on the part of the United States for the forfeiture of certain goods seized for fraudulent violation of the revenue laws, where the government has made out probable cause for the prosecution by proof tending strongly to the conclusion that the invoices of the goods in question were greatly under the actual cost at the place and in the country whence they were imported, and, in pursuance of notice previously given for that purpose, has called upon the claimant for the production of his books and papers containing an account of the importations, and his dealings in respect to them with the foreign houses, together with the correspondence concerning the same, it is not error to instruct the jury that, if the claimant has withheld the proofs which his accounts and transactions afforded, it may be presumed that they would, if produced, have operated unfavorably to his case. *Clifton v. United States*, 4 How., 242.

§ 1453. In a proceeding for forfeiture of a vessel for violation of the collection act of 1799, section 50, where sufficient evidence is offered on the part of the government to cast the burden of proof on the claimants under the seventy-first section, and the claimants fail to produce proofs which are under their exclusive control, and which would have an important influence, the presumption is that the proofs would, if offered, operate unfavorably upon their case. *The Brig Busy*, 2 Curt., 586.

§ 1454. In a proceeding for the forfeiture of a vessel for trading with the enemy, and using his license, the fact that the vessel was sent into the enemy's port for adjudication, and afterwards permitted to resume her voyage, was held to raise a violent presumption that she had such a license, and to cast the burden of proof upon this point upon the claimant. *The Langdon Cheves*, 4 Wheat., 103.

§ 1455. On a libel for violation of the non-intercourse law, where a prohibited cargo has been taken on board at a prohibited port, and brought to the United States, it is presumed that it was taken with the knowledge of the master with intent to import it into the United States. But this presumption may be rebutted by evidence to the contrary. The property of the

claimant being taken *in delicto*, the burden is upon him to show the transaction to have been innocent. *United States v. The Paul Shearman*, Pet. C. C., 98.

§ 1456. It is not to be presumed, from the fact that goods not subject to be imported under the non-importation acts were permitted to be entered by the collector, that they were unladen by unavoidable accident, necessity, or distress, or that the requisite oaths and proofs thereof were furnished before the collector. *United States v. Hayward*, 2 Gall., 485.

§ 1457. The presence of a party, when testimony is given against him which he does not contradict, raises an inference of its truth. *McCall v. McDowell*, 1 Abb., 212.

§ 1458. The construction put upon a grant of a part of the water of a spring, by its actual operation and practice through a period of sixteen years, was held in this case to be conclusive evidence as to what was intended to be conveyed. *Irwin v. United States*, 16 How., 513.

§ 1459. Personal presence in a place is evidence of domicile, but far from conclusive. *Lee v. Simmons*,* 1 Or., 158.

§ 1460. Acts done by the cashier of a bank, in the ordinary course of the business actually confided to such an officer, are *prima facie* evidence that they fall within the scope of his duty. *Fleckner v. Bank of the United States*, 8 Wheat., 338.

§ 1461. The fact that the bond of the cashier of the Bank of the United States is in the possession of the bank, and is put in suit by them, and the introduction of the cashier into the office and his continuing to act as cashier, is evidence of the delivery and acceptance of the bond, to be submitted to the jury, without the production of a written record of the fact, the execution and acceptance of the bond being required before the cashier could legally enter upon the duties of the office. *Bank of United States v. Dandridge*, 12 Wheat., 64.

§ 1462. In an action against an insurance company, acts and proceedings of third persons, not in privity with the insurance company, nor known to them, are not evidence against them. *Conard v. The Atlantic Insurance Co.*, 1 Pet., 386.

§ 1463. In an action against a corporation to recover back purchase money paid for the conveyance of certain land, a paper, reciting the sale, and the receipt of part of the purchase money, and a note for the balance, and pledging the conveyance of the land by the corporation upon the payment of the note, and under the hands and seals of the president and cashier, and reciting that it is done by order of the board of directors, is, upon proof of the handwriting of the president and cashier, admissible and competent evidence for the plaintiff, without further proof of the authority of the president and cashier to sign the contract and bind the corporation. *Guttschlick v. Bank of the Metropolis*, 5 Cr. C. C., 435.

§ 1464. Where the resolution of the board of directors to resist a claim on a policy is in general terms, failure of the company to object specifically for the non-production of the proofs of loss is not sufficient from which to infer a waiver of this requirement. *Columbian Insurance Co. v. Lawrence*, 2 Pet., 25.

§ 1465. A waiver of process and voluntary appearance by an attorney in behalf of a defendant is *prima facie* evidence of an appearance by the party. But it may be shown by the testimony of the attorney himself that he had no authority to appear.* *Shelton v. Tiffin*, 6 How., 163.

§ 1466. An attorney in fact for a party who has conducted for him a correspondence with an agent may give evidence with respect to the correspondence, where it tends to establish a presumption of ratification by the party of the acts of the agent. *Owings v. Hull*, 9 Pet., 607.

§ 1467. **Spoliation or non-production of evidence.**—Everything is to be presumed against the despoiler of evidence. *The Steamship Idaho*, 5 Ben., 280.

§ 1468. There is no presumption of *law* arising from the suppression of the written examinations and confessions of the prisoners by the district attorney, that if brought forward their effect would be unfavorable to the prisoners. The presumption is of *fact* only, and is to be left to the jury. *United States v. Gibert*, 2 Sumn., 19.

§ 1469. The failure to produce a witness who could testify to a material fact raises no legal presumption against the truth of the alleged fact, but only a presumption of fact. *Ibid.*

§ 1470. Where a ship was seized for an alleged attempt at blockade running, and it was proved that at the beginning of her voyage she had certain papers on board which at her capture could not be found, a presumption is raised that they were intentionally destroyed by those on board. *The Ouachita*, Bl. Pr. Cas., 306.

§ 1471. Where ship's papers are destroyed, the presumption is that such destruction was to conceal some unlawful interest, and, if unexplained, it will cause the vessel's forfeiture. *Schooner Mersey*, Bl. Pr. Cas., 187.

§ 1472. There is a presumption that an accomplice would destroy a letter that would implicate him. *United States v. Doeblér*, 1 Bald., 519.

§ 1473. If a consignee has rendered no account of the sales of goods consigned to him for many years, and, at the trial of an action against him by the consignor, offers no evidence to

prove what part of the goods has been sold, and at what prices, every presumption is against him that he sold them at the invoice prices. *Field v. Moulson*, 2 Wash., 155.

§ 1474. Whenever it is shown that a party to a suit has in his possession evidence which he can give to clear up any doubt or resolve any difficulty, and he does not give it, the jury have a right to draw the presumption that the evidence, if given, would be in corroboration of that already given against him. Thus, where a rectifier or wholesale dealer in distilled spirits has kept a book, as prescribed by section 26 of the internal revenue act of July 13, 1866, and made an entry which does not comply with the requirements of the act, anything doubtful about the entry is to be taken most strongly against him, if he does not offer evidence to explain the difficulty. *A Quantity of Distilled Spirits*, 3 Ben., 70.

§ 1475. In criminal cases.—Whatever the character or condition of the defendant, the law presumes him innocent of the crime charged until the contrary is proved beyond a reasonable doubt. *United States v. Montgomery*, 3 Saw., 544. See CRIMES.

§ 1476. The presumption of innocence attends and protects an accused until overcome by testimony which proves his guilt beyond a reasonable doubt. *United States v. McKee*, 3 Dill., 551.

§ 1477. If a public officer is charged with conspiracy, collusion and fraud in the discharge of the duties of his office, the presumption of his innocence will prevail even against circumstances of suspicion. But if you establish beyond controversy similar official delinquencies on his part in other transactions of similar character, and especially in other transactions between himself and the same party, this presumption is completely overcome. *Bottomley v. United States*, 1 Story, 135.

§ 1478. Upon the trial of an indictment for counterfeiting coin it was proved that the defendant had been the lessee and actual occupant of a room, together with one R., who was arrested therein for the same crime, in which a large quantity of spurious coin, and various instruments and appliances for coining, were found; that a box containing plaster of paris, purchased by the defendant, was found in the room; and that, when arrested, several pieces of counterfeit coin were found upon the defendant's person. It was held that these were circumstances from which, unexplained, the law raised a presumption of guilt, and that the jury might rightfully presume his guilty participation in making the spurious coin found upon his person. *United States v. Burns*, 5 McL., 23.

§ 1479. If a party found in possession of stolen property clearly identified fails to show how he came by it, the presumption of his guilt is strengthened. *United States v. Keene*, 5 McL., 509.

§ 1480. Proof that accused dealt the cards at faro is sufficient, *prima facie*, to charge him as keeper of the gaming house. *United States v. Miller*,* 4 Cr. C. C., 104.

§ 1481. An intention to defraud is presumed if the person on whom a forged instrument is drawn would be liable to pay it if it were genuine. *United States v. Shellmire*, 1 Bald., 374.

§ 1482. The application for a permit to carry goods to a certain section is evidence to show an intention of "proceeding to" that section within the meaning of the act of July 13, 1861, and the exhibition of fraudulent invoices to procure the permit shows the intention to be fraudulent. *United States v. 129 Packages*,* 11 Am. L. Reg., 427.

§ 1483. If a man attacks another with a dangerous weapon and kills him, no sufficient provocation appearing, the law presumes malice from the act. *United States v. Mingo*, 2 Curt., 1.

§ 1484. Payment for the goods stolen is evidence against the prisoner, unless made merely to avoid the inconvenience of imprisonment and trial and not under a consciousness of guilt. *United States v. Hunter*,* 1 Cr. C. C., 317.

§ 1485. On an indictment for larceny, where the verdict was guilty, it is presumed that the evidence sustained all the allegations of the indictment. *Mason v. People*,* 2 Colo. T'y, 373.

§ 1486. Upon an indictment for a riot it is not necessary to prove that the prisoners met with an intention to commit the unlawful act, but the jury may infer the unlawful intention from the unlawful act. *United States v. McFarland*, 1 Cr. C. C., 140.

§ 1487. Of freedom.—The presumption of freedom attaches to every resident of a free state without regard to color; and on the same principle, in a state which recognizes African slavery, every colored man is presumed to be a slave. *Miller v. McQuerry*, 5 McL., 469.

§ 1488. If one was born a slave, the fact that he is permitted to go at large without restraint is not evidence of his being free. A negro is *prima facie* a slave. If one is born a slave he is presumed to be always a slave. *Bell v. Hogan*, 2 Cr. C. C., 21.

§ 1489. Although color is *prima facie* evidence of slavery, the fact that one has for eleven years publicly acted as free will rebut the presumption. *Minchin v. Docker*, 1 Cr. C. C., 370.

§ 1490. In time of slavery it was a rule of evidence that a negro was *prima facie* to be considered as a slave and the property of somebody; and he who acted in regard to him as if he were a free man acted at his peril, and the burden of proof was upon him to show that the negro was not a slave, or at least to show circumstances rebutting the presumption arising

from color. Thus, where the keeper of a stage-office sent a negro away in a stage-coach, it was held to be *prima facie* evidence of negligence. *Mandeville v. Cookendorfer*, 3 Cr. C. C., 257.

§ 1491. Evidence that a colored woman has lived as a free person for a year, and is generally reputed to be free, is sufficient to overcome the presumption of slavery arising from her color. *United States v. West*, 5 Cr. C. C., 35.

§ 1492. As to death and survivorship.—Evidence that a person has not been heard of for many years raises a strong presumption that he is dead. *Morrell v. Craefe*, 2 Wash., 380. See DEATH.

§ 1493. If seven years have elapsed since a person has been heard of, there is a presumption that he died at the end of the seven years. *Moffit v. Varden*, 5 Cr. C. C., 658.

§ 1494. A person shown not to have been heard from for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death. But the presumption is not conclusive, nor is it to be rigidly observed without regard to accompanying circumstances which may show that death occurred within the seven years. There is no presumption that he died at any particular time. *Davie v. Briggs*, 7 Otto, 628.

§ 1495. The law presumes that a man who has not been heard of for seven years is dead. It also presumes that a man once shown to be alive continues to live until his death is proved, or the rule of law applies by which death is presumed to have occurred at the end of the seven years. And the presumption of life is received, in the absence of any countervailing testimony, as conclusive of the fact, establishing it for the purpose of determining the rights of the parties as fully as the most positive proof. The only exception to this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails. *Montgomery v. Bevans*, 1 Saw., 653.

§ 1496. When a person is once shown to be alive, the presumption of life continues if nothing has been heard of him until the end of seven years. It is the rule in England that the existence of life at any particular time within the seven years must be proved. Where an officer in the United States navy started on a journey, and was lost sight of under such circumstances that death or desertion was the only possible cause, it was held that desertion could not be implied, and that his death was proved. *Montgomery v. Bevans*,* 4 Am. L. T., 205.

§ 1497. No presumption of death arises from the fact that a man when last heard of was in bad health, and if alive at the trial would be eighty years old. The question of death is one of fact in such a case. *Hall's Deposition*, 1 Wall. Jr., 103 (§§ 2032-40).

§ 1498. Where two persons, husband and wife, were killed in the same accident, it was held to be a presumption of law that they died at the same moment. *Kansas Pacific Railway Co. v. Miller*,* 2 Colo. Ty, 442.

§ 1499. Where two persons perish at sea in the same event, there are no presumptions as to survivorship. *Robinson v. Gallier*,* 2 Woods, 178.

§ 1500. The presumptions of the Civil Code of Louisiana as to survivorship do not apply in a case in which the persons are respectively entitled to inherit from one another, nor unless there is an absence of circumstances of the fact. *Ibid.*

§ 1501. In a suit by an administrator, the fact that administration has been granted upon the estate is evidence of the death of the alleged intestate. *Ketland v. Lebering*, 2 Wash., 201.

§ 1502. Of sanity.—All persons are presumed to be sane until the contrary is proven. *Moore v. Connecticut Mutual Life Ins. Co.*, 1 Flip., 363. See § 672.

§ 1503. Every person is presumed to be of sound mind until the contrary is proved, and therefore it is unnecessary to summon witnesses on the part of the prosecution before the grand jury to prove the sanity of an accused. *United States v. Lawrence*, 4 Cr. C. C., 514.

§ 1504. The law presumes that every man is sane and capable of disposing of his property, and the person alleging his insanity must establish the fact. If the validity of a particular act is assailed on this ground, the assailant must establish that insanity existed at the time the act was done. The fact of the existence of prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof. If, however, habitual insanity is shown to have existed, the presumption is that the person was insane at the time of the act, and the burden of proof is shifted. *Hall v. Unger*, 4 Saw., 672.

§ 1505. As to marriage.—If, in an information against a married woman alone, she is not described either as married or single, she may move to quash the information for want of a proper addition, or plead in abatement the omission. But if she fails to do this, and pleads not guilty, it is *prima facie* evidence that she is single. But the presumption is not conclusive, and she may show the contrary on the trial, and other facts necessary to make out marital coercion. *United States v. De Quilfeldt*, 5 Fed. R., 276. See § 936.

§ 1506. Marriage is the legal result of a mutual and absolute engagement to be husband and

wife. It cannot be inferred from the fact that the parties lived and cohabited together as man and wife for however long a time. *Holmes v. Holmes*, 1 Abb., 555.

§ 1507. Where two persons of opposite sex demean themselves like husband and wife, there is a presumption of more or less weight that they are married. *Kansas Pacific R'y Co. v. Miller*,* 2 Colo. T'y, 442.

§ 1508. Where the fact of marriage is proved, the presumptions of law are all in favor of good faith. *Gaines v. New Orleans*, 6 Wall., 642.

§ 1509. That a man and woman have lived together as man and wife, and were reputed to be married, and that the man has recognized the woman as his wife by his will, authorize the presumption of a legal marriage, and this presumption is not overcome by unsettled rumors as to the manner in which the marriage was solemnized. *Hinde v. Vattier*, 1 McL., 110.

§ 1510. **Legitimacy.**—The presumption is in favor of the legitimacy of a child born in wedlock, but this presumption may be rebutted by other testimony, which does not go to the full extent of absolute impossibility. Mere probability is not enough; but the presumption may be rebutted by testimony which places the negative beyond reasonable doubt. *Stegall v. Stegall*, 2 Marsh., 256.

§ 1511. When, in the progress of a suit in equity, a question of pedigree arises, and there is proof enough, in the opinion of the court, to establish the marriage of the ancestor, the presumption of law is that the child of the marriage is legitimate, and it will be incumbent on him who denies it to disprove it, though in doing so he may have to prove a negative. *Patterson v. Gaines*, 6 How., 550.

§ 1512. The testamentary recognition of the legitimacy of the issue of a marriage is evidence of the highest kind that it was contracted in good faith on the part of the testator. *Gaines v. New Orleans*, 6 Wall., 642.

§ 1513. It is *prima facie* evidence that a husband is the father of a child of his wife, born before marriage, if he has treated the child as his own and called it by his name. *United States v. Skam*, 5 Cr. C. C., 367.

§ 1514. A domicile once acquired is presumed to continue until it is shown to have been changed. But a resident in a rebellious state will not be presumed to have resided there after the war broke out, since this would impress him with a hostile character to the United States, whether he was adherent to the rebellion or not. *Stoughton v. Hill*, 3 Woods, 404. See DOMICILE.

§ 1515. **As to continuance of state or condition.**—When ownership of property is shown to be in a particular person, the presumption is that it continues to be so until the contrary appears. *United States v. Mathoit*, 1 Saw., 142.

§ 1516. The prize law regards property which was enemy when shipped as continuing to be such, although consigned by a bill of lading to other parties, unless clear evidence is given of a change of title. *Hannah M. Johnson*, Bl. Pr. Cas., 3.

§ 1517. One proved to have been master of a vessel is presumed to continue such until some overt act or declaration of the owners displaces him from that station. *Fox v. Holt*,* 36 Conn., 558.

§ 1518. Land shown to have been once in the possession of trustees to whom it was conveyed is presumed by law to have continued in their possession, until an ouster or dispossession is shown. *Bayard v. Colefax*, 4 Wash., 38.

§ 1519. If a patent has been granted to a person, the presumption is that he is still the owner of it. *Fischer v. Neil*, 6 Fed. R., 89.

§ 1520. Where a person enters into possession of land as the tenant of another, he is presumed to remain in that capacity if at all. *McIver v. Ragan*, 2 Wheat., 25.

§ 1521. Where there was an agreement for consortship between the masters of two vessels employed in the business of salvage, such agreement is deemed to be made for the benefit of the owners and crews, and presumptively is to continue notwithstanding that one of the parties ceases to be master. The answer of one of the parties, that by the original agreement the removal of either from the position of master was to dissolve the agreement, is not evidence to overthrow this presumption. *Andrews v. Wall*, 3 How., 568.

§ 1522. Where a decree provides in its terms that it may be modified or changed, upon the application of either party, upon sufficient cause shown, and is binding and absolute until changed, the presumption is that it remains unchanged, and this presumption can only be overcome by record evidence to the contrary. *Bennett v. Bennett*, Deady, 299.

§ 1523. Production of a mortgage, where this recites an indebtedness, is sufficient *prima facie* proof of the continuance of such indebtedness. *Eyster v. Gaff*,* 2 Colo. T'y, 228.

§ 1524. Where a vessel is licensed under a statute of the United States, and enrolled as sailing between Detroit and Buffalo, and is for years so engaged, the presumption is that her officers and crew were duly engaged in her service in a domestic port. *The Propeller F. W. Backus*, Newb., 1.

§ 1525. If a mariner ship as engineer without any rate of wages being stipulated, the court will, in the absence of evidence to the contrary, presume the rate at which he served in that capacity for the previous years to be proper and right. *Milligan v. The Propeller B. F. Bruce*, Newb., 539.

§ 1526. Where a partnership was continued beyond the time limited by the articles, the presumption is, in the absence of evidence, that it was continued upon the same terms. *United States Bank v. Binney*, 5 Mason, 176.

§ 1527. **Alteration of instruments.**—If a deed appears to have been altered, the presumption is that the alteration was made after the execution of the deed. And the same presumption arises in reference to a settled account. *Prevost v. Gratz*, Pet. C. C., 364.

§ 1528. If it appears from the face of an ancient instrument that it has been altered, and the alterations do not tend to increase the obligations of the obligor or advance the interests of the obligee, the obligee will not be presumed to have made them, where the instrument has been for a time in the possession of a person hostile to it. *Walton v. Coulson*, 1 McL., 120.

§ 1529. Where a check, drawn in Philadelphia, is offered in Boston in an altered state, it is *prima facie* proof that the alteration was made in Boston. *United States v. Britton*, 2 Mason, 464.

§ 1530. The falsification of records, either by interlineations or erasures, with reference to a matter in which the party making such falsification is suspected or charged, or liable to be suspected or charged, with neglect or wrong doing, is strong presumptive evidence of guilt. *United States v. Randall*, Deady, 524.

§ 1531. **Fraud** is never presumed, nor ought it to be imputed on mere suspicion. It may be inferred from facts and circumstances; but when the facts are susceptible of a natural and probable explanation consistently with the good faith and honesty of the parties, they do not prove fraud, and the legal conclusion is in favor of innocence. *Garrow v. Davis*,* 10 N. Y. Leg. Obs., 225. See §§ 244, 606. See, also, FRAUD.

§ 1532. Fraud will not be presumed in a court of equity any more than in a court of law. He who makes the charge must prove it. *Hager v. Thomson*, 1 Blatch., 80.

§ 1533. An occupant of land, who has made improvements thereon, is presumed to have acted in good faith, unless the contrary is shown. *Stark v. Starr*, 1 Saw., 15.

§ 1534. Where an act does not necessarily import fraud, and has more likely been done through a good motive than a bad one, fraud should never be presumed. *Gregg v. Sayre*, 8 Pet., 244.

§ 1535. Where a purchase has been made for full value, a presumption of good faith is raised in favor of the purchaser, and all the evidence to charge him with notice must be taken together, as the question is what effect it should as a whole have produced on his mind. The statement of a witness that he understood from A. that B. was part owner of a vessel is not evidence. It is merely an inference from conversation. A charge of perjury could not be founded on it if false. *Calais Steamboat Co. v. Pelt's Adm'r*, 2 Black, 372.

§ 1536. There is no presumption against the validity of a deed from a child to a parent. *Jenkins v. Pye*, 12 Pet., 241.

§ 1537. A fraudulent intent will generally be presumed from the fact that a person conveying away his land is indebted at the time. *Gilmore v. North American Land Co.*, Pet. C. C., 460.

§ 1538. A subsequent conveyance is presumptive evidence that a prior voluntary conveyance of the same land by the grantor was fraudulent, and casts upon those claiming under such voluntary conveyance the burden of proving that it was made *bona fide*. It is not conclusive, as is held by the English courts under the 27th Elizabeth. *Cathcart v. Robinson*, 5 Pet., 264.

§ 1539. The plaintiffs contracted to construct a public work for the defendants to be completed by a specified time. The contract contained a clause that if the work was not prosecuted with force and diligence necessary to insure its completion by the time stated in the contract, the engineer of the defendants might declare the contract forfeited, and take charge of the work. The engineer having declared the forfeiture, the plaintiffs brought suit, alleging that the defendants had maliciously and wrongfully procured the engineer to declare the contract forfeited. It was held that if there was reasonable and probable cause for the declaration of the forfeiture, it afforded a *prima facie* presumption that it was done in good faith; and that the fact that the defendants had on different occasions expressed the opinion that a considerable saving would result to the company by annulling the contract would not justify the presumption that the defendants were actuated by a dishonorable and fraudulent motive. *Culbertson v. Ellis*, 6 McL., 248.

§ 1540. There is no presumption of law that a misdescription of the premises in a proposal for insurance, in a matter material to the risk, has induced the insurers to take the risk at a lower premium than would otherwise have been demanded, though the jury may draw such an inference of fact. *Columbia Insurance Co. of Alexandria v. Lawrence*, 10 Pet., 507.

§ 1541. Where a neutral lays claim to an enemy vessel, but no bill of sale is found among

her papers, and there is no proof of payment of purchase money, the presumption is strong against the *bona fides* of the transfer. *Schooner Mersey*, Bl. Pr. Cas., 187.

§ 1542. The absence of a log-book on a captured vessel raises a presumption of fraud unless accounted for. One of the chief evidences of fraud is a vessel being out of the course to the port of destination shown in her papers. *Joseph H. Toone*, Bl. Pr. Cas., 223.

§ 1543. A law extending the term of a patent is conclusive evidence that the term is extended. An allegation that the law was obtained by fraud cannot be considered. *Gibson v. Gifford*, 1 Blatch., 529.

§ 1544. Every possession is presumed to be lawful until the contrary appears, and therefore adverse to the title of any other claimant. *Stark v. Starr*, 1 Saw., 15. See § 255.

§ 1545. The law presumes a deed to be in the possession of the grantee, at any time after delivery. *Minor v. Tillotson*, 7 Pet., 100 (§§ 817-20).

§ 1546. Possession of land by the grantee in a deed is *prima facie* evidence of the delivery of the deed. *Games v. Stiles*,* 14 Pet., 322.

§ 1547. An adverse possession cannot be presumed against a deed. It must be shown by the party who impeaches the deed. *Lessee of Barr v. Galloway*, 1 McL., 476.

§ 1548. Possession of a postmaster's bond by the proper officers of the United States is *prima facie* evidence that it has been delivered and accepted. *United States v. Wilkinson*, 12 How., 246.

§ 1549. Possession of a thing is evidence of property in the possessor, but something more is necessary where men are claimed as slaves. *The Antelope*, 10 Wheat., 66.

§ 1550. Possession is *prima facie* evidence of ownership of bonds payable to the holder and transferable without assignment or indorsement. *Martin v. Somerville Water Power Co.*,* 27 How. Pr., 161.

§ 1551. Possession and acts of ownership exercised over a slave are *prima facie* evidence of title. *Negro William v. Van Zandt*, 3 Cr. C. C., 55.

§ 1552. As to acts and jurisdiction of courts.—There are no presumptions in favor of the jurisdiction of the courts of the United States. *Ex parte Smith*, 4 Otto, 455. See COURTS.

§ 1553. A court of appeal is bound to presume everything in favor of the correctness of the decision of the court below, until the contrary appears. *Carroll v. Peake*, 1 Pet., 22 (§§ 784-89).

§ 1554. The presumption is always in favor of a judgment or decree of a court of general jurisdiction. *Pennington v. Gibson*, 16 How., 65.

§ 1555. Every act of a court of competent jurisdiction will be presumed to have been rightly done until the contrary appears. And a want of jurisdiction will never be presumed against a court of general jurisdiction. *Biggs v. Blue*, 5 McL., 148.

§ 1556. The presumption is that the court, having jurisdiction, and having entered a judgment, did everything that was necessary to warrant the entry of the judgment. The contrary may be shown, but the burden of proof is upon him who alleges the error. In courts of limited jurisdiction the presumption is against jurisdiction; but when the jurisdiction appears, such courts are entitled to the same presumptions in favor of their action as other courts are. *Miller v. United States*, 11 Wall., 268.

§ 1557. When the judgment or decree of a court of plenary jurisdiction is pleaded, the presumption is that all the requisite prior proceedings were had in the case, until the contrary appears. The presumption is therefore in favor of the regularity and validity of the steps pursued prior to a decree of discharge in bankruptcy under the bankruptcy law of 1841. *Lathrop v. Stuart*, 5 McL., 167.

§ 1558. In a proceeding under the general and ordinary jurisdiction of the court as a court of law or of equity, many things may be presumed which do not appear on the record, nor in the evidence produced; nor will evidence be permitted to contradict the presumption arising from the acts of the court as they appear upon the record. Thus, after the court has ordered a sale, in the exercise of its general and ordinary jurisdiction, it must be presumed that the court had satisfactory evidence of every prerequisite to justify the order, and such presumption will continue as long as the order remains unreversed. But if the proceeding is under a special authority delegated to the court in a particular case, as a proceeding for the sale of the real estate of an intestate, under the Maryland act of descents, 1786, ch. 45, § 8, the person claiming title under the proceedings must show them to be regular and within the jurisdiction and authority of the court. *Tolmie v. Thompson*, 3 Cr. C. C., 123.

§ 1559. It seems that the presumption is in favor of the jurisdiction which has been assumed by a court of general jurisdiction. *Lincoln v. Tower*, 2 McL., 473.

§ 1560. The presumption is in favor of the regularity of the proceedings of a court of general jurisdiction. If it appears from the records that a decree might have been given in either of two suits, the presumption is that it was given in the one in which it would have been legal, rather than the other. *Alexander v. Knox*, 6 Saw., 54.

§ 1561. When the jurisdiction of a court of limited or special authority appears on the face

of its proceedings, the same presumption of law, that it was rightly exercised, arises as prevails in reference to the action of a court of superior and general authority. Thus, where the death of a non-resident intestate, and possession by him at the time of property within the territory, is sufficient to give the probate court jurisdiction, the recital of these facts in the record is *prima facie* evidence of their truth. *Comstock v. Crawford*, 3 Wall., 396.

§ 1562. In making an order for the sale of the property of an intestate to pay his debts, under authority of a private act of the legislature, the court is presumed to have adjudged every question necessary to justify the order or decree, viz., the death of the owner; that the petitioners were his administrators; that the personal estate was insufficient to pay the debts of the deceased; that the private act, as to the manner of sale, was within the constitutional power of the legislature; and that all the provisions of the law as to notices, which are directory upon the administrators, have been complied with. Especially does this presumption obtain after the lapse of many years. *Florentine v. Barton*, 2 Wall., 210.

§ 1563. Where a judgment is rendered by a court having jurisdiction of the parties and the subject-matter, the exercise of jurisdiction warrants the presumption, in favor of a purchaser under the judgment, that the facts which were necessary to be proved to confer jurisdiction were proved. *Erwin v. Lowry*, 7 How., 172.

§ 1564. The granting of a license to an administrator to sell real estate is conclusive evidence of all the facts necessary to give the court power to make it. *Grignon v. Astor*, 2 How., 319.

§ 1565. A certificate, by a competent court, that an alien has taken the naturalization oath, raises a presumption that the court was satisfied as to the moral character of the alien, and of his attachment to the principles of the constitution. *Campbell v. Gordon*, 6 Cr., 176.

§ 1566. Although a decree, for omissions in the proceedings, is irregular, and might be reversed by an appellate court, yet, when the decree is used as matter of evidence, it cannot be disregarded. *Carrington v. Brents*, 1 McL., 167.

§ 1567. Every presumption is in favor of the action of a court of general jurisdiction, especially after the lapse of many years. The jurisdiction of the court is also presumed unless the contrary appear. *Sprague v. Litherberry*, 4 McL., 442.

§ 1568. Where real estate of a minor has been sold under the order of a probate court, everything necessary to render the order a valid one is presumed to have been rightly done, especially after the lapse of many years. *Segee v. Thomas*, 3 Blatch., 11.

§ 1569. The court will presume that a foreign court passing a decree of condemnation is a legitimate tribunal, if its origin is not known. But if the source of its authority and condemnation is stated, the court ought to examine it, and if contrary to the usual mode of constituting courts, it shifts the burden of proof upon the party who would support the condemnation. *Snell v. Faussatt*, 1 Wash., 271.

§ 1570. A foreign sentence of condemnation as prize is not conclusive evidence that the property condemned was not neutral property. *Maley v. Shattuck*, 3 Cr., 458.

§ 1571. The proceedings of courts of superior authority, in cases where the persons are within reach of their process, or where the proceedings are within the course of the common law, are supported by a presumption of jurisdiction. This presumption is overthrown when it appears that the persons, at the time of the alleged service, were beyond the reach of the process of the court, or when the proceedings were not within the course of the common law; and the burden of establishing jurisdiction is thrown on the party who invokes the benefit of the court's decrees. *Gray v. Larrimore*, 2 Abb., 549.

§ 1572. It will be presumed that where, after the trial, the judge has drawn up and filed the statement of facts as of the day of the trial, *nunc pro tunc*, he was requested so to do at the trial. *McGavock v. Woodlief*, 20 How., 221.

§ 1573. Where a will had been proved, and the person named therein as executor had acted as such and had been recognized as such by the court, it will be presumed that letters testamentary have been granted. An executor may apply to the court through his attorney for leave to sell real estate. And where this has been done by an attorney, the sanction of the executor will be presumed unless the contrary appear. *Piatt's Heirs v. McCullough's Heirs*, 1 McL., 69.

§ 1574. Acts of officers.—The acts of a public officer, within the sphere of his duty, are *prima facie* taken to be within his power. *Strather v. Lucas*, 12 Pet., 410. See §§ 492, 955, 1343.

§ 1575. Public acts of public officers, purporting to be exercised in an official capacity, and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously conferred or subsequently ratified. But this rule is held not to apply to the granting powers of the territorial or departmental governors of California. *Den v. Hill*, McAl., 480.

§ 1576. An officer is presumed to have done his duty, and misconduct will not be presumed. *Corning v. Burdick*, 4 McL., 133.

§ 1577. Public officers, when acting within the scope of their duty, must be presumed to have fulfilled every requisite which the discharge of their duty demands. *Russell v. Beebe*, Hemp., 704.

§ 1578. Where appraisers have made an appraisal, and they had no right so to do without the previous request of the collector, and no such request appears in the evidence, the presumption is that the request was duly made. *Rankin v. Hoyt*, 4 How., 327.

§ 1579. An officer of the customs duly commissioned and acting in the duties of his office is presumed to have taken the regular oaths. If the collector of the district appoints and commissions an inspector, the consent of the secretary of the treasury is presumed. *United States v. Bachelder*, 2 Gall., 15.

§ 1580. A grant or a concession made by that officer who is by law authorized to make it carries with it *prima facie* evidence that it is within his power. No excess of or departure from his power is to be presumed, and he who alleges such excess or departure must prove the fact. *Delassus v. United States*, 9 Pet., 117.

§ 1581. Where abandoned property is shown to have gone into the hands of the proper military authorities, and under the direction of the quartermaster charged with the care of such property, the law presumes that it was regularly sold and the proceeds paid into the treasury. The burden to show the contrary rests on the government. *Silvey's Case*,* 4 Ct. Cl., 490.

§ 1582. In an action against a deputy postmaster for neglect of duty, the defendant, being a sworn officer, is presumed to have performed his duty faithfully until the contrary is shown. *Dunlop v. Munroe*, 1 Cr. C. C., 536.

§ 1583. The return of a writ is presumed to have been made on the return day, unless the date of the return specially appears by indorsement on the writ itself or an entry of record. *Slaughter v. Bevans*,*1 Burn. (Wis.), 195.

§ 1584. Where a commanding officer gave express orders that captured property should be forwarded, the presumption is that it was so forwarded, and was transmitted by other officers who might have received it according to the legal duty imposed upon them, until it came into the possession of the treasury. *Henry's Case*,* 6 Ct. Cl., 389.

§ 1585. The vouchers of a person acting notoriously as an officer of the government, under the observation of his superiors, and recognized by them, if given within the ordinary scope of his duties, are *prima facie* evidence of the truth of the statements they contain. *Parish's Case*,* 2 Ct. Cl., 341.

§ 1586. An appraisement made under the act of April 18, 1818, chapter 74, to ascertain the true value of goods imported subject to an *ad valorem* duty, is conclusive as to the value of the goods. On the question whether the collector, as required by the act, exercised his judgment as to the grounds of suspecting fraudulent valuation in the invoices, the fact that he directed an appraisement is *prima facie* evidence that he did so exercise his judgment. *Tappan v. United States*, 2 Mason, 393.

§ 1587. In replevin against a United States district marshal, where the defendant has pleaded *non cepit*, his return upon the writ of attachment stating that the goods were attached is conclusive evidence against him of the taking. *D'Wolf v. Harris*, 4 Mason, 515.

§ 1588. An appraisement made by three sworn appraisers by order of a district judge is not conclusive evidence of value, but it is better evidence than the opinion of a single witness examined *viva voce* in open court. *United States v. Brig Union*, 4 Cr., 216.

§ 1589. The legal presumption in favor of the sanity of the maker of a deed is strengthened by the attestation of the officer, it being his duty to satisfy himself of the competency of the party before attesting his instrument. *Hall v. Unger*, 4 Saw., 672.

§ 1590. If the genuineness of the signature of the public officer making a grant is admitted, it is presumptive evidence of the due execution of the instrument at the time it bears date. But the presumption may be rebutted by evidence. *Den v. Hill*, McAl., 480.

§ 1591. It is a presumption of law, from the certificate of acknowledgment of a deed before justices of the peace, and the certificate of the county clerk to the official character of the justices, that they were sworn into office and took the acknowledgment in the county of which they were justices. *Deery v. Cray*, 5 Wall., 795.

§ 1592. Under the statute of Ohio of May 3, 1818, which requires certain formalities in taking the acknowledgment of a *feme covert* to a deed, where the magistrate's certificate set out that she was examined apart from her husband, it was held that the court would presume that the examination was conducted in accordance with the statute. *Raverty v. Fridge*, 3 McL., 245.

§ 1593. Where a commissioner of deeds has authority to take acknowledgments only in his county, it will be presumed that he exercised the duties of his office within the territorial limits for which he was appointed, although the state only is named in the paper. *Carpenter v. Dexter*, 8 Wall., 513.

§ 1594. The defalcation of a defaulting paymaster is presumed to have occurred in trans-

actions within the district in which as appears by his bond he was bound to act, where there is no evidence to the contrary, though he acted outside the district in several instances. *Duncan v. United States*, 7 Pet., 435.

§ 1595. It is the presumption that all public officers perform their proper official duties until the contrary is proved. And where an act is to be done, upon evidence and proofs to be laid before a public officer, the fact that he has done the act is *prima facie* evidence that the proofs have been regularly made and were satisfactory. No other tribunal can examine or controvert the sufficiency of such proofs when the law has made such officer judge of their sufficiency and competency. So the fact that a patent has been reissued under the patent act of 1832 is evidence that the prerequisites required by the act have been complied with. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet., 448.

§ 1596. A patent for land, being the act of a public officer who acts under a special authority delegated to him by law, and which prescribes the terms upon which it is to be granted, is *prima facie* evidence that everything is regular; and every presumption is in its favor. But it is not conclusive evidence of title. *Huidekoper v. Burrus*, 1 Wash., 109.

§ 1597. An administrator who is solvent and indebted to the estate is presumed to have done his duty and to have collected the debt from himself as a debtor of the estate by transferring it to himself as administrator thereof. *United States v. Eggleston*, 4 Saw., 199.

§ 1598. A permit by the special agent of the treasury to purchase cotton in the south during the rebellion, being authorized only as to country within the lines of the federal military occupation, raises a *prima facie* presumption that the country in which it allowed the purchase of cotton was within those lines of occupation. *Butler v. Maples*, 9 Wall., 766.

§ 1599. Every presumption is to be made in favor of the regularity of a survey made by a sworn officer and returned into the land office and there accepted. *Griffith v. Tunckhouser*, Pet. C. C., 418.

§ 1600. The presumption is in favor of the acts of a sworn public officer, and this rule applies in tax proceedings under the law of Ohio of March 14, 1831. *Lamb v. Gillett*, 6 McL., 365.

§ 1601. Land grants executed by officers of the crown of Spain, within its dominions, and in the exercise of an apparently legitimate authority, are presumed to have been authorized. *United States v. Davenport*, 15 How., 1.

§ 1602. A warrant of distress issued by the solicitor of the treasury under the act of congress of May 15, 1820, is conclusive evidence of the facts recited in it and of the authority to make the levy. The return of the marshal that he had levied on lands is at least *prima facie* evidence that his levy was not irregular by reason of the existence of goods and chattels subject to the process. *Murray v. Hoboken Land & Improvement Co.*, 18 How., 272.

§ 1603. Where a cause is referred to an auditor to state an account, under the Maryland act of 1785, ch. 80, § 12, his report is *prima facie* evidence that the balance found is due from the defendant to the plaintiff, if the auditor has committed no error in admitting or rejecting evidence, and has applied the correct principles. *Bank of United States v. Johnson*, 3 Cr. C. C., 228.

§ 1604. In an action by the officers of a revenue cutter against the collector, to recover their proportion of a forfeiture for violation of the non-intercourse law of 1812, the officers need not produce their commissions, proof that they acted as such officers being sufficient. *Sawyer v. Steele*, 3 Wash., 464.

§ 1605. It is not necessary for an officer to produce the certificate of election or commission of appointment to show his official character. Proof that he has acted notoriously as such officer is *prima facie* evidence of his official character, and this rule applies in replevin for goods attached by a sheriff. *Dayton v. Wyoming Nat. Bank*,* 1 Wyom. T'y, 263.

§ 1606. As to title.—The law presumes that a person dying seized of land was entitled to a fee-simple interest, unless the contrary is shown. *West v. Pine*, 4 Wash., 691. See § 1015.

§ 1607. A person seized in fee-simple is presumed to be in actual possession, unless the contrary appears. *Lamb v. Burbank*, 1 Saw., 227.

§ 1608. Where the deed executed by an attorney is apparently within the scope of his power, it is *prima facie* evidence of the validity of the grant. *Morrill v. Cone*, 22 How., 75.

§ 1609. The acts of a consular agent are supported by no presumption until it is shown that the case is one within his jurisdiction. *The Atlanta*, Abb. Adm., 465.

§ 1610. No presumption can be received in behalf of a collector who sells real estate for taxes, to cover any radical defect in his proceedings; and the proof of regularity in the procedure devolves upon the person who claims under the collector's sale. *Ronkendorff v. Taylor*, 4 Pet., 349.

§ 1611. Lapse of time.—A presumption from lapse of time always arises under pleadings which would render the facts presumed proper evidence. Where the declaration is demurred to, there is therefore no ground for presumption from lapse of time, since no evidence can be heard. *Walden v. Craig*, 14 Pet., 147.

§ 1612. Length of time cannot be presumed. If relied on as a bar to an action, it must be proved by some evidence, either positive or circumstantial. *Hurst v. McNeil*, 1 Wash., 70.

§ 1613. Great lapse of time may afford a presumption against the justice of a claim, where it is not barred by the statute of limitations. *Patterson v. Phillips*, Hemp., 69.

§ 1614. Lapse of time affords no presumption of the acquiescence of a *cestui que trust* in a purchase of the trust property by the trustee. *Prevost v. Gratz*, Pet. C. C., 364.

§ 1615. The discharge and extinguishment of a trust may be presumed from the lapse of many years, and the death of all the original parties. *Prevost v. Gratz*, 6 Wheat., 481.

§ 1616. The presumption that a trustee reconveyed the trust property, when by the terms of the trust deed the time had passed within which the work was to be done, and the conditions upon which the trust was to be executed had become impossible, arises only in the absence of proofs to the contrary, and may be disputed. *Lincoln v. French*, 15 Otto, 614.

§ 1617. As length of time necessarily obscures all human evidence, and as it removes from the parties all immediate means to verify the nature of the original transactions, it operates by way of presumption in favor of innocence and against imputation of fraud. *Prevost v. Gratz*, 6 Wheat., 481.

§ 1618. The presumption in favor of the authenticity of ancient instruments applies to no instrument which is not valid upon its face, and which does not contain every essential requirement of the law under which it was made. *Meegan v. Boyle*, 19 How., 130.

§ 1619. The presumption in favor of the genuineness of an ancient deed is not limited to cases where possession follows it. *Walton v. Coulson*, 1 McL., 120.

§ 1620. Where a reasonable presumption is raised by oral and written evidence that every part of a large tract of land, subdivided into several tracts, has been held under an ancient deed from its date to the present time, it may also be presumed that a recital in the deed of the heirship of one of the grantors is true, and that a will recited in the deed as authorizing its execution existed at the time, though it cannot now be found. *Deery v. Cray*, 5 Wall., 795.

§ 1621. Where a grantor sells as heir of his mother, and a marriage between his mother and father is proved, a recital of his heirship in the deed, which is sixty-five years old, and under which possession has been held without question for thirty years, is presumptive proof of the fact. *Stokes v. Dawes*, 4 Mason, 268.

§ 1622. Where the docket upon which judgments are entered according to the usual practice of the court has been lost, there is a conclusive presumption of the existence of the record of a judgment, after the lapse of thirty years, where there is on file a confession of judgment by the defendant, prior to the date of the alleged judgment; a precept for final process, and final process, reciting a judgment; an indorsement by the defendant on the writ acknowledging to have received due notice of the time and place of holding an inquisition and appraisement, and releasing all errors touching the premises; followed by a sale made with the concurrence of the defendant, and remaining unquestioned by him during his whole life. It is immaterial that the final process recites a judgment of a different month than the one alleged, and the clerk omitted to record the entry of the judgment into a larger docket kept and used for that purpose. *Cromwell v. Bank of Pittsburg*, 2 Wall. Jr., 569.

§ 1623. The fact of alienage being proved, and the laws of Virginia requiring an oath to be taken in a court of record as indispensable to an alien's becoming a citizen, the fact that an alien acquired property in Virginia many years ago is not sufficient to raise a presumption that he became a citizen, the land having been occupied by one claiming as purchaser after his death. *Blight v. Rochester*, 7 Wheat., 535.

§ 1624. A slave being entitled to his freedom by the law of Virginia unless the owner took a certain oath within a certain time after his removal to Virginia, it was held that lapse of time would not raise a presumption against the slave that the oath was taken. *Garretson v. Lingam*, 2 Cr. C. C., 236; *Reeler v. Robinson*, 2 Cr. C. C., 220; *Negro Matilda v. Mason*, 2 Cr. C. C., 343.

§ 1625. By a law of Virginia, slaves brought into that state became free after the lapse of one year, unless the owner took a certain oath within sixty days after the removal. It was held that the lapse of twenty years, accompanied by possession of slaves, raised a presumption that the oath had been taken; and that this presumption obtained as well against the children of the slaves originally brought to the state, though they had been in a state of infancy during a greater part of the time. *Mason v. Matilda*, 12 Wheat., 590.

§ 1626. — as to land titles. — Lapse of time affords no presumption in favor of the regularity of a survey in Pennsylvania, where it was made without any order to that effect ever having been granted by the board of property as required by law. *Improvement Company v. Munson*, 14 Wall., 442. See §§ 1015, 1606. And see LIMITATIONS.

§ 1627. In Kentucky, a survey is presumed to be recorded at the expiration of three months from its date. *Elmendorf v. Taylor*, 10 Wheat., 152.

§ 1628. A judge cannot instruct a jury to presume a grant, unless length of time and of possession are proved in the case. *Hanson v. Eustace*, 2 How., 708 (§§ 3530-31).

§ 1629. Circumstances may raise a presumption of a grant, though sufficient time has not elapsed for the statute of limitations to afford a bar. *Ewing v. Burnet*, 11 Pet., 41.

§ 1630. Long possession raises a presumption of a valid grant of land, though no record of it can be found. *United States v. Roselius*, 15 How., 36.

§ 1631. Long possession, in order to raise a presumption of a deed, must be consistent with the idea of a deed. It cannot be presumed where the parties against whom it is attempted to be raised frequently remonstrated against the possession, and consulted counsel for a prosecution. *Stillman v. White Rock Manufg Co.*, 3 Woodb. & M., 538.

§ 1632. In an action by one of the daughters of a testator, who had married while under age, and continued under coverture until a short time before the action brought, claiming to be entitled to her aliquot part of all the lands of the testator, evidence of long acquiescence, from thirty to forty years, by the plaintiff and her husband, in the enjoyment of the lands in severalty by the children of the testator, and that the records of the court which had jurisdiction to make partitions among devisees had been destroyed by fire, was held not to raise any presumption, as against the plaintiff, of a lawful partition by the decree of a competent tribunal. *Weatherhead v. Baskerville*, 11 How., 329.

§ 1633. After a long possession of land in severalty a deed of partition may be presumed. *Hepburn v. Auld*, 5 Cr., 262.

§ 1634. The lapse of seventy years raises a presumption of the due execution of a lease recited in a deed of release, and intended to serve merely as a means of giving full operation to the release. *Crane v. Morris*, 6 Pet., 598.

§ 1635. Where there has been a long and uninterrupted possession under a *bona fide* claim of title, presumptions are favorable to such title. *Buckley v. Carlton*,* 6 McL., 125.

§ 1636. In favor of long possession and of strong apparent equity, much may be presumed; but in a case where the presumption would defeat possession, where the equity is doubtful, and where the parties rely upon strict law, courts will be cautious in presuming that which does not appear, and which might be shown by a record. *Blight v. Rochester*, 7 Wheat., 535.

§ 1637. Circumstances may warrant the presumption of a deed in favor of long and quiet possession, but these circumstances may be accounted for and their effect repelled. *Hurst v. McNeil*, 1 Wash., 70.

§ 1638. A deed may, under certain circumstances, be presumed from long possession; but this presumption may be rebutted by contrary presumptions. It can never arise where all the facts are entirely consistent with the non-existence of a deed. The presumption must not only be consistent with the facts of the case, but must appear naturally to arise out of them. *Ransdale v. Grove*, 4 McL., 319.

§ 1639. The entries in the Lord Proprietors' books of Maryland are evidence from which the jury may presume the existence of a deed; and the entries may be explained by parol evidence. *Contee v. Godfrey*, 1 Cr. C. C., 479.

§ 1640. An uninterrupted possession and use of a mill privilege for twenty years is *prima facie*, and, if unexplained, conclusive evidence of the right. *Hazard v. Robinson*, 3 Mason, 272.

§ 1641. Where a person named in a deed as grantor made no claim under it in his life-time, and no claim was made by his heirs for more than fifty years from the date of the deed, a jury may take that fact into consideration, as conducing to show, in connection with the fact that the grantor was the father-in-law of the grantee, that the deed was not delivered. *Buckley v. Carlton*,* 6 McL., 125.

§ 1642. After the elapse of forty-eight years since an order of the probate court for the conveyance of land of one as an intestate who had died without issue, the jury may presume that the person was dead, intestate, and without issue at the time of the proceedings, there being no opposing title set up in all this time against that of the grantee in the conveyance and those claiming under him. *Allen v. Lyons*, 2 Wash., 475.

§ 1643. Where a concession was made by the governor of Louisiana in 1799, the neglect to perform the requirements to complete the title, together with the absence of claim or assertion of right to the land, and the absence of any proof of the actual existence of the grant for the period of more than thirty-six years, was held to raise a presumption of abandonment. *United States v. Hughes*, 13 How., 1, 4 and 7.

§ 1644. Notorious residence by a settler under a Spanish permit, on land in the country of the Sac and Fox Indians, for the period of twenty-five years prior to the treaty by the United States with those Indians, made in 1804, was held to raise a presumption that the Indians had notice of and assented to the claim at the date of the treaty. *Marsh v. Brooks*, 14 How., 513.

§ 1645. — as to payment. — It seems that a presumption of payment from lapse of time cannot be raised against the government. *United States v. Williams*, 4 McL., 567; *United States v. Williams*, 5 McL., 133. See PAYMENT.

§ 1646. Length of time raises no presumption that the purchase money for land has been paid to the proprietaries, where no patent is produced by the claimant, or proved by him to have been issued. *Conn v. Penn*, Pet. C. C., 496, note.

§ 1647. When a mortgagee seeks to foreclose an equity of redemption, where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release, unless the circumstances are sufficiently strong to repel the presumption. Payments by the mortgagor on account of the debt and acknowledgments within eight and thirteen years before the institution of the suit are sufficient to repel the presumption. *Hughes v. Edwards*, 9 Wheat., 489.

§ 1648. Lapse of time cannot raise a presumption that a mortgage has been paid, as against a mortgagee in possession. And if it could, such presumption is rebutted by proof that the mortgagor died insolvent before the maturity of the mortgage debt, and the person to whom he sold the equity of redemption also became insolvent and removed from the state and never returned. *Brobst v. Brock*, 10 Wall., 519.

§ 1649. After a lapse of twenty years a note is presumed to be paid, if no demand of payment has been previously made; and under peculiar circumstances the presumption will arise in a shorter period. *Denniston v. McKeen*, 2 McL., 253.

§ 1650. If presumption of payment from lapse of time applies to a bill of exchange, as it does to a sealed instrument, it may be met and rebutted by accounting for the time which has been permitted to elapse, and by showing improbability that the debt has been paid. *Hopkirk v. Page*, 2 Marsh., 20.

§ 1651. To raise a presumption of payment from the age of a bond, twenty years must have elapsed exclusive of the period of the plaintiff's disability. *Dunlap & Co. v. Ball*, 2 Cr., 180.

§ 1652. In debt on bond, payable by instalments, the jury were instructed that, as to an instalment due more than twenty years before suit, they ought to infer payment, and as to one due nineteen years and ten months before, they might presume payment. *Miller v. Evans*, 2 Cr. C. C., 72.

§ 1653. In debt on bond the jury were instructed to presume payment from length of time, notwithstanding an indorsement of payment by the obligee, if they were not satisfied that this indorsement was made with the privity of the obligor. *Kirkpatrick v. Langphier*, 1 Cr. C. C., 85.

§ 1654. Payment of rent for one year, with receipt therefor, raises the presumption that the rent for previous years was paid. *Jenkins v. Calvert*,* 3 Cr. C. C., 216.

§ 1655. A forbearance by a sailor for nine months to sue for wages does not raise a presumption of payment. It did not appear that the libellant was on the spot, nor the vessel within the court's power during that time, but the court said that if these facts had been proved the presumption would have been no different. *Holmes v. Lodemia*, 1 Crabbe, 434.

§ 1656. When a petitioner seeks to have a *supersedeas* of a commission of bankruptcy revoked, in order that he may prove debts against which there is a *prima facie* presumption of payment, he must satisfy the court that he has a reasonable expectation of rebutting the presumption if the opportunity is afforded him. *Morris' Estate in Bankruptcy*, 1 Crabbe, 70.

§ 1657. If the assignee of an insolvent debtor has sold the property assigned to him, the presumption is, in an action by the United States for money had and received, claiming to be entitled to a priority of payment, that he has received payment for it. *United States v. Clark*, 1 Paine, 629.

§ 1658. It being the question whether a loan office certificate issued by the continental congress was legally countersigned, and no sufficient proof being offered, the payment of interest by the government affords no presumption of legality. *Ward's Case*,* 1 Ct. Cl., 360.

§ 1659. Marks and certificates being no evidence of the payment of duties, the want of them can afford no presumption of non-payment. *Six Hundred and Fifty-one Chests of Tea v. United States*, 1 Paine, 499.

§ 1660. Where the obligor in a bond has the right of election to convey land or pay money, and the money has not been paid after fifty years, an election to convey the land may be presumed. *Coulson v. Walton*, 9 Pet., 62.

§ 1661. Grants; patents; deeds; title papers generally.—An ouster cannot be presumed in favor of the naked possession of a mere intruder. *Society for the Propagation, etc., v. Town of Pawlet*, 4 Pet., 480. See §§ 890, 900, 907, 1015, 1292.

§ 1662. The delivery of a deed may be inferred from circumstances. *Gardner v. Collins*, 3 Mason, 398.

§ 1663. Possession of a deed by the grantee raises a presumption of delivery. *Flagg v. Mann*, 2 Sumn., 486.

§ 1664. Where an instrument on its face purports to be a deed, the solemnities required by law, such as signing, sealing, delivery, etc., are presumed, in the absence of proof of the omission. *Follett v. Rose*,* 3 McL., 332.

§ 1665. A mortgage is *prima facie* evidence of indebtedness, but its validity being disputed this presumption cannot be admitted in its support. *Machette v. Wanless*,* 2 Colo. T'y, 169.

§ 1666. A conveyance purporting to be *bona fide* and for a valuable consideration is presumed to be so until the contrary appears. *Briggs v. French*, 2 Sumn., 251.

§ 1667. A grant raises a presumption that the incipient steps required to give it validity have been taken. *Best v. Polk*, 18 Wall., 112.

§ 1668. Where a patent to land is regularly issued, it will be presumed that all the usual incipient steps were taken before the title was perfected. *Bagnell v. Broderick*, 13 Pet., 436.

§ 1669. Where a patent to land has been issued there is a presumption of law that every prerequisite has been performed. *Polk v. Wendal*, 9 Cr., 87.

§ 1670. A grant raises a presumption of the existence of all the prerequisites, and a land warrant is evidence of the existence of an entry. *Polk v. Wendell*, 5 Wheat., 293.

§ 1671. A grant raises a presumption that every prerequisite has been performed. *Patterson v. Jenks*, 2 Pet., 216.

§ 1672. A patent for land, issued by the United States, is presumptively valid. Such patent being also *prima facie* evidence that all preliminary steps to justify making it have been properly taken, it is to be presumed that a necessary order from the secretary of the treasury to the register of the land office to offer the land for sale has been given. *Minter v. Crommelin*, 18 How., 87.

§ 1673. In an action at law a United States patent is conclusive evidence that the title to the land is in the patentee. In an action of ejectment brought by the patentee, a receiver's receipt for the same tract of land embraced in the patent, showing that it was entered by the defendant at the land office before the date of the patent, is not admissible evidence for the defendant. A patent which appears on its face to have been regularly issued will be presumed valid until the contrary appears, and the court will not undertake to say, from a mere inspection of the handwriting, that the name of the president was not signed by the proper person. *Parkison v. Bracken*,* 1 Burn. (Wis.), 13.

§ 1674. Papers which are shown *prima facie* to be genuine are presumed to have been executed at the time of their date. *United States v. Libby*, 1 Woodb. & M., 221.

§ 1675. The delivery of a deed is presumed to have been made on the day of its date, but this presumption may be removed by evidence that it was delivered on some subsequent day. *United States v. Le Baron*, 19 How., 73.

§ 1676. Where conveyance of land is made to a corporation called in the deed "The Sulphur Springs Land Company," it will be presumed, in the absence of evidence on the subject, that the grantee is capable of taking a conveyance of real estate. *Myers v. Croft*, 13 Wall., 291.

§ 1677. The assent of a grantee to a deed which is clearly for his benefit may be presumed. But if a consideration is to be paid, the assent must be proved. *Hurst v. McNeil*, 1 Wash., 70.

§ 1678. A charter granted to persons named in it is presumed *prima facie* to have been applied for and accepted by them. But if nothing is done under the charter for seven years after it is granted, this is sufficient to rebut the *prima facie* presumption of acceptance. *Newton v. Carbery*, 5 Cr. C. C., 632.

§ 1679. The admission contained in a grant of land from the Mexican government, that the grantee has been naturalized—being a necessary recital—is conclusive. The fact that such grantee had joined the forces of the United States in the war with Mexico is not sufficient alone to raise a presumption that he meant to abandon the grant. *United States v. Reading*, 18 How., 1.

§ 1680. Where it is shown that a party claims under a deed with a general warranty, the law presumes the title papers to be in the hands of the warrantor; and the warrantee is not required to produce them in evidence. Certified copies are sufficient. *Cook v. Hunter*,* 2 Overt. (Tenn.), 113.

§ 1681. Where the counterpart of a deed appearing upon its face to be an indenture is produced by one of the parties to it, the part produced being signed by the other party, it is presumed that the original is in the hands of the other party. *Hallett v. Collins*, 10 How., 174.

§ 1682. Where the certificate of the magistrate who took the privy examination of a *feme covert* to a deed does not state that she was of the age of twenty-one, the presumption is that she was of full age until the contrary is shown. *Battin v. Bigelow*, Pet. C. C., 452.

§ 1683. If one making an entry upon land have a right to enter only in virtue of a mortgage which he holds as assignee, the legal presumption is that his entry is in that right, under color of his title, and that he intends to assert his right to the entire subject of the mortgage, though his actual possession, the lands being wild and uninclosed, does not extend to the whole. *Brobst v. Brock*, 10 Wall., 519.

§ 1684. Under the statute of Illinois authorizing execution against the lands of a deceased judgment debtor, provided that the plaintiff in the execution gives notice to the executor or

administrator, it is incumbent on the purchaser under such an execution to prove that the notice was given, where he seeks to use the title thus obtained in an ejectment suit brought by him. There is no presumption that the notice was given. *Ransom v. Williams*, 2 Wall., 313.

§ 1685. All titles to land in California, except where land is covered by tide-waters, or is acquired by accretion from the sea, come either from the United States or the government which preceded them; and in the absence of proof that the title to land is obtained directly from the government, the legal presumption is that the title is in the United States. This presumption is not only one which would arise independent of any legislation, but it has been expressly declared by statute in that state. *Patterson v. Tatum*, 3 Saw., 164.

§ 1686. The assent to a private act of incorporation may be presumed from participating in the benefits of it. *Beaty v. Knowler*, 4 Pet., 152.

§ 1687. One who ships goods in a particular trade is chargeable with notice of a well-established usage of the trade with regard to stowage, and is presumed to consent to it. *Baxter v. Leland*, 1 Blatch., 526.

§ 1688. In the absence of all evidence to the contrary, in case of an absolute assignment of property by a debtor to his creditor for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit he is to derive from it. *Grove v. Brien*, 8 How., 429. See DEBTOR AND CREDITOR.

§ 1689. If in a debtor's assignment to a trustee for the benefit of all the creditors, no release or other condition is stipulated for in behalf of the debtor, the assent of the creditors to the assignment is presumed until the contrary is shown. If there are conditions in the assignment the presumption does not arise. *Halsey v. Whitney*, 4 Mason, 206.

§ 1690. A party, by his neglect of an ordinary duty, as to look after his interests for an unreasonable length of time when he knows that his property is in the hands of and being managed by a third person, may be presumed to have approved of the management of the person having it in charge. *In re Jewett*, 7 Biss., 328.

§ 1691. Where the name of an individual appears on the stock-book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock; and in an action against him as a stockholder the burden of rebutting the presumption is upon him. *Turnbull v. Payson*, 5 Otto, 418.

§ 1692. Where a statement is furnished by an officer of a corporation from a private memorandum, and represented to be a copy from the books of the corporation, it may be presumed that it was received as official. *James v. Atlantic Delaine Co.*, 3 Cliff., 622.

§ 1693. As to intent.—A creditor, taking a security from his debtor who is afterwards declared a bankrupt, is bound to presume, as the law presumes, that the bankrupt intends the natural consequences and effect of his acts. *Graham v. Stark*, 3 Ben., 520.

§ 1694. One who is conscious of the act he commits, and has the capacity to comprehend its nature and consequences, is presumed to intend the results which naturally and ordinarily follow from it. So held in an action on a life insurance policy, where the insured had killed himself, and the policy contained a condition declaring it void in the event of the suicide of the insured. *Gay v. Union Mutual L. Ins. Co.*, 9 Blatch., 143.

§ 1695. The intention to commit an act of bankruptcy is presumed when the party admits the facts which legally constitute such act of bankruptcy. *In re Smith*, 4 Ben., 1. See DEBTOR AND CREDITOR.

§ 1696. In law every one is presumed to intend the natural consequences of his own acts. Thus if a debtor, while insolvent or in contemplation of insolvency, suffers his property to be taken on execution in such a manner as naturally operates to give a preference, he is presumed to intend such a preference in the view of the bankruptcy act of 1867. *In re Dibblee*, 3 Ben., 283.

§ 1697. Every one is presumed to intend that which is the natural and necessary consequence of his own acts. And the giving of a judgment note by a debtor, payable one day after date, for a debt not due, affords a strong ground to presume that the debtor intended to give the creditor a preference and that the creditor intended to obtain it. *Clarion Bank v. Jones*, 21 Wall., 325.

§ 1698. Every person of sound mind is presumed to intend the natural, necessary, or legal, consequences of his own act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of a want of such intention. Thus, where an insolvent debtor makes a voluntary assignment of all his property for the benefit of his creditors, it is an act of bankruptcy under the act of 1867, and the law conclusively presumes the intention to delay and defeat the operation of the bankruptcy act, and to prevent the property assigned from being distributed under the provisions of that act. *In re Smith*, 4 Ben., 1.

§ 1699. Every one is presumed to have intended whatever is the necessary and legitimate

result of his acts. Thus if the escape of a fugitive from labor follows as the result of certain words or acts of a person, the law raises the presumption that it was intended. *Weimer v. Sloane*, 6 McL., 259.

§ 1700. **Contracts.**—The presumption is that a contract is to be performed at the place where it is made, when there is nothing inconsistent with that intention in its terms or in the explanatory circumstances of its execution. *Pritchard v. Norton*, 16 Otto, 124. See §§ 513, 870.

§ 1701. In *assumpit* against one for a portion of his commissions on the sale of a certain cargo, the fact that he has delivered the cargo to the owners is evidence against him of the receipt of his commissions. *Manning v. Lowdermilk*, 1 Cr. C. C., 282.

§ 1702. The law will presume, in the absence of any special agreement on the subject, that the place where a commission merchant does business is the place of delivery of wheat to be purchased for his principal. *Rice v. Montgomery*, 4 Biss., 75.

§ 1703. There is no presumption in favor of a contract by a state exempting property from taxation. *Tucker v. Ferguson*, 22 Wall., 527.

§ 1704. Strong and clear proof will be required to overcome the presumption that the rights of the parties to a contract are reciprocal. *Truesdale v. Young*, Abb. Adm., 391.

§ 1705. Letters addressed to a person at his known postoffice address, prepaid, and deposited in the postoffice, are presumed to have reached their destination and to have been received by the person to whom they were addressed. This is not a conclusive presumption, and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters. *United States v. Babcock*,* 3 Dill., 571. See §§ 330, 510, 922.

§ 1706. The postmark on a letter is *prima facie* evidence of the place where it was deposited. *Kansas Pacific Railway Co. v. Miller*,* 2 Colo. Ty., 442.

§ 1707. The general rule that the regular postmark is presumptive evidence of the mailing of a letter is not overthrown by proof that sometimes envelopes have been postmarked which were not in fact mailed. *United States v. Noelke*, 17 Blatch., 554.

§ 1708. Courts do not presume, from the mere fact of a letter's having been mailed, or sent by private hand, that it has been received, even for the purpose of laying a foundation for the introduction of secondary evidence of its contents. *Allen v. Blunt*, 2 Woodb. & M., 121.

§ 1709. Notice of the taking of a deposition in Cincinnati on the 28th of the month was deposited in the postoffice at Cincinnati on the 21st, addressed to the attorney of the opposite party at Chillicothe. It was not received by him till the 29th. *Held*, that this was only presumptive evidence of notice, and that the presumption was overcome by the fact that notice was not received. *Walker v. Parker*,* 5 Cr. C. C., 639.

§ 1710. **Notes.**—Contrary to the general rule of commercial law, it is the presumption in Massachusetts that a note is given in satisfaction of the debt. But this presumption may be repelled and controlled by evidence that such was not the intention of the parties, and this evidence may arise from the general character of the transaction as well as from direct testimony to the fact. *The Kimball*, 3 Wall., 37. See §§ 260, 565, 941.

§ 1711. In Massachusetts and Maine, when a negotiable security is taken for a debt it is *prima facie* taken as absolute payment. *Wallace v. Agry*, 4 Mason, 336.

§ 1712. In an action on a note the production of the note by the plaintiffs, indorsed to them as a firm, is *prima facie* evidence of the existence of such a firm. *Maret v. Wood*,* 3 Cr. C. C., 2.

§ 1713. The indorsement of a promissory note is *prima facie* evidence that it was indorsed for full value. *Riddle v. Mandeville*, 5 Cr., 322.

§ 1714. The possession of negotiable paper by one to whom it is indorsed is *prima facie* proof that it is his property. *Bank of Metropolis v. New England Bank*, 1 How., 234.

§ 1715. The holder of a note is presumed to have the beneficial interest in it, although he has struck out subsequent indorsements; and a plea that the note has been assigned should be supported by proof that the beneficial interest is still in the assignee. *Conant v. Wills*, 1 McL., 427.

§ 1716. There is a presumption in favor of the holder of a note that the filling up of a blank indorsement related back to the time when the indorsement was made. *Martin v. Kercheval*, 4 McL., 117.

§ 1717. Where there is a promise to pay by the indorser, it is presumptive evidence that notice was given to him in due time. *Sherman v. Clark*, 3 McL., 91.

§ 1718. Presenting a bill of exchange for payment to the acceptor, who is a merchant, at his place of business, will be *prima facie* evidence that the demand was made at a proper time of day. *Wiseman v. Chiappella*, 23 How., 368.

§ 1719. It may be presumed that a note discounted at a bank was at the bank when discounted; and the bank being the owner and holder of the note, the presumption is at least

prima facie that it remained at the bank to be delivered up when paid. *United States Bank v. Smith*, 11 Wheat., 171.

§ 1720. In an action to recover a balance claimed to be due of the purchase money agreed to be given for property sold and conveyed, the consideration being secured by notes, all but one of which had been paid, and that one produced, it was held that the presumption was that the other notes had been given up when paid, and that they need not be produced; and that it must be presumed, from the fact of the execution of the notes, that the conveyance was executed and delivered, until the contrary was shown. *Lyman v. Bank of United States*, 12 How., 225.

§ 1721. **Carriers.**—The bill of lading is *prima facie* evidence of the shipment of the goods, but this presumption may be rebutted. And when thus overcome, the necessary conclusion is, in the absence of proof to the contrary, that there were no more goods shipped under the bill of lading than are found on board with marks corresponding to the bill. *The Alice*, 12 Fed. R., 496. See §§ 541, 867, 1325. And see CARRIERS.

§ 1722. A cargo, when received on board, is presumed to be in good condition until the contrary appears; and this presumption is strengthened where the circumstances and time of its detention have been sufficient to produce any existing damage found. *Ibid.*

§ 1723. Where goods, acknowledged by the bill of lading to have been received in good condition, are delivered in a damaged state, the presumption of law, without countervailing proof, is that the injury has arisen from fault or negligence in the stowage or transportation in the ship. And the burden is upon the carrier to show affirmatively that the injury was received by *vis major*, or before the delivery of the goods to the ship, or at least to show circumstances affording a violent presumption that the injury could not have been communicated on board the ship. *The Ship Martha, Olc.*, 140.

§ 1724. When goods shipped on a carrier vessel are found, on being unpacked, to be injured, the presumption, in an action by the owner against the carrier, is that they were in good condition when packed, unless something in their appearance shows the contrary. The words in the bill of lading, "weight, contents and value unknown," will not affect this presumption. *English v. Ocean Navigation Co.*, 2 Blatch., 425.

§ 1725. Where a bill of lading shows that the cargo claimed was shipped by the claimants at Richmond, the presumption is that the claimants were domiciled at that place. *The Winifred*, Bl. Pr. Cas., 3.

§ 1726. Lard in liquid condition and contained in wooden barrels, shipped on a carrier vessel during very hot weather, is not properly packed. Such packing is a secret defect, and, in case of damage, will rebut the presumption from the statement in the bill of lading that the goods were received in good order. *Nelson v. Woodruff*, 1 Black, 156.

§ 1727. **Collision.**—Where a vessel, injured by being run into by another, was, at the time, lying safely moored in her wharf, at a distance of about twenty feet inward from the end thereof, it was held that the presumption of fault was clear on the part of the other, and that the burden was upon her to excuse it. *The Helen R. Cooper — The R. L. Mabey*, 7 Blatch., 378. See § 667. And see MARITIME LAW.

§ 1728. When a collision takes place between a vessel under sail and one not under sail, the *prima facie* presumption is that the fault is imputable to the vessel in motion. *The Scioto*, Dav., 359.

§ 1729. When a collision takes place in daylight between a vessel under sail and one not under sail, the *prima facie* presumption is that the vessel in motion was in fault. *Hall v. Little*, 2 Flip., 153.

§ 1730. Running a large steamer on a dark night at the rate of seventeen miles an hour, along a track frequented by sailing vessels, is conclusive evidence of negligence, unless the other party is clearly in fault. *The Northern Indiana*, 3 Blatch., 96.

§ 1731. In a collision case the burden is on the vessel through whose negligence the injury was sustained, to show that the loss was not the result of that injury. *The Rebecca*, Bl. & How., 347.

§ 1732. When a vessel is moored to a wharf and another vessel collides with her, there is a presumption of negligence against the second vessel. *The Bridgeport*, 7 Blatch., 361.

§ 1733. When a collision occurs between a steamer and a sail vessel, the steamer is presumed to be at fault, unless she can show that she was prevented from performing her duty by some fault on the part of the sail vessel. *Farr v. Steamship Farnley*, 1 Fed. R., 631.

§ 1734. **Seaworthiness.**—The ordinary presumption is that a ship is seaworthy and her machinery in good order when she undertakes a voyage. *Pyman v. Von Singen*, 3 Fed. R., 802. See §§ 674, 1305.

§ 1735. There is no presumption arising from the seaworthiness of the vessel at the commencement of the voyage that all repairs which become necessary during the voyage are to be attributed to extraordinary perils. *Donnell v. Columbian Ins. Co.*, 2 Sumn., 366.

§ 1736. If a vessel, after she commences her voyage, becomes unfit to prosecute it, and has been exposed to no extraordinary perils of the sea, this circumstance may raise so strong a presumption of her having been unseaworthy at the time of her departure as to call upon the insured, when suing upon a policy, to give strong evidence to repel the presumption. *Cort v. Delaware Ins. Co.*, 2 Wash., 375.

§ 1737. Supplies and repairs.—*Prima facie*, and until the contrary is proved, the master of a vessel is presumed to have acted in good faith, and with upright intentions and reasonable diligence in making repairs and giving a bottomry bond therefor. *The Ship Fortitude*, 3 Sumn., 228. See §§ 674, 1305, 1734.

§ 1738. A person advancing money to the master of a vessel for repairs, and taking a bottomry bond, is presumed to have made all due and reasonable inquiries on the subject which the occasion required. *Ibid.*

§ 1739. Necessary repairs furnished by material men to a foreign ship are *prima facie* a lien on the vessel. But if the material man takes a note or a bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall continue. *Phelps v. The Camilla*, Taney, 400.

§ 1740. When repairs are furnished to a vessel in a foreign port a lien is presumptively raised against her. This presumption may be rebutted by evidence that there was no apparent necessity for the repairs or that some special contract for payment was made. The agent's dishonored draft is not evidence that the work was done on his personal credit alone. *Steamboat Washington Irving*, 2 Ben., 318.

§ 1741. The presumption is that supplies furnished to a vessel were given on the credit of the vessel, not of the owners. *The Prospect*, 3 Blatch., 526.

§ 1742. Where one authorized to procure supplies for a foreign vessel orders supplies for the vessel, that are used by the vessel and necessary therefor, the presumption is that they were furnished on the credit of the vessel. *The Steamboat Metropolis*, 9 Ben., 83.

§ 1743. If material men holding a maritime lien upon a vessel suffer their demand to sleep for three seasons of navigation, with repeated opportunities to enforce it on the vessel, and at different ports, without any action on their part, and with no excusatory circumstances exhibited, the presumption is strong and conclusive that they have waived their lien, and intend to look to the owner for payment. *The Buckeye State*, Newb., 111.

§ 1744. Where repairs were made on a stranded vessel by the purchasers, and the former owners then claimed the vessel without having objected to the repairs, the presumption is that they acted in good faith and were ignorant that they were being made. *The Henry*, Bl. & How., 465.

§ 1745. Enemy property.—Goods found on board an enemy's ship are presumed to be enemy's property. *The London Packet*, 5 Wheat., 132. See WAR.

§ 1746. Goods found on board an enemy's ship are presumed to be the property of the enemy. If a neutral ship goods on an enemy vessel, and does not send with them documents which shall clearly show their neutral character, he cannot be allowed the indulgence of further proof. *The Flying Fish*, 2 Gall., 374.

1747. In time of war everything that issues from a hostile country is *prima facie* enemy property; and it is for the claimant of condemned property to rebut the presumption. *The Rapid*, 8 Cr., 155.

1748. Acts of ownership by any enemy, such as selection of master, control in destination, and instructions for conduct of the voyage, in the absence of a charter-party or other explanation, may repel presumptions of ownership in a neutral arising from registry or other documents, and will warrant condemnation of the vessel as enemy property. *The Bermuda*,* 14 Am. L. Reg., 569.

VI. ADMISSIONS, DECLARATIONS AND CONVERSATIONS.

§ 1749. Admissions — In general. — The withdrawal of an objection to the competency of a survey is not an admission of its legality. *United States v. Low*, 16 Pet., 162; *United States v. Breward*, 16 Pet., 143. See § 1155.

§ 1750. If a party, in order to prevent a continuance moved for by the other on the ground of the absence of a material witness, admits that the absent witness, if present, would testify as stated in the affidavit, he does not thereby admit the fact which the absent witness would testify to, or preclude himself from explaining away the testimony thus admitted. *Bestor v. Sardo*, 2 Cr. C. C., 260.

§ 1751. A decree of default regularly obtained is regarded as equivalent to an admission on the record of the offense charged. *Schooner Zavalla*, Bl. Pr. Cas., 173.

§ 1752. A. and B. were sued as partners; A. made default, and B. pleaded the general issue. *Held*, that B. could not read in evidence letters written by A. to show that he, B., was not a partner. *Champlin v. Tilley*,* 3 Day (Conn.), 306.

§ 1753. A compromise proposed or accepted is not evidence of an admission of the amount of the debt. *Insurance Companies v. Weides*, 14 Wall., 375.

§ 1754. In a prosecution against a collector of customs for embezzlement, a proposition by him to deposit a certain amount in the treasury to secure the payment of any amount of moneys which should be found in his hands is not an admission of any amount being due, but only a proposal of compromise. *United States v. Forsyth*, 6 McL., 584.

§ 1755. An admission by the maker of a promissory note, to an indorsee, that he owes the debt, made in the course of negotiations for an enlargement of the time of payment of the debt, is not made in an offer to buy peace, and is admissible and sufficient evidence to prove the signatures on the note and the debt, in an action against the maker. *M'Niel v. Holbrook*,* 12 Pet., 86.

§ 1756. In an action upon an insurance policy, where the defendants consented to a verdict against them, subject to the report of auditors as to the amount of loss, it was held that they thereby admitted only that the plaintiff had some cause of action, and had sustained some damage within the perils of the policy, and did not admit the cause of the loss and prevent inquiry into that. *Donnell v. Columbian Ins. Co.*, 2 Sumn., 366.

§ 1757. The owner of a patent-right granted a license to another to make and sell the patented article, upon the weekly payment of a certain sum. The non-payment of this sum for four successive weeks gave the owner a right to take back the interest conveyed. In a suit by the owner for several weekly payments in arrear, the defendant confessed judgment. In a subsequent suit to enjoin the defendant from making and selling the article, it was decided that the confession of judgment was an admission that the weekly payments claimed by the plaintiff in that suit were in arrear. *Armstrong v. Hanlenbeck*,* 3 N. Y. Leg. Obs., 43.

§ 1758. A confession is sufficient to sustain a charge of bigamy in a civil suit, when made under circumstances from which no objection to it as a confession can be implied. *Gaines v. Hennen*, 24 How., 553.

§ 1759. The confession of entry in an ejectment suit is sufficient to enable the plaintiff to recover damages and mesne profits, without proof of entry. *Brown v. Galloway*, Pet. C. C., 291.

§ 1760. In the question of fact whether one is owner or not of a vessel, a bill of sale to him as owner, and two oaths taken on subsequent occasions that he was the true and only owner, when opposed by his oath at the trial that he never had any interest in her, constitute a preponderance of evidence. *Casey v. Leary*, 2 Ben., 530.

§ 1761. Where indorsers brought suit against the acceptors of a bill of exchange, and the defendants denied the indorsement, an affidavit of one of the defendants, filed in the cause, to procure a continuance, was held admissible evidence from which the jury could infer an admission of the indorsement by the defendants. *Payson v. Coolidge*, 2 Gall., 233.

§ 1762. The admissions and confessions of a party are admissible in equity, though not charged in the bill. There is no difference between the rules of a court of equity and those of a court of law as to the admission of such evidence. But its admission may be subject to the qualification that if one party should keep back evidence which the other might explain, the court may, in its discretion, give no effect to it, without first giving the party to be affected by it the opportunity of controverting it. *Jenkins v. Eldredge*, 3 Story, 181.

§ 1763. In a collision case it was testified by the witnesses for one of the colliding vessels that the bow-light of the vessel was set and burning. On the day after the hearing, the counsel for this vessel, by direction of the owners, stated to the court that the bow-light, though burning, was covered with a tarpaulin. It was held that this statement, although forming no part of the evidence, must be regarded as an admission in the cause. *The Steam Tugs Harry and May-Flower*, 9 Ben., 524.

§ 1764. — **when admissible.**—The admissions of a party are always admissible in evidence against him. They may be made either directly or by acquiescence in statements which if untrue should be denied. They may be by acquiescence in a written statement as well as a verbal one. Thus, where an account of the plaintiff against the defendant, stated in a letter from the former to the latter, was traced into the hands of the latter, which account asserted a lien upon certain cattle, and the letter was not replied to by the defendant, it was held that the conduct of the defendant might be considered by the jury as an admission by acquiescence, and that the letter was admissible in evidence to show the extent of the admission. *Smith v. Kennedy*,* 1 Wash. T'y, 66.

§ 1765. The admissions and confessions of a party are evidence against him. *Robinson v. Wiley*, Hemp., 38.

§ 1766. Every admission is to be taken as an entirety of the fact which makes for the one

side, with the qualifications which limit, modify or destroy its effect on the other side. Thus an admission by the officers of an insurance company to the agent of the claimant, that the proofs of death furnished were sufficient in form, but that they disclosed a case of suicide, should be taken as a whole, and if sufficient to establish the death of the insured, it is sufficient to show that the insured committed suicide. And it is error for the court to allow the statement as to the sufficiency of the proofs to be received as conclusive of that fact, and, by its charge, separate it from the accompanying language as to the suicide, and hold that this latter statement is of an independent fact to be proved by the company. *Insurance Company v. Newton*, 22 Wall., 32.

§ 1767. Admissions are to be taken with considerable allowance; but where there is a conflict in the evidence, and where the admissions concern the subject-matter about which the conflict arises, they are not only competent but may control the conclusion. *Union Mut. Life Ins. Co. v. Masten*, 3 Fed. R., 881.

§ 1768. A refusal to deny where a party is bound to speak is equal to an admission of the charges made against him; and what is admitted need not be proved. *United States v. Samperey*, Hemp., 118.

§ 1769. If the complainant introduce in evidence the confession of the defendant, it may be used by either side. *Brown v. Brown*, 1 Woodb. & M., 325.

§ 1770. An admission by the maker of a promissory note that he owes the debt is sufficient proof of the signature, and of an indorsement, in an action by the indorsee against the maker. *M'Niel v. Holbrook*,* 12 Pet., 87.

§ 1771. A letter introduced in evidence as an admission is evidence as well to those parts in favor of the party making the admission as to those against him. *Campbell v. James*, 17 Blatch., 42.

§ 1772. The admissions of a party to the record are just as competent now as before parties were competent witnesses; and this, too, notwithstanding the party has been sworn and examined as a witness on the trial, and was not asked whether he had made such admissions. But if not otherwise admissible, and offered for the purpose of impeachment, the question should be first asked of the party while on the stand. *The Stranger*, 1 Brown, 281.

§ 1773. Admissions are not to be rejected because they are of conclusions of mixed law and fact. But where they are of conclusions merely, and not of facts simply, and have not been acted on so as to work an estoppel, they are entitled to but little weight. *Ibid.*

§ 1774. In a suit by a passenger to recover damages for personal injuries consequent upon the breaking down of a railroad bridge, the subsequent construction of a new bridge, allowing for more water, is an admission that the first was inadequate, but not that there was negligence in building it. *Kansas Pacific Railway Co. v. Miller*,* 2 Colo. T'y, 442.

§ 1775. Due notice of protest of a bill of exchange may be presumed or proved from admissions of liability by the defendant. *Hyde v. Stone*, 20 How., 170.

§ 1776. A defendant's admission of liability to pay is not conclusive on him, but is to be weighed by the jury in connection with the other evidence in the case. *Murley v. Ennis*,* 2 Colo. T'y, 300.

§ 1777. The account of a city marshal is an official admission which is competent to bind the sureties in his bond, even if it is rendered after the expiration of his term of office, if rendered within a reasonable time after such expiration. *Jenness v. City of Black Hawk*,* 2 Colo. T'y, 578.

§ 1778. In an action against C., on a note executed by S. and C. jointly, S. having been discharged in bankruptcy, the admissions of S. were admitted against C. *Howard v. Cobb*,* 3 Day (Conn.), 309.

§ 1779. The acknowledgment of a debt by one partner will bind the firm; but such an acknowledgment is not proof of a partnership. *Corps v. Robinson*,* 2 Wash., 390.

§ 1780. Where it is sought to charge A. and B. as partners, after evidence of a partnership has been given, the confessions of A. may be proved to show that the debt was a partnership debt. *Garrett v. Woodward*,* 2 Cr. C. C., 190.

§ 1781. The admissions of plaintiff's partner, who has an interest in the note sued on, though he is not named on the docket, are admissible to show the discharge of the note during the existence of the partnership. *Weed v. Kellogg*,* 6 McL., 44.

§ 1782. In an action upon an alleged partnership note, the admission of one of the alleged partners to whom the note was presented, that it was signed by his partner, is proper evidence, and is evidence from which, together with an offer to pay the note in property, the jury may infer a joint liability in the absence of opposing evidence. *Thomas v. Wolcott*,* 4 McL., 365.

§ 1783. In an action for a balance of accounts claimed as due, the confessions and admissions of one of the parties, consisting of accounts rendered in a former controversy on the same subject, before arbitrators, are admissible, the award of the arbitrators not having been received in evidence because it had been set aside for irregularity. *Martin v. Ihmsen*, 21 How., 394.

§ 1784. In a case of collision the admission of the master of one of the vessels, based upon statements of his mate and crew, made at the time of the occurrence, attributing the calamity to the mismanagement of his own vessel, is entitled to great weight, though he was not upon deck at the time of the collision. *The Douglass*, 1 Brown, 105.

§ 1785. In an action against the drawer of a draft, an admission by an indorser, made to counsel of the plaintiff, that he had indorsed the draft, which was not shown to him at the time, is evidence that he indorsed the draft, sufficient to throw the burden of proof upon the other side to show that the admission might have referred to another draft drawn by the defendant. *Hyer v. Smith*, 3 Cr. C. C., 437.

§ 1786. In a suit against a city for breach of contract in refusing to receive certain hose, for the manufacture of which it had contracted with the plaintiff, the declaration of an authorized agent of the city, who had participated in making the contract, to the effect that he thought the city was liable on the contract to a certain extent, on account of its having used the hose for fires, was allowed to be proved. *Chicago v. Greer*, 9 Wall., 726.

§ 1787. Whatever has been acknowledged by a bankrupt before bankruptcy may be given in evidence against his assignees. *Marks v. Barker*, 1 Wash., 185, note.

§ 1788. The admission of a plaintiff in ejectment that she had no knowledge of the deed, under which action was brought, until more than fifty years after its date, may be considered by the jury in relation to the question of the delivery of the deed. *Buckley v. Carlton*,* 6 McL., 125.

§ 1789. Evidence of admissions can be received in questions of boundary as well as in other cases, but they should be clear and unequivocal to have any effect. It is always a suspicious kind of evidence, and the jury should be convinced that it was the intention of the party to admit the fact, being satisfied of its truth. *Polk v. Robertson*,* 1 Overt. (Tenn.), 456.

§ 1790. In a suit in equity, where the validity of a deed to the defendant, executed by his father in consideration of services and affection, delivered to a third person for the use of the son until called for, and afterwards taken back by the father on account of the advanced age of such third person, and found among the papers of the father after his death, was questioned, the confession of the son that the deed was not to be made known during the father's life-time, and his statement that he assented to his father's taking the deed back from the third person, were held to be competent evidence. *Brown v. Brown*, 1 Woodb. & M., 325.

§ 1791. Where evidence is offered to prove the admissions of the prisoner of the facts laid in the indictment, not to have the effect of a confession, but as a circumstance for the jury, the admission need not be in writing, or in the words of the prisoner. The witness may relate the conversation as he recollects it. If the conversation was in detached parts, relating to different subjects, he need only state what relates to the matter in issue. But if it was an unbroken chain, the whole must be given. *United States v. Wilson*, 1 Bald., 78.

§ 1792. In this case the city of Portland was held to have admitted that a strip of land between Front street and the Willamette river was private property, by adopting and recognizing, by its common council, a map in which this strip was not included in Front street, and by assessing the property and collecting taxes on it. *Lownsdale v. City of Portland*, Deady, 39.

§ 1793. Extorted confessions, or such as are not voluntary, should have no weight with the jury. But in an action on a fire policy, where the defense is that the property was burned by the plaintiffs, confessions of the plaintiffs, made from hope of personal benefit, unaccompanied by apprehensions of danger or duress, and not obtained by promises, are competent evidence to be weighed by the jury. *Scott v. Home Insurance Company*, 1 Dill., 105.

§ 1794. Declarations of a grantor at the time of executing a deed are admissible on the question whether the conveyance was made with fraudulent intent. *Wilcoxon v. Morgan*,* 2 Colo. Ty, 475.

§ 1795. An admission that a vessel was in a foreign port when supplies were furnished to her is an admission that there was an apparent necessity for the credit of the vessel, and this raises a presumption that a lien on the vessel was relied upon. *Steamboat Washington Irving*, 2 Ben., 323.

§ 1796. In a suit by seamen against the owners for their wages, the confessions of the master as to the contract of service are admissible in evidence, although not a part of the *res gestæ*, the master himself being personally liable for the wages. *The Enterprise*, 2 Curt., 317.

§ 1797. Where a fact is charged and put in issue in a bill in equity, the examination of witnesses to the confessions, conversations and admissions of the defendant are admissible to prove the fact, although such confessions, conversations and admissions are not expressly charged in the bill as evidence of such fact. *Smith v. Burnham*,* 2 Sumn., 612.

§ 1798. — not admissible.—Evidence of confessions, especially when it goes to the whole merits of the case, is open to much objection. *Smith v. Burnham*, 3 Sumn., 435.

§ 1799. Evidence made up of conversations and loose confessions is too indefinite and unreliable to authorize a court of equity to execute a contract, when sustained only by such. *Ibid.*

§ 1800. An admission against the government, made by a public officer in a letter not officially relating to the transaction, is not competent evidence. *Water's Case*,* 4 Ct. Cl., 389.

§ 1801. The admissions of one defendant are not evidence against his co-defendant. *Buckingham v. Burgess*, 3 McL., 549.

§ 1802. To affect a party by evidence that a statement was made in his presence, which he did not deny, the circumstances must be such as naturally called on him for a denial, if the statement was untrue. Otherwise it cannot be assumed that he acquiesced in the statement. And when a person, not a party, in a court of justice, hears a statement made by counsel to the court, he is not called upon to deny it, and would not be allowed to do so. *Carr v. Hilton*, 1 Curt., 390.

§ 1803. The opinion of an agent, based upon past occurrences, is never to be received as an admission of the principal, and this is doubly true when the agent was not a party to those occurrences. Thus, in an action upon an insurance policy, it cannot be proved that the agent of the company, after visiting the place of the death of the insured and examining into the liability of the company on the policy sued on, expressed his opinion to the witness that it would be best for the company to accept the situation and pay the amount of the policy. *Insurance Company v. Mahone*, 21 Wall., 152.

§ 1804. Admissions by an agent of a tanning firm, of the receipt of certain numbers of hides, are admissible evidence, although the receipts are not given on the arrival of each lot of hides, but after a considerable number have been received. *Barry v. Foyles*,* 1 Pet., 315.

§ 1805. In an action against an insolvent, which is defended by his assignees under the state insolvent law, his admissions made after the assignment of his property cannot affect his assignees. Especially is this reasonable where the insolvent is related to the other party, and charged with collusion with him to defeat his other creditors, and is therefore hostile to the course pursued by his assignees. *Whitmore v. Murdock*, 3 Woodb. & M., 380.

§ 1806. In an action by a guest against an inn-keeper for the loss of property placed in the coat-room, evidence that the boy in charge of the coat-room admitted that he stole the property cannot be received. *Elcox v. Hill*, 8 Otto, 218.

§ 1807. The assertion of a fact by a bankrupt's wife in his presence, and denied by him, cannot be given in evidence to impeach his testimony. *In re McCarthy*,* 5 Law Rep., 322.

§ 1808. In an action for the infringement of a patent, minutes of a company of which the plaintiffs are members may be read to prove that the plaintiffs were not the original inventors, and that the article was in use before the alleged invention. The minutes being read for this purpose, the plaintiffs cannot read other entries in the minute book, to show that the company at a subsequent time acknowledged the plaintiffs to be the original inventors, the defendant not being a member of that company. The minutes of other companies of which the plaintiffs are not members cannot be read by the defendant against them for any purpose. *Pennock v. Dialogue*, 4 Wash., 538.

§ 1809. Where there was a subscribing witness to a note and he was not produced, evidence of the confession of the defendant that the note was his was held inadmissible. *Smith v. Carolin*,* 1 Cr. C. C., 99.

§ 1810. There being a dispute concerning a seaman's claim to wages, an offer of the master to pay them is not an admission that they are due. *The Martha, Bl. & How.*, 151.

§ 1811. There is no instance of a decree being made in favor of a party seeking to redeem from a mortgage after the elapse of more than twenty years, upon the parol acknowledgments and verbal confessions of the mortgagee, within the twenty years, treating the conveyance as a mortgage. *Dexter v. Arnold*, 3 Sumn., 152.

§ 1812. — admissions in pleadings.— Allegations in pleading are admissions by the pleader, and need no proof unless denied and put in issue; and as against the pleader will always be taken as matter conceded. *Fashion v. Wards*, 6 McL., 152; *The Pacific and Brig Fashion, Newb.*, 8. See PLEADING.

§ 1813. The averment of citizenship, in order to support the jurisdiction of a federal court, need not be proved, unless it is denied in the plea or answer. *Hilliard v. Brevoort*, 4 McL., 24.

§ 1814. An allegation in the libel not denied in the answer is admitted, and no proof can be offered to contradict it. *The William Harris*, 1 Ware, 367.

§ 1815. Where an instrument sued on is admitted by the pleading of the opposite party, it may be read as it appears upon its face, without proof. *Benedict v. Maynard*, 6 McL., 21.

§ 1816. In an action for services rendered, where the plaintiff files his account as a part of his declaration, the whole account is to be received and read in evidence, that which makes for the plaintiff as well as that which makes for the defendant. *Bell v. Davis*, 3 Cr. C. C., 4.

§ 1817. Where a bill alleges that a deed bears a certain date, but not that it was delivered at that date, an admission of the allegation, by failure to deny it in the answer, does not preclude the respondent from proving that the deed was fraudulently antedated. *Holbrook v. Worcester Bank*, 2 Curt., 244.

§ 1818. The admission of facts by a demurrer cannot bind the party in another case where the same facts are in issue. *Auld v. Hepburn*, 1 Cr. C. C., 166.

§ 1819. Pleading to the merits is an admission of the corporate capacity of the plaintiffs. *Conard v. The Atlantic Insurance Co.*, 1 Pet., 386.

§ 1820. Pleading to the merits in an action by a corporation admits not only the competency of the corporation to sue, but to sue in the particular action which is brought. *Society for the Propagation, etc., v. Town of Pawlet*, 4 Pet., 480.

§ 1821. In debt upon a single bill, upon a plea of payment, the bill need not be produced in evidence; the plea admits its execution. *Turner v. White*, 4 Cr. C. C., 465.

§ 1822. It is held that, where the defendant in an action on a promissory note is required by law to deny his signature under oath, the failure to file such an affidavit is an admission of all the facts which appear upon the face of the note; and that, the note having been given to the plaintiffs as partners, the partnership need not be proved. *Pratt v. Willard*, 6 McL., 27.

§ 1823. A justification set up to a suit in admiralty for assault admits the fact of assault. *Treadwell v. Joseph*, 1 Sumn., 390.

§ 1824. In an action on a charter-party, alleging non-payment of a particular sum earned by the vessel at a particular time, a plea alleging generally that the defendant has paid all such sums of money as were to become due and payable from him according to the tenor and effect of the articles of agreement, does not confess the count, and relieve the plaintiff of the burden of proving the allegations of his declaration. *Simonton v. Winter*, 5 Pet., 141.

§ 1825. A mere statement by the defendant in an answer in chancery, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as can be received as evidence of the fact. *Brooks v. Byam*, 1 Story, 296.

§ 1826. An answer in equity denying an allegation in the bill must be taken as true unless contradicted by one witness and corroborating circumstances. *Higbie v. Hopkins*, 1 Wash., 230.

§ 1827. It is an established rule of evidence in equity that where an answer which is put in issue admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred. *Clements v. Moore*, 6 Wall., 299.

§ 1828. If a purchaser of real estate confess in his answer to a bill in equity against him, or in writing under his hand, that the money so laid out was the money of the person claiming the benefit of the purchase, it is sufficient evidence to establish a resulting trust. *Philips v. Crammond*, 2 Wash., 441.

§ 1829. The admissions of a bankrupt in an answer in chancery are evidence against him on the hearing of objections to his discharge. *In re —, a Bankrupt*,* 1 N. Y. Leg. Obs., 349.

§ 1830. **Declarations — In general.**— The declarations of a party given in evidence cannot be explained by what he said at a subsequent day respecting such declarations. *Blight v. Ashley*, Pet. C. C., 15. See § 1155.

§ 1831. A single declaration may be made in such a manner as to outweigh many others to the contrary by the same person as to the same fact. But if the many contrary declarations are associated with other proofs bearing upon the same point, derived from other sources, which are stronger than any proofs which can be connected with the single declaration, the many will outweigh the one. *Patterson v. Gaines*, 6 How., 550.

§ 1832. Declarations which would be admissible against the person making them to disprove his title are admissible against a person relying on the title of the person making the declarations. *Gaines v. Relf*,* 12 How., 472.

§ 1833. The declarations of a witness not under oath are not admissible against the witness' declarations on oath. *Harper v. Reily*,* 1 Cr. C. C., 100.

§ 1834. Statements made by one party to a fraud, though made in the absence of the other, are admissible in evidence against him, if they were part of the *res gestæ*, or were afterwards assented to by him. *Rea v. Missouri*,* 17 Wall., 544.

§ 1835. Confessions of the respondent put in evidence by the complainant may be used by either side. *Brown v. Brown*, 1 Woodb. & M., 325.

§ 1836. — **citizenship — Domicile.**— The treaty of Guadalupe Hidalgo having given Mexican citizens residing in the ceded territory the right either to retain the rights of Mexican citizens or acquire those of American citizens, and having declared that they should make this election within one year, and that those remaining after that time without declaring their intention to retain the character of Mexican citizens should be considered to have elected to become citizens of the United States, it was held that a Mexican citizen who by his continued residence and failure to declare his election had, according to the rules of evidence laid down by the treaty, become *prima facie* a citizen of the United States, might be shown to be a subject of Great Britain and not a citizen of the United States by his acts and declarations made *ante litem motam* and after the expiration of the year. *Tobin v. Walkinshaw*, 1 McAl., 186. See § 268. See, also, CITIZENS; COURTS; DOMICILE.

§ 1837. Declarations which are a part of the *res gestæ* are admissible in evidence to show the intention. And the instances are numerous where the declarations of a person made in changing a residence have been received as evidence of an intention to make the change permanent, and to rebut the presumption that it was made for temporary purposes. But the admission of such declarations is somewhat in the discretion of the court, and is subject to the rule that a person will not be allowed by his declarations to make a case for himself. Thus where the plaintiff, a resident of Illinois, came to Michigan and instituted a suit in a state court, which was removed to the federal court on account of the non-residence of the plaintiff, and the plaintiff thereupon submitted to a nonsuit, and instituted a new suit for the same cause in the state court, which was likewise removed to the federal court upon the petition of the defendant, the declarations of the plaintiff, made after her arrival in Michigan, as to her intention to become a citizen, were rejected as having been made with a design thereby to establish a new domicile, and thus enable herself to sue in the state court. *Doyle v. Clark*, 1 Flip., 536.

§ 1838. The declarations of a person in explanation of his overt acts may be received on the question of his domicile. *Prentiss v. Barton*, 1 Marsh., 389.

§ 1839. Declarations of an intention to change the domicile are of no weight when contradicted or rendered doubtful by a continuance of the original residence. *The Venus*, 8 Cr., 253.

§ 1840. Court below charged the jury that merely speaking of a place as *home*, without any act showing an intention to return to it, would amount to nothing as proof of domicile. But if acts and declarations concur, continued for many years, it is conclusive proof of the fact of domicile. Charge held correct. *Pennsylvania v. Ravenel*, 21 How., 103.

§ 1841. — **husband and wife.**—In an action by a husband and wife for alleged injuries to the wife received through the negligence of the defendant, the statements made by the wife, on the morning after the injury and on several successive days subsequent thereto, in regard to the state of her health and injuries, may be proved. The fact that the wife may be examined as a witness at the trial does not change the rule. *Sanders v. Reister*,* 1 Dak. T'y, 151.

§ 1842. The declarations of a husband that he had buried certain gold where his wife and her brother could find it, held insufficient to prove as against her that there was such hidden treasure within her power, or that, taking advantage of her knowledge, she took it into her possession. *Pulliam v. Pulliam*, 10 Fed. R., 23.

§ 1843. — **of ancestor, on a question of freedom.**—On a petition for freedom the declaration of the ancestor while held as a slave cannot be given in evidence to prove that the ancestor came from England. The declaration of a deceased person that the ancestor was free is evidence that she was in fact free, that is, not actually holden in slavery. *Queen v. Neale*, 2 Cr. C. C., 3. See § 1487.

§ 1844. — **marriage, and legitimacy of children.**—The declaration of a mother, who is still alive, is incompetent evidence on the question of the legitimacy of her issue. The declarations of the man supposed to be the father, if the child is illegitimate, are also inadmissible, when he is not proved to be dead. *Stegall v. Stegall*, 2 Marsh., 256. See §§ 936, 1505, 1510.

§ 1845. The declarations of a deceased husband that his wife's mother and father were not married to each other are admissible as evidence, in an action where the wife claims as heir of her father. *Jewell v. Jewell*, 1 How., 219.

§ 1846. The declarations of a father as to the maternity of his child are admissible and competent evidence; but the circumstances under which they were made, and the weight to be attached to them, are matters for the jury. *United States v. Sanders*, Hemp., 483.

§ 1847. Declarations of a decedent, contained in letters shown to have been written by him, are competent to show his marriage. *Kansas Pacific Railway Co. v. Miller*,* 2 Colo. T'y, 442.

§ 1848. Documents found among one's effects, setting forth his marriage and the birth of his children, although they purport to be copies from official registers, and there is no proof of their authenticity, are admissible as the party's declarations to prove the marriage and the legitimacy of the children. *Ibid.*

§ 1849. M., claiming to be the legitimate daughter of C., brought suit against his representatives to recover property claimed by her as his heir. They contended that her mother was the lawful wife of D. at the time she married C., and that her marriage was void. M. claimed that the marriage of her mother to D. was void, because D. had another wife living at the time. *Held*, that D.'s confession of bigamy was not admissible in evidence as against C.'s representatives. *Gaines v. Relf*,* 12 How., 472.

§ 1850. On the question of the legitimacy of persons claiming to be the heirs of a deceased, the declarations of a deceased member of the family are admissible. But, before the declarations can be admitted, the relationship of the declarant to the family must be established by other testimony. And the declarations of a person belonging to another family, and connected to the family in question only by the intermarriage of a member of each, are not so

admissible. The fact of the marriage of the parents of the persons claiming to be heirs of their father being the question, it is not sufficient to establish a relationship between the declarant and their mother. *Blackburn v. Crawfords*, 3 Wall., 175.

§ 1851. — **by assignor.**—The declarations and admissions of an assignor after he has parted with his interest in personal property are inadmissible either to show a want of title in him, or to affect the quality of the article, or to impair the right of the purchaser in any respect. So held with reference to the declarations of the patentee of an invention, after he had assigned his right, to the effect that the invention had been abandoned and was worthless. *Many v. Jagger*, 1 Blatch., 372.

§ 1852. — **of a bankrupt.**—In an action of trover by an assignee in bankruptcy against the bankrupt and another for the conversion of goods belonging to the estate, the declarations of the bankrupt are admissible in evidence against him. *Carr v. Gale*, 3 Woodb. & M., 38. See §§ 626, 830.

§ 1853. In a suit by an assignee in bankruptcy to recover of a creditor of the bankrupt a sum of money paid to him within four months before the commencement of the proceedings in bankruptcy, assuming that there was sufficient proof of a conspiracy between the bankrupt and the creditor to give the latter a fraudulent preference, to lay the foundation for the introduction of such evidence, the declarations of the bankrupt with regard to the transaction, made at and before the time of the payment, were held admissible in evidence against the defendant, although not made in his presence or brought to his knowledge. *Nudd v. Burrows*, 1 Otto, 426.

§ 1854. Declarations of a bankrupt as to the title to certain property were held admissible evidence in a suit between the assignee and a third person, as declarations made by the bankrupt while in conspiracy with such third person to conceal the property, and this transaction being relied on as part of the *res gestæ*. *In re Clark*, 9 Blatch., 379.

§ 1855. In an action by an assignee in bankruptcy against the bankrupt, and one, under whose name, according to the plaintiff's theory, property of the bankrupt has been placed, to defraud creditors, the schedule annexed to the petition in bankruptcy is not admissible to prove the property to be in the defendant in whose name it has been placed, since it is the mere declaration of the bankrupt, and therefore not admissible in his own favor, or in favor of the other defendant to disprove the fraud. *Carr v. Gale*, Dav., 328.

§ 1856. — **debtor and creditor — Fraud.**—In a suit by creditors to set aside a sale for fraud, the declarations of the vendor, made after the sale, are not competent evidence against the purchaser. *Clements v. Moore*, 6 Wall., 299. See §§ 244, 606, 1531.

§ 1857. The declarations of a debtor, as to the fraudulent character of his marriage contract, are not evidence against the other parties to the contract. *Magniac & Co. v. Thompson*, 1 Bald., 357.

§ 1858. In replevin for a slave taken by the defendant as marshal, by virtue of an execution against the mother of the plaintiff, the mother having executed a bill of sale of the slave to the plaintiff, and this bill of sale being charged to be in fraud of creditors, the declaration of the mother, made shortly before the execution of the bill of sale, to the effect that she would convey away all her property so that the creditor could not recover his debt, was received in evidence. *Bowie v. Hunter*, 4 Cr. C. C., 699.

§ 1859. — **parties to bills and notes.**—In an action by an indorsee of a note against the maker, the declarations of the payee, made after the date of the note and before he parted with it, may be proved by the defendant. And after the defendant has proved that such declarations were made after the date of the note and before suit brought, the burden is upon the plaintiff to show that the note was passed away by the payee before he made the declarations. Such declarations are admitted because the payee cannot be compelled to testify on account of his interest. *Commercial and Farmers' Bank of Baltimore v. Patterson*, 2 Cr. C. C., 346. See §§ 260, 565, 941, 1710.

§ 1860. Declarations made by the holder of a promissory note or chattel, while he held it, are not competent evidence in a suit upon it or in relation to it by a subsequent owner. *Dodge v. Freedman's Savings and Trust Co.*, 3 Otto, 379.

§ 1861. — **boundary — Deceased persons.**—In questions of private boundary, declarations of particular facts, as distinguished from reputation, made by deceased persons, are not admissible unless they were made by persons who, it is shown, had knowledge of what they spoke, and who were on hand, or in possession of it, when the declarations were made. To be evidence, they must have been made when the declarant was pointing out or marking the boundaries or discharging some duties relating thereto. *Hunnicut v. Peyton*, 12 Otto, 333.

§ 1862. It is not competent to prove the declaration of a chain carrier, since deceased, made long after the survey, as to the particular points of the survey. *Ellicott v. Pearl*, 1 McL., 206.

§ 1863. In examining any ancient historical fact of public interest, if unable to procure tes-

timony from living persons, the declarations of deceased persons, living about the time of the facts in question, will be received. *Fisher v. Carter*,* 1 Wall. Jr., 82.

§ 1864. The deposition in a previous suit, of a person since deceased, contained in a record from the general court of Maryland, was admitted as the declaration of a deceased person. *Negro Joice v. Alexander*, 1 Cr. C. C., 528.

§ 1865. In trespass *quare clausum*, the defendant having shown in evidence the declarations of one deceased on a question of boundary, in support of defendant's location, the plaintiff was allowed to show such person's declarations to the contrary. *Pancoast v. Barry*, 1 Cr. C. C., 176.

§ 1866. — **consignee.**— In a libel for the forfeiture of a vessel for removing timber from the public lands contrary to the act of March 2, 1831, the declarations of the consignee of the charterer are inadmissible to create a forfeiture, the master being charged by the libel with the commission of the unlawful act. *The Schooner Cherokee*,* 12 N. Y. Leg. Obs., 33.

§ 1867. — **parties to deeds.**— The declarations of a party to a deed or will, whether prior or subsequent to its execution, are nothing more than hearsay evidence, and cannot be received either to control the construction of the instrument, or to support or destroy its validity. *Stevens v. Vancleve*, 4 Wash., 262. See §§ 890, 1015, 1292, 1661.

§ 1868. The declarations of a grantor, impeaching his deed, are not competent evidence for that purpose. *Merrill v. Dawson*, Hemp., 563.

§ 1869. The statement of a grantor of land, made after the conveyance, is not admissible to invalidate his deed. *Steinbach v. Stewart*, 11 Wall., 563.

§ 1870. The acts and declarations of a grantor, subsequent to the making of the deed, are not evidence to prejudice the title of the grantee. But in a proceeding in equity to set aside the deed as fraudulent, they are admissible to disprove or discredit the answer of the grantor, and to this extent bear upon the whole merits of the case. *Venable v. Bank of the United States*, 2 Pet., 107.

§ 1871. In an ejectment suit, the declarations of the plaintiff's lessor that he had not authorized his name to be used, and that he had no claim upon or interest in the premises at the time, are not competent evidence to show the title to be out of him; and, if competent, would be too vague. *Wilkes v. Elliot*, 5 Cr. C. C., 611.

§ 1872. Stephen Jumel, the owner and possessor of a certain estate, conveyed a part of the lands to trustees for the separate use of his wife, and also gave her a power of attorney to manage his affairs, and sell all or any part of his real estate. His wife Eliza, acting under this power, made conveyances by which all his lands, except a certain tract, were transferred in fee to her adopted daughter, and also executed a power of appointment contained in the trust deed in favor of the adopted daughter. The plaintiff, claiming as heir of the said Eliza, brought an action of ejectment to recover all of the lands against the heirs of the adopted daughter. It was held that the declarations of the said Stephen, while residing on the tract which had not been conveyed, to the effect that his wife had sold all his property out of his hands, and that he had nothing to call his own, and that by a compromise settlement he was entitled to a living out of the estate, were admissible respecting the tract then occupied by him, as against his interest, and in harmony with the conveyances which he had made. *Bowen v. Chase*, 8 Otto, 254.

§ 1873. — **by parties in possession.**— The declarations of a party in possession of land are competent evidence, as against those claiming under him, to show the character of the possession of the person making them, and by what title he holds, but not to sustain or destroy record title. Such declarations are not admissible as against one who does not claim anything under the person making them, or to show the ownership or payment of notes secured by the land. *Dodge v. Freedman's Savings and Trust Co.*, 3 Otto, 379. See §§ 255, 1544.

§ 1874. If a person be found in possession of land, claiming it as his own, in fee, it is *prima facie* evidence of his ownership and seizin of the inheritance. But the presumption goes only to the extent of the interest claimed. If he does not claim a fee, there is no presumption that he has a fee. What is the quality and extent of the interest claimed must depend upon the collateral circumstances; and for this purpose the declarations of the party while in possession, equally with his acts, are good evidence. *Ricard v. Williams*, 7 Wheat., 59.

§ 1875. In an action of ejectment, possession accompanied by a claim of ownership in fee is *prima facie* evidence of such an estate. It is not possession alone, but that it is accompanied by a claim of fee, that gives this construction to the acts of the party. Hence his declarations are admitted to show the nature and extent of the interest claimed. *Jackson v. Porter*, 1 Paine, 457.

§ 1876. — **in forfeiture cases.**— In a proceeding against a distillery to enforce a forfeiture thereof, the statements and declarations of the lessee and occupant of the distillery, made voluntarily while under arrest and afterwards, may be admitted to show his fraudulent intent in

doing and omitting to do the acts assigned in the information as causes of forfeiture. *Dobbin's Distillery v. United States*, 6 Otto, 395. See § 763.

§ 1877. In a proceeding for the forfeiture of a vessel for violation of the coasting act of 1793, committed by the original owners, under whom the claimants hold as *bona fide* purchasers for a valuable consideration without notice, the declarations and admissions of the original owners are not admissible against the claimants unless they were a part of the *res gestæ*. *The Schooner Ruby*, 5 Mason, 534.

§ 1878. — **by parties to suits.**— The declarations of a party, made before the dispute arose, proving the existence of certain intentions in connection with certain acts, may be admissible in evidence. *Hovey v. Stevens*, 1 Woodb. & M., 290.

§ 1879. A party seeking in equity the specific execution of a contract for the exchange of lands cannot prove his contract by mere hearsay or evidence of declarations to mere strangers to the transaction in chance conversation, which the witness had no reason to recollect from interest in the subject-matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated. *Purcell v. Miner*, 4 Wall., 513.

§ 1880. Declarations made in the presence of a party to a suit, if of such a nature as to call for immediate denial, if false, and if not so denied, are admissible in evidence against him as admissions. *Turner v. Yates*, 16 How., 27 (§§ 62-68).

§ 1881. Where a party made an insurance in his own name for the benefit of another, his declarations are not admissible to prove the liability of such other person for the premium. *Millick v. Peterson*,* 2 Wash., 31.

§ 1882. In a suit for breach of contract, defendant was allowed to prove declarations made by the plaintiff after the date of the contract, for the purpose of mitigating the damages and to contradict the plaintiff's testimony. *Goldsborough v. Baker*, 3 Cr. C. C., 48.

§ 1883. In a suit to recover damages for the fraudulent sale of a mine, statements made to the defendants by third persons prior to the sale, as to the character and value of the mine, are admissible in their favor, the defendants' belief as to such character being an important issue. *The Emma Mining Co. v. Park*, 14 Blatch., 411.

§ 1884. Where a defendant had read in evidence for himself a letter written from a co-defendant to the plaintiff, it was held admissible for the plaintiff to discredit this by evidence of this co-defendant's written declarations. *Riggs v. Lindsay*, 7 Cr., 500.

§ 1885. In an action to recover damages against the defendants for fraudulently obtaining the property of the plaintiff, the declaration alleging that the fraud was a matter of pre-arrangement between them, the declarations of each, relating to the transactions under consideration, are evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of the common design to defraud the plaintiff. But not so if made after the consummation of the enterprise. *Lincoln v. Claffin*, 7 Wall., 132.

§ 1886. — **by partners.**— Until evidence is given sufficient to raise a *prima facie* presumption of partnership, the declarations of one of the alleged partners that the other is a partner are inadmissible. But after such evidence is given the declarations may be proved. *Pleasants v. Fant*, 22 Wall., 116. See §§ 597, 1339.

§ 1887. Statements made by a defendant whom it is sought to prove a partner of another defendant, to the effect that he is not a partner, are not admissible unless made in the presence of the plaintiff. If made in the plaintiff's presence, they may still be shown by the plaintiff to be untrue. Admissions made by the defendant that he is a partner are admissible against him whenever made. *Teller v. Patten*,* 20 How., 127.

§ 1888. In an action against one as a partner, where the proof of partnership consists of declarations made by the defendant to the effect that he is a partner, he cannot be held liable on that ground alone, but facts must be shown from which the jury may infer that the plaintiffs knew of those declarations. To rebut the evidence of the declarations, the defendant may show a contract made between himself and his alleged partners without the knowledge of the plaintiffs. *Benedict v. Davis*, 2 McL., 347.

§ 1889. Declarations of a partner made after the dissolution of the partnership do not bind his copartners, and are not evidence against them. *Thompson v. Bowman*, 6 Wall., 316.

§ 1890. Where one partner has purchased land and taken the title in his own name, his declarations and admissions are admissible to show that his copartner is a partner with him in the land. Joint possession by the two may also be shown for the same purpose. *Scruggs v. Russel*, 1 McCahon, 39.

§ 1891. In an action by an assignee in bankruptcy to recover money alleged to have been paid to a creditor as an unlawful preference, the plaintiff claimed that a partnership, of which the bankrupt was a member, was dissolved at a certain date, but the defendant claimed that it continued down to the close of the business in question, and that the transaction was not with the bankrupt alone, but with the firm. *Held*, that the defendant could not introduce the dec-

larations of those who had been partners of the bankrupt to prove this point. *Nudd v. Burrows*, 1 Otto, 426.

§ 1892. — **principal and agent.**— Declarations and letters of an agent are not admissible to prove a fact, because the agent himself should be called. But if the object is to prove what were the motives or inducements for a person to contract with the agent, the evidence is proper, not of the facts stated therein, but that such inducements and statements were made. *Blight v. Ashley*, Pet. C. C., 15. See §§ 411, 1279.

§ 1893. The acts and declarations of a person are not competent to prove his agency without previous evidence of his appointment as agent. *United States v. Boyd*, 5 How., 29.

§ 1894. In an action on a note signed by A. for B., to prove the agency the plaintiff introduced evidence that A. carried on a tan-yard for B., his father, the defendant. The declarations of A., made after the transaction, to show that the goods for which the note was given were furnished by the plaintiff for the tan-yard, were held to be inadmissible. *Davis v. Robb*, 2 Cr. C. C., 458.

§ 1895. The defendant, an indorser, in an action on a note, was the notary generally employed by the plaintiffs to demand payment of notes and give notice to the indorsers. His son being his deputy notary, the defendant's note was delivered to the deputy on the last day of grace for demand and notice. The declarations of the deputy at the time he returned the note to the plaintiffs, as to his giving notice to the defendant, were inadmissible. *Bank of Columbia v. Mackall*, 2 Cr. C. C., 631.

§ 1896. Where an agent is employed to lay out a town, and his plat is afterwards sanctioned by his principal, his declarations, made while laying out a certain street, that it should extend to low-water mark in the river along which it ran, and should be for the use of the citizens and the public forever, are admissible to prove a dedication of the land to that use, and the boundary of it. *Barclay v. Howell*, 6 Pet., 498.

§ 1897. — **sureties.**— The declarations of a surety on a bond, who is dead, are not admissible in an action against his co-surety for a breach of the bond by the principal, to fix upon the co-surety a separate liability. Nor is a statement by the deceased surety in writing admissible against the co-surety. *Very v. Watkins*, 23 How., 469.

§ 1898. In a suit against A., who became surety for money advanced to B., the acknowledgment of B. as to moneys received under the agreement was admitted in evidence. *Ingle v. Collard*,* 1 Cr. C. C., 134.

§ 1899. — **of testator.**— Where there is strong proof that a paper offered as a will is a forgery, and the issue is fraud and forgery, the declaration of the alleged testator, before and after the date of the alleged will, as to the dispositions he had made of his property, the evidence being offered as a circumstance tending to show that the testator was ignorant of any such will as the one set up, and that the dispositions contained therein are inconsistent with his often expressed intentions, may be admitted, though it is a dangerous kind of evidence, the effect of which is to be controlled by the instructions of the court. *Turner v. Hand*, 3 Wall. Jr., 88. See §§ 440, 1363.

§ 1900. It is no objection to the admission of a testamentary declaration made by a ship captain that it contradicts an invoice and bill of lading made and signed by him. *Blagg v. Phoenix Ins. Co.*,* 3 Wash., 5.

§ 1901. Declarations made or wishes expressed by a testator, at the time he made the will, are not admissible to determine whether he intended to include his daughters in the words "my children." *Weatherhead v. Baskerville*, 11 How., 329.

§ 1902. The testator and witnesses being dead, evidence of their signatures is competent. The testator's declaration that he made a certain codicil is competent as suppletory proof that he had made it and was acquainted with its contents. *Adams v. Norris*, 23 How., 353.

§ 1903. — **by vendor.**— Where a vendor of a slave took back a covenant from the vendee to set her free in twelve years, nothing being said as to the increase in the meantime, in a suit for children born of her while she was in possession of the vendee, it was decided that parol evidence of the declarations of the vendor that he had sold the slave for her full value as a slave for life; and that the vendee was to set her free, and that nothing was said by the vendor as to the increase during the twelve years, could not be given. *Scott v. Auld*, 3 Cr. C. C., 647. See §§ 1015, 1606, 1626, 1867.

§ 1904. — **declarations of a witness** cannot be given in evidence except in answer to evidence of other declarations of the witness inconsistent with what he had before sworn to. *Wright v. Deklyne*,*Pet. C. C., 199.

§ 1905. Previous declarations of a witness, consistent with his testimony on the stand, are not admissible except to oppose testimony of contradictory statements of his, given in evidence by the other side. *Ibid.*

§ 1906. — **by patentee.**— The declarations of a patentee, made after he has parted with his

interest under the patent, are not evidence against one claiming under him. *Wilson v. Simpson*, 9 How., 109. See PATENTS.

§ 1907. In a suit for the infringement of a patent, the question being as to the time the discovery was made, it was held to be competent to prove, on the part of the plaintiff, declarations made by him in a particular year relative to the discovery, in which he described the improvement then contemplated by him, not to prove that the plaintiff was the discoverer, but that he claimed to be at that time. *Evans v. Hettick*, 3 Wash., 408.

§ 1908. In an action for infringement of a patent, declarations by the patentee to a third person, bestowing upon him certain privileges, are not admissible for the defendant, either as proof of an assignment, for that must be in writing, or to show a license to make and use, for that is of force only as to the third person. *Baldwin v. Sibley*, 1 Cliff., 150.

§ 1909. — *trustee*.—The written declaration of a trustee, in a conveyance to a third person of property which had been previously conveyed to the trustee by his *cestui que trust*, cannot be used against the latter to determine the intent of both parties in making the original conveyance. *Waterman v. Wallace*, 13 Blatch., 128.

§ 1910. — *miscellaneous*.—In an action against a steam-tug for the loss of a boat in its tow, declarations of the master of the boat, made after the loss and after quitting the service of the owners of the boat, are inadmissible evidence against them. *Kenah v. The Tug John Markee*,* 3 Fed. R., 47.

§ 1911. In a suit for injuries received from the upsetting of a stage-coach, the declarations of a driver who preceded the one implicated, and who is himself not implicated in the case, to the effect that the stage was overloaded, cannot be received in evidence. *Maury v. Talmadge*, 2 McL., 157.

§ 1912. The declarations of a commissioner charged with the duty of making a judicial sale, that he was a member of the company which purchased the property at the sale, made after the sale and after the purchasers have acquired separate rights in the property, cannot be received to disparage their title. *Johns v. Slack*, 2 Hughes, 467.

§ 1913. In an action upon an open policy of insurance, a certificate made on oath by the supercargo, after his return, that he had sold the outward cargo belonging to the plaintiff and invested the proceeds in the return cargo, is not admissible to show the plaintiff's interest in the return cargo; nor can it be proved what the supercargo, now dead, said in his life-time upon this subject. A paper delivered by the defendants to the plaintiff, stating that they had received no proof of property except the declaration on oath of the supercargo, for which reason they refused to pay, does not make this declaration evidence. *Beale v. Pettit*, 1 Wash., 241.

§ 1914. In a libel for freight, where it is claimed that the goods were damaged on the voyage, the general declarations of the owners of the damaged goods, unaccompanied by any specific statements of disinterested persons, showing the nature and extent of the damage, are insufficient evidence, and will be rejected. *Eames v. Cavaroc*, Newb., 528.

§ 1915. The declarations of a surveyor, which contradict his official return, are not evidence; nor ought they to be received where he has no power to exercise a discretion as explanatory of his return, while he is still living, and may be examined as a witness. *Barclay v. Howell*, 6 Pet., 498.

§ 1916. Parol evidence of the declaration of an auctioneer is not admissible to vary the written terms of the sale; but when a farm is advertised to be sold, and is sold in lots, parol evidence is admissible of declarations of the auctioneer showing which lot was sold to a certain purchaser. *Wright v. Deklyne*,* Pet. C. C., 204.

§ 1917. In case for enticing a servant, the declarations of the servant are not admissible in evidence. *Milburne v. Byrne*, 1 Cr. C. C., 239.

§ 1918. *Conversations*.—Next to mere opinions, the testimony of conversations is a species of evidence least to be relied on. *Turner v. Hand*, 3 Wall. Jr., 88. See §§ 1111, 1155.

§ 1919. Where one party to a suit sends the other party to a third person for information relative to the facts of the case, he is bound by the answers of that person. If not, conversations between the other party to the suit and third persons are hearsay, and not admissible. *Allen v. Killinger*,* 8 Wall., 486.

§ 1920. In an action of debt to recover the value of certain cotton delivered by the plaintiff to the defendant to be ginned, which the defendant has refused to redeliver upon demand, a witness will not be allowed to state, at the question of the defendant, the whole conversation which took place at the time of the demand of the cotton, unless some confessions of the defendant made in the conversation have been introduced which make it important that all his conversation should be taken together. *Collins v. Johnson*, Hemp., 279.

§ 1921. A conversation by the indorser of a note with his indorsee, the holder, requesting the latter to pursue the maker, is not evidence of a waiver of demand and notice; but is evidence from which the jury may infer due demand and notice. *Riggs v. St. Clair*, 1 Cr. C. C., 606.

§ 1922. Testimony of casual conversations by the owner of land with acquaintances, expressing a willingness to convey certain property to the city for school purposes upon certain conditions and terms, which conveyance was never made, is not evidence of a dedication, or even of a proposal to convey. *Chapman v. School District No. 1, Deady*, 139.

§ 1923. In a suit in equity to set aside a conveyance of land for fraud, a conversation of the respondent, on a subject of kindred character, near the time of the transaction, and illustrating his intention, is competent evidence. *Warner v. Daniels*, 1 Woodb. & M., 90.

§ 1924. In an action for fraud in the sale of land to plaintiff and one W., plaintiff offered in evidence the deposition of W., stating, among other things, conversations which he had had with defendant in reference to purchasing prior to the agreement for the purchase by plaintiff and W. It appeared that defendant, at the time of the final agreement, knew that plaintiff had been informed of his prior conversations with W. Defendant objected to the reading of the deposition in reference to the prior conversations. *Held*, that it was admissible. *Crocker v. Lewis*,* 3 Sumn., 1.

§ 1925. Evidence of a conversation with the accused, at the time of his arrest, may be admitted without proof of corroborating circumstances. *United States v. Larkin*,* 4 Cr. C. C., 617.

§ 1926. On the separate trial of one prisoner on a joint indictment against three for murder, he cannot prove a conversation between the other two, when they were alone, inculcating themselves and exculpating him from participation in the crime. *United States v. Douglass*, 2 Blatch., 207.

VII. STATE LAWS AND RULES.

§ 1927. **Effect in federal courts.**—In actions at law the courts of the United States administer the rules of evidence as they are administered in the state courts. *Thompson v. Railroad Companies*, 6 Wall., 134.

§ 1928. It is competent for congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property; and, where congress has declared the rule, the state law is silent. *Connecticut Mut. Life Ins. Co. v. Schaefer*, 4 Otto, 457.

§ 1929. Viewed as a whole, the several acts of congress in relation to the competency of witnesses indicate an intent on the part of congress so to legislate that evidences of title to real estate, and the rules of decision in all controversies affecting rights of property, shall be the same in the federal courts as in the state courts of the same state and district. And the decisions of the supreme court throughout the period since its organization tend strongly to the same end. And therefore where, under that provision of the act of congress of March 3, 1865, that neither party shall be allowed to testify against the other in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, "unless required to testify thereto by the court," an application is made for an order allowing one of the parties to the suit to testify, such application will not be granted where the effect of granting it would be to adopt a rule of decision in the federal courts of the district different from that which the legislature of the state has prescribed for the government of the state courts in all similar cases. *Robinson v. Mandell*, 3 Cliff., 169.

§ 1930. The intention of the act of congress of July 16, 1862, was to remove the doubt as to whether, under the then existing legislation of congress, a state law rendering parties competent to testify had the effect to qualify them as such in the federal courts; and to require that the rules of decision in admitting and excluding evidence, not only in trials at common law, but also in equity and in admiralty, should be the same in the federal as in the state courts. But the immediate effect of the provision of the act of July 2, 1865, that no witness should be excluded in a civil action because he was a party to, or interested in, the issue tried, was to introduce diversity into the rules of decision in the federal courts, as compared with the rules prevailing in the state courts in the same district. *Ibid*.

§ 1931. The rules of evidence adopted by state tribunals furnish the proper rules for federal courts in those states, so far as they are not in conflict with the constitution, treaties or statutes of the United States. When a state publishes a book of land laws, and the supreme court of that state holds the book to be evidence of a grant, the federal court in that state will hold it also to be evidence. *Hinde v. Vattier*,* 5 Pet., 400.

§ 1932. Where, under the laws of the state, parties are competent witnesses and may be compelled to testify, the same rule applies under the judiciary act of July 6, 1862, and the acts of July 2, 1864, and March 3, 1865, in the federal courts sitting in that state. *Berry v. Fletcher*, 1 Dill., 66.

§ 1933. Under the judiciary act, the federal courts, in all civil cases at common law not within the exceptions stated in the act, are bound by the rules of evidence prescribed by the

laws of the state in which the court is held; and the rejection of a witness competent under the laws of the state is error. *Vance v. Campbell*, 1 Black, 427.

§ 1934. Under the act of congress of July 6, 1862, the competency of a witness in a suit in a federal court is determined by the law of the state in which the case is tried. By the law of Wisconsin in 1874, in a suit for damages for injury to the person, brought by a married woman, her deposition is admissible, though her husband is also joined as a nominal party to the suit. *Packet Company v. Clough*, 20 Wall., 537 (§§ 86-89).

§ 1935. If, under the state law, the wife is an incompetent witness for or against her husband, the act of congress of July 6, 1862, requires that the same rule shall apply in the United States courts when sitting in that state. *Lucas v. Brooks*, 18 Wall., 436.

§ 1936. Under the thirty-fourth section of the judiciary act of 1789, state laws of evidence are rules of decision in civil trials at common law in the courts of the United States. And the United States, when a party to such a suit, are bound by this act. *United States v. Dunham*,* 21 Law Rep., 591.

§ 1937. The thirty-fourth section of the judiciary act of 1789 embraces within its provisions those statutes of the several states which prescribe rules of evidence in civil cases in trials at common law. *Fowler v. Hecker*,* 4 Blatch., 426.

§ 1938. This rule is followed in all instances where the statutes of the state render evidence competent which would be inadmissible under the rules of the common law, whether the state statute be or be not enacted subsequently to the passage of the judiciary act. *Ibid.*

§ 1939. So, where a party to a suit is required to testify by the state law, a federal court will compel him to testify in a trial at common law. *Ibid.*

§ 1940. The rules of evidence prescribed by the laws of a state are, under the thirty-fourth section of the judiciary act, rules of decision for the United States courts while sitting within the limits of such state. Thus, if a party to the suit is a competent witness under the laws of the state, he is competent in the United States circuit court, notwithstanding a rule of the court to the contrary. *Ryan v. Bindley*, 1 Wall., 66.

§ 1941. The rules of evidence prescribed by the statutes of a state are always followed by the courts of the United States, when sitting in the state, in commercial as well as in other cases. Thus in an action on a promissory note, the protest and statement of notices certified under the notarial seal and verified by the affidavit of the notary, though not admissible on general principles of commercial law, may be admitted in the federal courts, if made evidence by a state statute. *Sims v. Hundley*, 6 How., 1.

§ 1942. The federal courts will follow the decisions of the state supreme court as to the admissibility in evidence of certified copies of deeds, without accounting for the absence of the originals, whether such decisions are in accord with what are deemed sound rules of interpretation or otherwise. *Wright v. Taylor*, 2 Dill., 23.

§ 1943. In this case, which was one for murder on the high seas, the court held that, under the act of congress of 1789, chapter 20, section 34, the laws of the state must govern the admissibility of the evidence. *United States v. Dow, Taney*, 34.

§ 1944. Congress has legislated on the subject of the examination, as a witness, of one party to an action at law in the federal courts, by the other, and the mode thus prescribed must be followed to the exclusion of that prescribed by state statute. *Easton v. Hodges*,* 7 Biss., 324.

§ 1945. Where there is a conflict between the act of congress and the law of the state as to competency of witnesses, the courts of the United States are bound to follow the act of congress. The fact that, while the case was pending in the state court, witnesses, competent by the act of congress, were held incompetent under the state law, does not preclude them from testifying in the case after its removal to the United States court. *King v. Worthington*, 14 Otto, 44.

§ 1946. A copy of an account current, certified by a notary public to be a true copy of the original, was offered in evidence by defendant, the plaintiff having failed to produce the original, after notice, and his counsel declaring he had not the same. The act of the assembly of Pennsylvania, making the certificate of notaries evidence, was cited in support of the admission of the copy. *Held*, that the federal court was not bound by the statutes of a state regulating the mode of proof; that a copy of an original might be produced, but it must be a sworn copy and not so certified. *Bell v. Davidson*,* 3 Wash., 328.

§ 1947. The law of Pennsylvania, passed in 1815, authorizing the acts of notaries public and other officers to be given in evidence, does not apply to, nor is obligatory upon, the circuit court of the United States. *Craig v. Brown*, 3 Wash., 503.

§ 1948. The act of Maryland of 1715, chapter 26, section 2, which prevents the owner of stolen goods from being a witness for the prosecution in an indictment for larceny in the county courts, does not apply in the circuit court for the District of Columbia. *United States v. Tarlton*, 4 Cr. C. C., 682.

§ 1949. The act of July 6, 1862, providing that "the laws of the state in which the court

shall be held shall be the rules of decision as to the competency of witnesses, in the courts of the United States, in trials at common law, in equity and in admiralty," does not apply to criminal cases. *United States v. Brown*, 1 Saw., 531.

§ 1950. The law by which the admissibility of evidence in criminal cases in the courts of the United States is determined is the law of the state as it was when the courts of the United States were established by the judiciary act of 1789. The thirty-fourth section of this act, declaring that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, has no application to the rules of evidence in criminal cases. And no state law made since 1789 can affect the rules of evidence in the United States courts in such cases. *United States v. Reid*, 12 How., 361.

§ 1951. Rules of evidence prescribed by state laws are inapplicable to suits in equity in the courts of the United States. *Russell v. Southard*, 12 How., 139.

§ 1952. Section 34 of the judiciary act of September 24, 1789, does not make a state statute, allowing interested witnesses to testify in suits at law and equity, applicable to a suit in equity in a federal court; and the rules of evidence in the courts of the United States, in equity and in criminal cases, are not affected by any state statute on the subject. *Segee v. Thomas*, 3 Blatch., 11.

§ 1953. Section 914, Revised Statutes of the United States, assimilating the practice in all except equity and admiralty cases to that of the various states, does not apply to the taking of depositions *de bene esse* under section 863, Revised Statutes of the United States. *United States v. Tilden*,* 10 Ben., 566.

VIII. CIRCUMSTANTIAL EVIDENCE.

§ 1954. In general.—In cases depending largely upon circumstantial evidence, a separate examination of the circumstantial facts is indispensable in order to ascertain whether the facts themselves are proved, but the final determination cannot be safely placed entirely on that examination. That is to be arrived at from the whole evidence given. So in a prosecution for engaging in the slave trade, the circumstances attending the fitting, equipping and loading of the vessel and of the voyage must be weighed in connection with the declarations of the master, which are admissible, and are regarded as direct evidence in such cases. *United States v. Bark Isla de Cuba*,* 2 Cliff., 295.

§ 1955. Circumstances must be of the most controlling and irresistible nature to justify an entire disregard of positive testimony. *United States v. Nine Packages of Linen*, 1 Paine, 129.

§ 1956. Whenever it becomes necessary to resort to circumstantial evidence, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. *United States v. Hartwell*, 3 Cliff., 221.

§ 1957. Great latitude is justly allowed by law to the admission of indirect or circumstantial evidence; and whenever the necessity for a resort to such evidence arises, either from the nature of the inquiry or the failure of direct proof, objections on the ground of irrelevancy are not favored. *Lawrence v. Dana*, 4 Cliff., 1.

§ 1958. Whenever necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry, or the failure of direct proof, objections to testimony, upon the ground that any particular circumstance is irrelevant or of an inconclusive nature and tendency, are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other or with the direct proofs in the case. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute positive proof. *United States v. Bark Isla de Cuba*,* 2 Cliff., 295.

§ 1959. Testimony, however positive, may be overcome by suspicious circumstances. *Nelson v. United States*, Pet. C. C., 235.

§ 1960. Circumstances may often be more convincing than positive evidence; and, in a revenue case, if inconsistent with the innocence of the accused, and arise out of his own conduct and are not explained by him, are sufficient to justify a condemnation though no positive testimony is offered. *The Robert Edwards*, 6 Wheat., 187.

§ 1961. In a proceeding for the condemnation of property under section 48 of the internal revenue act of June 30, 1864, as amended by section 9 of the act of July 13, 1866, the ground of condemnation being, that the claimants being distillers, the property mentioned in the information was found in their possession, custody, or control, or upon the distillery premises, for the purpose of being sold or removed by the claimants in fraud of the revenue laws, it was decided that in order to prove the intent, purpose and design of the claimants, on the 30th day of October, 1867, the day on which the seizure took place, evidence of fraudulent acts of

violation of the revenue laws by the claimants during the seven months preceding, in making false returns of the quantity of spirits manufactured and materials used, was admissible. It was further held that nearly all of the same property having been seized in September, 1857, for similar violations of the revenue laws, and an information filed for its forfeiture, the pendency of such information could have no bearing on the admissibility of this evidence. *United States v. Thirty-six Barrels of High Wines*, 7 Blatch., 469.

§ 1962. Fraud may be proved by circumstances, though it cannot be presumed. *Henckley v. Hendrickson*, 5 McL., 170.

§ 1963. Circumstantial evidence of fraud may be sufficient to outweigh positive evidence to the contrary. *United States v. Samperyac, Hemp.*, 118.

§ 1964. The fact that the grantor in a deed was forced into bankruptcy soon after the date of the deed, and the lands embraced in the deed were duly scheduled by him as assets and disposed of as such under the bankrupt law, may be considered by the jury as conducing to show that the deed was never delivered. *Buckley v. Carlton*,* 6 McL., 125.

§ 1965. In a suit on a promise to pay a certain bill when able, the ability of the defendant to pay need not be proved by positive evidence. It may be inferred from his apparent circumstances. *Lonsdale v. Brown*, 4 Wash., 86.

§ 1966. Circumstantial evidence to establish a contract of employment as master must go further than to show a case equally consistent with the supposition of temporary employment as with that of employment to go in command of the vessel. *Jones v. Davis, Abb. Adm.*, 450.

§ 1967. The purchaser of a wrecked vessel, in order to maintain his title under a master's sale, is not required to furnish direct and positive evidence of the honesty of the master's conduct and the necessity of the sale. Implied and presumptive proof may be sufficient. *The Schooner Lucinda Snow*,* 11 N. Y. Leg. Obs., 97.

§ 1968. Evidence to prove that an insurance company has waived the presentation of preliminary proofs of loss may be by circumstances as well as direct testimony. Among such circumstances is the fact the agent authorized to settle losses acted and spoke, after the time for presenting the proofs had gone by, as though they had been presented; that, while resisting the claim upon the company, he placed his objections upon other grounds, and never alluded to any failure to exhibit preliminary proofs until those other grounds were apparently swept away; and that, after making payment of a loss of certain property, and being notified that the policy would be retained in order to assert afterwards other claims upon it, he expressly waived another one of its conditions, for the purpose of giving the plaintiff a continuing right to bring a suit. *Home Ins. Co. v. Baltimore Warehouse Co.*, 3 Otto, 527.

§ 1969. Where an obligor in a bond has an election, it may be shown by circumstances that he has made his election. *Walton v. Coulson*, 1 McL., 120.

§ 1970. Where proof was invoked, under the thirty-third rule of the court in prize cases, from a case of a vessel condemned for attempting to violate the blockade, into a case where the charge was of similar character, and it appeared that the owners of both cargoes, or parts of both cargoes, were the same, that the agents were the same, and that there was a correspondence between the marks and numbers on the packages aboard each vessel, it was held to be a fair inference that the cargo in question had the same destination as the cargo condemned. *The Springbok*, Bl. Pr. Cas., 434.

§ 1971. Where a distillery and a rectifying establishment were situated close together, and means existed by which spirits could be run from one to the other, and there was some circumstantial evidence that this had been done, the motion to bond the distillery was denied, notwithstanding the affidavits of the proprietor and his men that it had not been done. *Quantity of Distilled Spirits*, 2 Ben., 101.

§ 1972. In criminal cases.—In order to convict on circumstantial evidence in a criminal case, the jury must find the circumstances to be clearly proved as facts, and must also find that those facts clearly and unequivocally imply the guilt of the prisoner, and cannot be reasonably reconciled with any hypothesis of his innocence. *United States v. Douglass*, 2 Blatch., 207. See § 1475.

§ 1973. Where the prosecution in a criminal case rely upon circumstantial evidence, the facts and circumstances must be proved in order to lay the basis for the presumption which is sought to be established. Each circumstance essential to the conclusion must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance. *United States v. Goldberg*, 7 Biss., 175.

§ 1974. In any case, more particularly in one that is capital, the circumstances relied upon to establish the guilt of the accused ought to be so strong as to leave no doubt of the fact; and they should be consistent with themselves, each circumstance tending to establish the guilt of the party. *United States v. Vanranst*,* 3 Wash., 146.

§ 1975. In criminal cases depending on circumstantial evidence, in order to justify a verdict

of guilty, the hypothesis of guilt must flow naturally from the facts proved and be consistent with them all. *United States v. Babcock*, 3 Dill., 621.

§ 1976. In criminal cases depending on circumstantial evidence, in order to justify a verdict of guilty, the evidence must be sufficient to exclude every reasonable hypothesis but that of the guilt of the accused. Not only must all the facts proved be consistent and point to his guilt, but they must be inconsistent with his innocence. If the evidence can be reconciled either with the theory of the innocence or guilt of the accused, the law requires the jury to give the accused the benefit of the doubt and adopt the former. *Ibid.*

§ 1977. To warrant a conviction on circumstantial evidence it must not only be consistent with the guilt of the accused, but it must be inconsistent with any other conclusion. *United States v. Butler*,* 1 Hughes, 457.

§ 1978. Circumstantial evidence, in order to convict by itself, must be so strong as to be inconsistent with innocence. *United States v. Lyman*, 5 McL., 513.

§ 1979. Circumstances may be sufficient to justify a conviction for any crime, but all circumstantial evidence is to be received with caution. *United States v. Martin*,* 2 McL., 256.

§ 1980. Circumstances, in order to produce conviction, must be established; they must be consistent with each other, and with the guilt of the defendant; and they must, to a moral certainty, exclude the idea of his innocence. *Ibid.*

§ 1981. The existence of a conspiracy may be established by indirect or circumstantial evidence. *United States v. Goldberg*, 7 Biss., 175.

§ 1982. Circumstantial evidence, to convict of conspiracy, must be so strong as to be inconsistent with the innocence of the accused. *United States v. Cole*, 5 McL., 513.

§ 1983. Circumstances without any witnesses, when they exist in documentary or written testimony, may combine to establish the charge of perjury without other proof than that of their authenticity. Written proofs, existing and within the knowledge of the defendant when the perjury was committed, especially if in the form of letters written by him, are thus sufficient to sustain the charge. (THOMPSON, J., dissenting.) *United States v. Wood*,* 14 Pet., 430.

§ 1984. On a trial for murder, where the discovery of the body after the crime is impossible, as where the murder was committed on the high seas, the fact of death may be proved by other means. It may be proved by direct evidence, or, when that does not exist, by cogent circumstances, provided they are sufficient to produce conviction on the mind of the jury and exclude every reasonable doubt. *United States v. Williams*,* 1 Cliff., 5.

§ 1985. Upon an indictment for counterfeiting bank notes, the intent to defraud the bank or some other person need not be proved by positive testimony. Circumstantial evidence is sufficient if it be such as to satisfy the jury. *United States v. Moses*, 4 Wash., 726.

§ 1986. The *scienter* may be shown by evidence that similar orders were found in the possession of another who was proved to be in collusion with the defendant for the purpose of passing the orders. *United States v. Hinman*, Bald., 292.

§ 1987. On a criminal trial, telegrams addressed to the defendant by name, care of executive mansion, Washington, were received in evidence without actual proof of receipt by him, it being proved that they were delivered to the door-keepers of the executive mansion, whose custom it was to deliver all telegrams to the person to whom they were addressed or place them upon his desk; the defendant being the president's private secretary, and having an office in the executive mansion. *United States v. Babcock*,* 3 Dill., 571.

§ 1988. Telegraph dispatches addressed to a defendant are admissible in evidence though not shown to have been answered by him; but in giving effect to such evidence the surrounding circumstances are to be considered by the jury. *Ibid.*

IX. HEARSAY AND GENERAL REPUTATION.

SUMMARY — *General rule and exceptions*, § 1989. — *Letters between third parties*, § 1990. — *Letters from the war accountant's office*, § 1991. — *Statements concerning similar causes of action*, § 1992. — *Reputation; as to private and public rights; surveys; boundaries*, §§ 1993-1995. — *Declarations as to pedigree*, §§ 1996-2000.

§ 1989. Hearsay evidence is incompetent to establish any fact which is in its nature susceptible of being proved by witnesses who speak from their own knowledge. Hearsay evidence not only supposes some better testimony which might be adduced in the particular case, but its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, exclude such testimony. Cases of pedigree, prescription, custom, boundary, and matters of general and public history, are exceptions to this rule. *Queen v. Hepburn*, §§ 2001-3.

§ 1990. A letter written by one who gives a deposition in a cause, to a third party, annexed to the deposition, but not sworn to be true in the deposition, is *res inter alios acta* as to the parties to the cause and cannot be admitted as evidence in the cause. *Dwyer v. Dunbar*, §§ 2004-7.

§ 1991. A letter from the war accountant's office, which is not authenticated as required by act of congress, so as to be admissible as an abstract of an account, is not admissible in evidence in a suit against the sureties on an official bond, though it purports to contain a statement of moneys due by the principal to the United States. *Pendleton v. United States*, §§ 2008-9.

§ 1992. Where the capacity in which a debt is contracted by the defendant is at issue, evidence of a statement by a third person, holding a similar claim, that such claim was settled by defendant in a certain capacity, is hearsay and inadmissible. *Young v. Godbe*, §§ 2010-12.

§ 1993. Hearsay as to private rights or specific facts relating thereto is inadmissible. Declarations of a deceased chain carrier, who accompanied the surveyor making the original survey, are inadmissible because mere hearsay, if made subsequent to the original survey, though made on the place in question while it is being resurveyed. In England no evidence of reputation as to private boundaries is admissible. In America, evidence of general reputation as to boundaries between contiguous private estates is admitted. *Ellicott v. Pearl*, §§ 2013-23.

§ 1994. To render evidence of general reputation or tradition admissible, it must relate to the exercise of a *public* right; it must not relate to specific facts, and it must be supported by acts of possession. *Ibid.*

§ 1995. A public survey is evidence as to things therein stated which are within the surveyor's official duty. Statements therein as to other facts are hearsay. *Ibid.*

§ 1996. Declarations as to pedigree, made after a controversy has arisen on the general subject of the title, but not on the specific point which the declarations are offered to prove, are admissible. *Elliott v. Peirsol*, §§ 2024-31.

§ 1997. Declarations relating to pedigree are inadmissible if made *post litem motam*, or after a question has arisen on the point which they are offered to prove. (English and American authorities largely reviewed by Baldwin, J., and the decision in *Bondereau v. Montgomery*, 4 Wash., 187, criticised.) *Hall's Deposition*, §§ 2232-40.

§ 1998. Depositions taken in a cause are not evidence in another case in which the parties are not the same, though some of them may be concerned in both cases. If, however, these declarations concern pedigree they may be admissible as declarations. The fact that such declarations were made *post litem motam* will not exclude them. *Bondereau v. Montgomery*, §§ 2041-45.

§ 1999. When, in depositions taken abroad to prove pedigree, the deponent states his information to be derived from *la notoriété publique*, it will be inferred that this notoriety was the tradition in the family, and admissible. *Dussert v. Roe*, §§ 2046-48.

§ 2000. Declarations regarding pedigree, made before any controversy arose, and made in order to prove a title in the land office in order to procure a warrant of survey, are admissible in evidence in a suit concerning that title afterwards; and the fact that these declarations are in the form of affidavits does not exclude them. *Hurst v. Jones*, §§ 2049-50.

[NOTES.— See §§ 2051-2089.]

QUEEN v. HEPBURN.

(7 Cranch, 290-299. 1813.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This was a suit instituted by the plaintiffs in the circuit court of the United States for the county of Washington, in which they claim freedom. On the trial of the issue, certain depositions were offered by the plaintiffs, which were rejected by the court, and exceptions were taken. The verdict and judgment being rendered for the defendants, the plaintiffs have brought the cause into this court by writ of error, and the case depends on the correctness of the several opinions given by the circuit court.

The first opinion of the court to which exception was taken was for the rejection of part of the deposition of Caleb Clarke, who deposed to a fact which he had heard his mother say she had frequently heard from her father. The second exception is to the opinion overruling part of the deposition of Freeders Ryland, which stated what he had heard Mary, the ancestor of the plaintiffs, say respecting her own place of birth and residence.

The fifth exception is substantially the same with the second. The question is somewhat varied in form, and the testimony given by the defendant, to which no exception was taken, is recited, and the hearsay evidence is then offered as historical; but the court perceives no difference, in law, between the second and fifth exceptions.

The sixth exception is taken to an instruction given by the court to the jury on the motion of the counsel for the defendants. The plaintiffs had read the deposition of Richard Disney, who deposed that he had heard a great deal of talk about Mary Queen, the ancestor of the plaintiffs, and has heard divers persons say that Captain Larkin brought her into this country, and that she had a great many fine clothes, and that old William Chapman took her on shore once, and that nobody would buy her for some time, until at last James Carroll bought her.

Whereupon the defendant's counsel moved the court to instruct the jury that if they find the existence of this report and noise was not stated by the witness from his knowledge, but from what had been communicated to him respecting the existence of such a report and noise many years after her importation, without its appearing by whom or in what manner the same was communicated to him, then the evidence is incompetent to prove either the existence of such report and noise or the truth of it; which instruction the court gave.

The plaintiffs also read the deposition of Thomas Warfield, who deposed that John Jiams, an inspector of tobacco, told him that Mary, the ancestor of the plaintiffs, was free, and was brought into this country by Captain Larkin, and was sold for seven years. The court instructed the jury that if they should be satisfied upon the evidence that these declarations of John Jiams were not derived from his own knowledge, but were founded on hearsay or report communicated to him many years after the importation and sale of the said Mary, without its appearing by whom or in what manner such communication was made to him, then his said declarations are not competent evidence in this cause. To these instructions the counsel for the plaintiffs excepted.

§ 2001. *Hearsay evidence is incompetent to establish any specific fact, which is in its nature susceptible of being proved by witnesses who speak from their own knowledge.*

These several opinions of the court depend on one general principle, the decision of which determines them all. It is this: That hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge.

However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the application of a rule of evidence to cases of this description which would be inapplicable to general cases in which a right to property may be asserted. The rule, then, which the court shall establish in this cause will not, in its application, be confined to cases of this particular description, but will be extended to others where rights may depend on facts which happened many years past.

It was very justly observed by a great judge, that "all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property, are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered

from their antiquity and the good sense in which they are founded." One of these rules is, that "hearsay" evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

§ 2002. *To the general rule of hearsay evidence, cases of pedigree, prescription, custom, boundary, and matters of public and general history are exceptions.*

To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact. It will be necessary only to examine the principles on which these exceptions are founded, to satisfy the judgment that the same principles will not justify the admission of hearsay evidence to prove a specific fact, because the eye-witnesses to that fact are dead. But if other cases standing on similar principles should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all.

If the circumstance that the eye-witnesses of any fact be dead should justify the introduction of testimony to establish that fact, from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained.

This subject was very ably discussed in the case of *The King against the Inhabitants of Eriswell*, 3 Term R., 707, where the question related to the fact that a pauper had gained a residence, a fact which it was contended might be proved by hearsay evidence. In that case the court was divided, but it was afterwards determined that the evidence was inadmissible. This court is of the same opinion.

The general rule comprehends the case, and the case is not within any exception heretofore recognized. This court is not inclined to extend the exceptions further than they have already been carried. There are other exceptions taken which appear on the record, but were not much relied upon in argument.

§ 2003. *After a juror is sworn no exception can be taken to him on account of his being an inhabitant of another county. What constitutes such bias as will render a juror incompetent.*

The third exception is to the qualification of one of the jurors. He was called as a talesman, and was stated to be an inhabitant of the county of Alexandria, not of Washington. The court decided that he was a proper juror, and he was sworn. After his being sworn the objection was made by the plaintiff's counsel, and an exception was taken to the opinion of the court. Whatever might have been the weight of this exception if taken in time, the court cannot sustain it now. The exception ought to have been made before the juror was sworn.

The fourth exception also applies to an opinion given by the circuit court, respecting the service of one of the persons summoned as a juror. James Reed, when called, was questioned, and appeared to have formed and expressed

no opinion on the particular case; but on being further questioned, he avowed his detestation of slavery to be such that, in a doubtful case, he would find a verdict for the plaintiffs; and that he had so expressed himself with regard to this very cause. He added, that if the testimony were equal, he should certainly find a verdict for the plaintiffs. The court then instructed the triers that he did not stand indifferent between the parties. To this instruction an exception was taken.

It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice. Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question, the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable. Yet they ought to be superior to every exception; they ought to stand perfectly indifferent between the parties; and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way; and therefore the court exercised a sound discretion in not permitting him to be sworn.

There is no error in the proceedings of the circuit court, and the judgment is affirmed.

MR. JUSTICE DUVALL dissented, holding that by the law of Maryland, on petitions for freedom, where the petitioner claims from an ancestor long dead, hearsay evidence is admissible if better cannot be procured.

DWYER v. DUNBAR.

(5 Wallace, 318-325. 1866.)

ERROR to U. S. District Court, Eastern District of Texas.

STATEMENT OF FACTS.—The defendant set up a compromise and composition with plaintiff, but wholly failed to prove it. The instruction referred to in the last part of the opinion was as follows:

“That if the jury find that the defendant executed and delivered the notes, and that he has not paid the same, they will find for the plaintiff.”

Opinion by MR. JUSTICE SWAYNE.

The suit was founded upon two promissory notes executed by Dwyer to George C. Dunbar, and by him indorsed to the defendant in error, who was the plaintiff in the court below. Dwyer, in that court, set up, as a defense to the action, that he had made a compromise and composition with his creditors, and that the plaintiff was a party to the arrangement and bound by it. The plaintiff denied that he was in anywise a party to the agreement.

The cause was tried by a jury and a verdict and judgment were rendered for the plaintiff. Upon the trial Dwyer took exceptions to the ruling out of certain testimony which he offered, and to the refusal of the court to give instructions which he submitted. A bill of exceptions was taken, setting forth these rulings, and they are relied upon in this court to reverse the judgment. We will consider them in the order in which they are presented in the record.

§ 2004. *A letter written to a third person, in which a certain transaction is described, and which was attached to a deposition but was not sworn to as true therein, is not admissible in evidence.*

1. The rejection of the letter of Smith. The letter, of itself, was clearly

not evidence. There being no proof of the truth of its contents, it was within the definition of *res inter alios acta*. It was simply a narrative to a third person of a past transaction, in relation to which the writer was a competent witness, and gave his deposition. All that he says upon the subject of the letter is as follows: "The letter of this affiant to Charles Russell was written in reply to said Russell, wishing to know the circumstances respecting the settlement made of the Dunbar claim by me. This affiant is not acquainted with J. S. Ray or his signature." The letter was properly excluded from going to the jury.

§ 2005. *A deposition proving the contents of a certain letter, which is neither produced nor its non-production accounted for, is secondary evidence, and inadmissible.*

2. The ruling out of Russell's deposition. This deposition was offered to prove the contents of the letter from Ray. The evidence was entirely secondary in its character. Without the excluded letter there was no foundation for its introduction. The ruling of the court was correct.

§ 2006. *A court is not bound to give instructions not warranted by the evidence, and having no practical application to the case.*

3. The instructions asked by the defendant below to be given to the jury were not called for by the facts of the case as disclosed in the evidence. Under the circumstances they were abstractions. They had no practical application and the court was not bound to give them.

§ 2007. *Where, in a suit upon promissory notes, the defendant pleads only a compromise and composition, and fails to prove it, an instruction, with others, "that if the jury find that the defendant executed and delivered the notes and has not paid them" they will find for defendant, is proper.*

The instruction given, which was complained of, was in conformity with the practice of the courts of the United States, when a clear case is made out by the plaintiff, and no defense, or only one clearly invalid, is shown by the defendant. The court below proceeded upon this principle, and, as the case is disclosed in the bill of exceptions, did not err in its application. The judgment below is affirmed, with costs.

PENDLETON v. UNITED STATES.

(Circuit Court for Virginia: 2 Marshall, 75-80. 1822.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a writ of error to a judgment of the district court obtained by the United States against the plaintiffs in error, for the sum of \$496.08, with interest from the 30th of September, 1808.

Philip Pendleton, the testator of the plaintiffs, had become bound to the United States as security for Michael M'Kewan and Daniel Hanagan, who were contractors to furnish rations to the troops in Virginia and Maryland, for the year 1802. This suit is brought for the balance of moneys unaccounted for, which was in their hands on the last day of December of that year. The breach assigned in the declaration is the non-payment of \$1,159.89, being the balance due from the said M'Kewan and Hanagan on the 31st day of December, 1802.

In support of this action, the attorney for the United States offered in evidence a certificate from the treasury department, certified by the comptroller on the 3d day of October, 1821, stating that, on a settlement of the accounts

of Michael M'Kewan and Daniel Hanagan, late contractors for supplying the troops stationed in Maryland and Virginia, they are chargeable —

To balance remaining in their hands for moneys advanced from the 22d of October, 1801, to the 6th of January, 1803, per report No. 15,129.....	\$1,159 89
The same paper contains the following credits —	
On the 30th of June, 1808	\$230
On the 30th of September.....	306
	536 00
Leaving due to the United States.....	\$623 89

This paper was objected to by the counsel for the defendants, and was rejected by the court, because it claimed a gross sum of \$1,159.89, for moneys advanced up to the 6th of January, 1803, to M'Kewan and Hanagan, whereas, the defendants were liable only for moneys advanced up to the last day of December, 1802.

The attorney for the United States then offered in evidence an affidavit made by the defendant, Philip Pendleton, December 1, 1818, for the purpose of obtaining a continuance, in which he states, among other things, that during the pendency of the suit, and prior to the year 1810, he, with the other security in the bond, caused sundry payments to be made to an amount about equal to the sum stated to be due, after deducting therefrom the sum of \$392.54, or thereabouts, which was obviously, he thinks, an unjust charge against the securities. The vouchers for these payments were placed in the hands of Mr. Williams, with other documents, a gentleman then practicing at this bar, who is since dead. After the death of Mr. Williams, a judgment was obtained, without any appearance for the defendant, for upwards of \$2,000, which, on his motion, was set aside, and a new trial granted. The affidavit then states that a search was made among the papers of Mr. Williams, which resulted, as he is informed, in finding a statement made by Mr. Hay, the then attorney for the United States, admitting the incorrectness of the charge as against the sureties, a certificate of the treasurer of the United States as to the payment of \$160, on or about the 31st day of October, 1803, and a letter from the affiant to Mr. Williams, dated the 20th of April, 1809, in which he says: "I send you two receipts and a letter, evidencing the payment of \$696 of the judgment." These papers, the affiant says, are, as he is informed, mislaid, and he prays a continuance for the purpose of endeavoring to replace them.

The attorney for the United States also offered to read a letter from William Simmons to Michael M'Kewan, in these words:

"DEPARTMENT OF WAR, ACCOUNTANT'S OFFICE, January 15, 1803.

"*Sir* — I have to acknowledge the receipt of yours of the 10th instant, with the papers, . . . of which have been admitted, and your accounts as contractor for the year 1801, and of yourself and Daniel Hanagan for the year 1802, finally closed, leaving a balance due to the United States in each, to wit:

From yourself, as contractor for Virginia for the year 1802.....	\$408 76
From yourself and D. H., as contractors for V. and M. for 1803.....	767 35
	\$1,176 11

For which you are to make immediate payment to the United States.

"WILLIAM SIMMONS."

The counsel for the defendant objected to the admission of this account from the treasury department, and of the letter from Mr. Simmons, which objection the court overruled, "being of opinion that the document from the treasury

department was capable of being explained to the satisfaction of the jury, by reference to the letter from William Simmons to Michael M'Kewan, which letter was found by the attorney for the United States this day, among the papers filed in this case in this court, and because, from inspection of the same, the court is satisfied that the same was probably brought into court many years ago, and has remained among the papers in this cause as being produced originally by the said Michael M'Kewan, an original party in the cause to whom the same is directed." To this opinion the counsel for the defendant excepted, and the judgment is now before this court on writ of error.

§ 2008. *A letter from the war department to a principal on a contractor's bond, not authenticated as provided by law, is not evidence against the sureties on the bond.*

The letter from Simmons to M'Kewan, not being authenticated in the form prescribed by the act of congress, derives no aid from that act, and the question concerning its admissibility is consequently dependent on general principles of law.

The record contains no evidence that Michael M'Kewan was ever a party to this cause. The declaration is against the executors of Philip Pendleton, deceased, who was one of the sureties of M'Kewan and Hanagan. I must presume, from the statement of the judge of the district court, that a suit was originally brought against all the parties to the bond, and that on the death of Philip Pendleton, one of the obligors, this suit was brought against his executors, and that this paper was found in the original suit.

It is not stated by the judge, nor does it in any manner appear, that a trial ever took place as against M'Kewan, that this paper was ever read in evidence, or that it was filed with the permission of the court. In what light, then, is this letter to be considered? I am by no means satisfied that it is not the paper of M'Kewan, which he would be at liberty to withdraw at his own pleasure, and would not be compellable to use. If seized by the attorney for the United States, he could not use it as evidence offered by M'Kewan, but as a letter addressed to and received by him. But, if I am wrong in this, still it only establishes the amount of the claim against M'Kewan and Hanagan, and does not show with sufficient precision that the sureties were liable for the whole of the claim. The documents show that, on the books of the treasury, the sums for which the sureties are not liable are blended with those for which they are liable, and that the whole is claimed from them. The account certified by the comptroller claims for moneys advanced to the contractors up to the 6th of January, 1803, without specifying the dates at which the several advances were made, or showing how much was advanced after the last day of December, 1802. The letter of the war accountant is dated after the 6th day of January, 1803, and states a balance to be due, varying from that contained in the account certified by the comptroller, but omits to state that it was wholly due for advances made on or prior to the last day of December, 1802. It is said that an inference may be fairly drawn from a comparison of these accounts, that the balance claimed in the letter of Mr. Simmons was due for advances for which the sureties are responsible. But inferences may be drawn either way, and this is not a case which ought to be left to uncertain inferences. The books of the treasury ought to show with precision and certainty the several periods at which the money was advanced, and an abstract from the books would be evidence in the cause. A court ought not to reason on a letter not explicit, and draw from it doubtful inferences, when the party

requiring this course has in his possession testimony which would dispel every doubt.

If the letter does not show, when accompanied by the account certified by the comptroller, that all the money it claims was advanced before the 1st of January, 1803, then no acquiescence in it by M'Kewan, no admission of its verity, implied or expressed, can affect the security. M'Kewan's admissions show only his own liability; but if that is more extensive than the liabilities of his securities, they cannot be affected by admissions which apply to the claim against him generally, without discriminating between those parts of it which affect the sureties, and those which do not. Upon these reasons, I am of opinion that the letter of Simmons does not explain, with the requisite clearness, the account certified by the comptroller, and ought not to have been admitted.

§ 2009. *On a writ of error, no notice will be taken of a fact not stated in the bill of exceptions.*

I am not unmindful of the allegation made by the attorney for the United States, that the papers which would explain this transaction are burnt and cannot be produced. But this fact is not stated in the bill of exceptions, and cannot be noticed. I can no more take it into consideration than I can the indorsement on the letter controverting the amount it claims, and, consequently, destroying every implication arising from its being considered the paper of M'Kewan. I must consider it as a paper, equivocal in itself, produced by a party in possession of testimony which is unequivocal. The judgment must be reversed.

YOUNG v. GODBE.

(15 Wallace, 562-566. 1872.)

ERROR to the Supreme Court of the Territory of Utah.

STATEMENT OF FACTS.—This was a suit by Godbe against Brigham Young as trustee in trust of the Church of Jesus Christ, etc., upon an account stated. Upon the question of the liability of defendant, *as trustee*, the testimony was conflicting; and the plaintiff in rebuttal introduced one Armstrong, who testified that a member of a firm, for which he was book-keeper, and which had a claim against the defendant of a like nature to the one here in suit, told him that such claim was settled by the trustee in trust, in a certain manner, and it also appeared so on the books of the firm. The testimony was admitted, and the court instructed the jury to consider it for what it was worth.

Opinion by MR. JUSTICE DAVIS.

The testimony of Armstrong, the book-keeper of Kimball & Lawrence, was objected to by the defendant for the reason that it was not in rebuttal, and therefore illegal, but the court overruled the objection and permitted the testimony to go to the jury for what it was worth.

§ 2010. *Where the capacity in which a debt or obligation was contracted by a defendant is at issue, evidence of a statement by a third person, holding a claim similarly contracted, that such claim was settled by defendant in a certain capacity, is hearsay and inadmissible, and it is error to admit it, even with an instruction to the jury to consider it for what it is worth.*

We are not prepared to say that Godbe could not rebut the case made by Young by showing that the affairs of the company were so connected with the church that, as one of the witnesses said, "he did not know the difference

between them." But the evidence on this subject should not have been the declaration by one person of what another said. The fact that Young had settled the account of Kimball & Lawrence in the way he did was proper evidence to go to the jury, if Lawrence had testified to it, but Armstrong's statement of what Lawrence told him was pure hearsay. Besides, the court on its own motion enlarged the scope of the evidence by directing the jury to consider it for what it was worth. This direction enabled the jury to take a wider range of the subject than they otherwise would, and naturally inclined them to consider the evidence as fixing the right of the plaintiff to recover from the defendant in the capacity in which he was sued. On account of the error in admitting the testimony of Armstrong, and in indicating the effect which the jury should give to it, the judgment will have to be reversed.

§ 2011. *Interest begins to run from the time a debt is due.*

But as the case goes back for a new trial, it is proper to say a word upon the subject of interest, which seems more than anything else to be the chief point of difference between the parties. We can see no objection to the charge of the court on this subject. If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment. And if the account be stated, as the evidence went to show was the case here, interest begins to run at once. 1 Am. Lead. Cases, 5th ed., pp. 626 and 514.

§ 2012. *Where no law exists concerning interest, a reasonable rate according to the custom of the community will be allowed by way of damages for unlawfully withholding payment of an overdue account.*

It is said there is no law in the territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable and conform to the custom which obtains in the community in dealings of this character. Judgment reversed and a *venire de novo* awarded.

ELLICOTT v. PEARL.

(10 Peters, 412-446. 1836.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error to the judgment of the circuit court for the district of Kentucky, upon a writ of right, sued forth on the 17th of January, 1831, in which the plaintiffs in error were the demandants. The proceedings are in the form prescribed by the statute of Kentucky, and the cause was tried upon the issue joined by the parties. There were several writs of right against other tenants of distinct parcels of the same tract of land, held by the tenants, respectively, under a common title; and all of them were tried at the same time, by consent of the parties, as the same evidence was applicable to each.

The demandants claimed title through intermediate conveyances to a tract of land of two thousand acres lying on the east fork of Rockcastle in Lincoln county, under a patent granted to James Kincaid, by the commonwealth of Kentucky, dated the 2d day of February, 1796; and also another tract of land, containing one thousand acres, on the waters of Rockcastle, on the south

side, and contiguous to that of two thousand, on a like patent, dated on the same day.

The tenants claimed title to the premises under a patent from the commonwealth of Virginia, to Jacob Remey, of twenty thousand acres of land, lying on the waters of Rockcastle, dated on the 15th of July, 1789. Remey, on the 20th of November, 1799, conveyed thirteen thousand four hundred acres of the same tract to William Edwards, and Edwards, on the 26th of December, 1799, conveyed seven thousand acres of the same tract, by metes and bounds, to William Pearl, the tenant, under whom all the other tenants claim. The conveyance to Pearl comprehends all the land in controversy, and the same land is also included in the patents to Kincaid.

At the trial evidence was introduced by the tenants to prove that, in 1800, Pearl entered into and settled on the tract of land so conveyed to him, intending to take possession of the whole tract; and that he, and those claiming under him, have had possession of the same land ever since, and have always claimed to hold the land under Remey's patent. Evidence was also introduced to prove that James M'Cammon (whose name is mentioned, as we shall hereafter see, in the bill of exceptions) moved his family and settled on a part of the land in controversy, either in the year 1800 or 1801, under a purchase from Pearl; but how much land he purchased or held did not appear, and about two years afterwards, by some arrangements between them, M'Cammon took some other part of Pearl's land, in the same tract, and Pearl took the place where M'Cammon had settled. Pearl's original settlement was a little outside of the southern bounds of Kincaid's thousand-acre tract, between Sugar Camp Branch and Rockcastle, and M'Cammon's original settlement was within Kincaid's two thousand acres south of Moore's creek.

The demandants then introduced evidence to show that Remey's patent did not cover the lands patented to Kincaid, but that it covered land at or near the mouth of Pond creek; and that the survey of Remey was, in fact, made on Pond creek (which was outside of the western boundary of Kincaid's patent) as the beginning corner, under a mistake that it was Raccoon creek. If so made, it was clear from the plea that Remey's survey was surveyed off the land in controversy.

The foregoing are all the portions of the evidence which seem necessary to be stated in order fully to understand the bearing of the questions made at the trial.

§ 2013. *Hearsay evidence, inadmissible.*

The first question was upon the admissibility of the evidence of witnesses, offered by the demandants to prove that one Moore, whose name was put down as one of the original chain-carriers, in making Remey's survey, was dead; and that he attended with the witness, Camp Mullins, about twenty-four or twenty-five years ago, when one Charles Smith run from the mouth of Pond creek to the White Oak Tree, and also run the line north from the mouth of Pond creek; and while at the corner and running the line, he declared that to be the corner made by Kincaid (the surveyor), and the line run by Wilson, by the direction of Kincaid, for Remey's original survey; and also to prove what Moore had said to others relative to the boundary of Remey's original patent, and the making of the original survey, since the settlement and possession of Pearl on the land in controversy. This evidence being objected to, was rejected by the court, and this constitutes the matter of the first exception of the demandants.

We are of opinion that the evidence was properly rejected. It was not merely hearsay, but hearsay not to matters of general reputation, or common interest among many, but to specific facts, namely, the manner and place of running the boundary lines of Remey's patent. The general rule is, that evidence, to be admissible, should be given under the sanction of an oath, legally administered; and in a judicial proceeding, depending between the parties affected by it, or those who stand in privity of estate or interest with them. So it was laid down by Lord Kenyon, in his able opinion in *The King v. Eriswell*, 3 Term R., 721. Certain exceptions have, however, been allowed, which perhaps may be as old as the rule itself. But these exceptions stand upon peculiar grounds, and, as was remarked by Lord Ellenborough, in *Weeks v. Sparke*, 1 M. & Selw., 686, the admission of hearsay evidence, upon all occasions, whether in matters of public or private right, is somewhat of an anomaly.

§ 2014. *Exceptions to rule as to hearsay. Pedigree. Prescriptive rights and customs. Cases of a quasi public nature.*

Hearsay is admitted in cases of pedigree, or prescriptive rights and customs; and some other cases of a public or *quasi* public nature. In cases of pedigree, it is admitted upon the ground of necessity, or the great difficulty, and sometimes the impossibility, of proving remote facts of this sort by living witnesses. But in these cases it is only admitted when the tradition comes from persons intimately connected, or in close relation with the family, or from sources of a kindred nature, which, in a general sense, may be said to import verity, there being no *lis mota*, or other interest, to affect the credit of their statement. So the law was expounded by Lord Kenyon in *The King v. Eriswell*, 3 Term R., 723, and by Lord Eldon in *Vowles v. Young*, 13 Ves., 143, and in *Whitlock v. Baker*, 13 Ves., 514.

In cases of prescriptive rights and customs, and other claims of a public nature, tradition and reputation have been in like manner admitted. They are all cases of a general right, affecting a number of persons, having a common interest. In *Morehead v. Wood*, 14 East, 329 (note), Lord Kenyon stated the general ground of this exception thus: "Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information." "But," he says, "how can this apply to private titles, either with regard to particular customs or private prescriptions? How is it possible for strangers to know anything that concerns only their private titles?" Lord Ellenborough, in *Weeks v. Sparke*, 1 M. & Selw., 686, commenting on this distinction between public and private rights, said: "I confess myself at a loss fully to understand upon what principle, even in matters of public right, reputation was ever deemed admissible evidence. It is said, indeed, that upon questions of public right all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights. But I must confess I have not been able to see the force of the principle on which that distinction is founded so clearly as others have done; though I must admit its existence." And in that case, which was the case of the claim of a prescriptive right to common by the defendants, as appurtenant to a messuage, evidence of reputation was admitted on the part of the plaintiff to qualify that right, because the right, in some sense, partook of the nature of a public right, as it was understood that there were other persons standing in *pari jure*

with the defendant; and, therefore, it was a question between the plaintiff, and a multitude of persons.

§ 2015. *Hearsay not admissible as to private rights, but admissible as to public rights.*

And, indeed, the distinction seems now clearly established in England, that hearsay, or reputation, or tradition, is not admissible in cases of mere private rights, but only in case of public rights, or those *quasi publici*, involving similar interests by a number of persons. See *Morehead v. Wood*, 13 East, 327, note 329; 1 Phillips on Evid., ch. 7, sec. 7 (third ed.), p. 190; 1 Stark. Ev., 32 (second London ed.); *Doe v. Thomas*, 14 East, 323; *Freeman v. Phillips*, 4 M. & Selw., 491. Perhaps a reason may be found which, upon general principles, would well support this distinction. It is that, in regard to private rights, the acts, possession, and assertion of title by the parties claiming for themselves are, in all cases, susceptible of direct proof; but in cases of public rights, the acts, possession, and assertion of title by many persons, not in privity with each other, cannot be explained or qualified to be in furtherance of a common public right, unless the evidence of general reputation were admissible to explain the intention and objects of the parties in those acts, or that possession or assertion of title; that is to say, whether done in furtherance of a common right, or of a private right.

It is upon the ground of this same distinction that general reputation is admitted in England, in cases of disputed boundaries between parishes and manors, because the right affects many persons, and is of public notoriety and interest as to all the inhabitants of the parish or manor. *Nichols v. Parker*, cited 14 East, 331, note; *Plaxton v. Dare*, 10 B. & Cres., 17. And yet, in England, it has been held, at *nisi prius* (though the point has not been settled by the highest authority), that general reputation as to the boundaries between private estates is not admissible evidence. That was so held by Baron Graham, in *Clothier v. Chapman*, cited in 14 East, 331, note. See also 1 Stark. Ev., pp. 33, 34, second London ed.; Phillips on Ev., ch. 7, § 7, pp. 189, 190, third ed. But see *Barnes v. Mawson*, 1 M. & Selw., 77, 81. The doctrine in America, in respect to boundaries, has gone further; and has admitted evidence of general reputation as to boundaries between contiguous private estates, but there it has stopped. See *Caufman v. Presbyterian Congregation*, 6 Binn., 59; *Conn v. Penn*, 1 Pet. C. Rep., 496, 511, 512. See, also, *The King v. Eriswell*, 3 Term R., 719.

§ 2016. *Grounds upon which hearsay evidence is excluded.*

These are the principal, if not the only, classes of cases in which hearsay and reputation have been deemed admissible evidence. The exclusion of it, in other cases, stands upon the general consideration that it is not upon oath; that the party affected by it has no opportunity of cross-examination; that it often supposes better evidence behind; that it is peculiarly liable to be obtained by fraudulent contrivances; and, above all, that it is exceedingly infirm, unsatisfactory, and intrinsically weak in its very nature and character. On these accounts, judges in modern times have leaned against any extension of it, as being subversive of the security of the titles of parties to property; for upon a strict adherence to the rules of evidence that security must essentially depend. This will be clearly seen by what fell from the court in *The King v. Eriswell*, 3 Term R., 707. In that case, Mr. Justice Buller, though in favor of the admission of the evidence upon the ground of authority, said: "The true line for courts to adhere to is, wherever evidence, not on oath, has been repeatedly

received and sanctioned by judicial determinations, it shall be allowed; but, beyond that, the rule that no evidence shall be admitted but what is upon oath shall be observed." The doctrine of the other judges, on that occasion, went to the same extent. In *Doe v. Thomas*, 14 East, 323, the court held, evidence of reputation that the land had belonged to J. S., and was purchased of him by the first testator, though coupled with corroborative parol evidence that the same had belonged to J. S., was inadmissible, upon the ground that reputation was not admissible to prove the ownership of private property. See *Blackett v. Lowes*, 2 M. & Selw., 494. And Mr. Chief Justice Mansfield, in delivering his opinion in the case of *The Berkeley Peerage*, 4 Camp., 414, 415, after stating that, by the general rule of law, nothing said by any person can be used as evidence between contending parties, unless it is delivered on oath, in the presence of those parties, said, "With two exceptions this is adhered to in all civil cases; first, on the trial of rights of common and other rights claimed by prescription; and, secondly, on questions of pedigree." Perhaps this enumeration will, upon close examination, be found too narrow; but it shows the strictness with which the exception in favor of hearsay, tradition, and reputation, is constantly construed as being against the general principles of evidence.

In this court, a like restricted doctrine has been maintained. In *Queen v. Hepburn*, 7 Cranch, 290 (§§ 2001-3, *supra*), Mr. Chief Justice Marshall, in delivering the opinion of the court, said: "If other cases (of hearsay), standing on similar principles, should arise, it may well be doubted, whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule; the value of which is felt and acknowledged by all."

§ 2017. *Reputation as to public rights must be supported by acts of enjoyment, and must not be declarations as to particular facts.*

These, and other cases also, fully justify the conclusion (which is indeed stated by elementary writers) that, in order to authorize the admission of hearsay evidence (except in cases of pedigree), three things must generally concur; first, that the fact to which the reputation or tradition applies must be of a public nature; secondly, if the reputation or tradition relate to the exercise of a right or privilege, it must be supported by acts of enjoyment or privilege within the period of living memory; thirdly, that it must not be reputation or traditionary declarations to a particular fact. See 1 Starkie's Evidence, 32, 35, second London edition; 1 Phillips on Ev., ch. 7, § 7, pp. 178, 192; *Morewood v. Wood*, 14 East, 327, note.

This last qualification is most important in the present case, as it applies directly to it, and is established by clear and decisive authority. In *Autram v. Morewood*, 5 Term R., 123, Lord Kenyon said: "Although a general right may be proved by traditionary evidence, yet a particular fact cannot;" and Mr. Justice Groce (the only other judge then in court) concurred in that opinion. That was a case where hearsay evidence was offered to establish the identity of lands, and thereby a right to the coals in them; and it was held inadmissible. The same doctrine was recognized by Lord Ellenborough, in *Weeks v. Sparke*, 1 M. & Selw., 687; where, referring to evidence of perambulations, he admitted that they were not evidence of a particular act done, as that such a turf was dug, or such a post put down in a particular spot. So Mr. Chief Justice Mansfield, in his opinion on *The Berkeley Peerage Case*, 4 Camp., 415, after alluding to the evidence of what dead men have said, as to

the reputation of a right of way, common and the like, said: "A declaration with regard to a particular fact which would support or negative the right is inadmissible." Even in cases nearly approaching to those of pedigree, where hearsay is admissible of particular facts, such as marriages, births and deaths, and their respective times, it has been held that hearsay as to the place of birth is not admissible; for it turns upon a single fact, that of locality, and that ought to be proved by the ordinary course of evidence. *Rex v. Erith*, 8 East, 539. In *Queen v. Hepburn*, 7 Cranch, 290 (§§ 2001-3, *supra*), the court decided that hearsay evidence was not admissible to prove a specific fact, although the witnesses to the fact were dead; and, therefore, evidence of hearsay that the ancestor of a person, suing for freedom, was free, was held inadmissible. The same point was again decided in *Davis v. Wood*, 1 Wheat., 6; 3 Cond. Rep., 465.

Upon these doctrines and authorities, we are of opinion that the evidence in the present exception stated was rightly rejected. It was evidence not to general reputation as to boundary, but to particular facts and circumstances attendant upon the original making of Remey's survey.

§ 2018. *Evidence of a witness' previous declarations is inadmissible to confirm his testimony.*

The next exception is founded upon the refusal of the court to permit testimony to be given of the declarations of one Kincaid (the surveyor of Remey's survey) under the following circumstances: Kincaid had been examined as a witness for the demandants (by way of deposition), and the tenants, thereupon, gave in evidence the conversations and declarations of Kincaid, to certain witnesses, in order to discredit his (Kincaid's) testimony, and to show that he had stated that the survey was made by him at the mouth of Raccoon creek, for Remey, when it was his interest to place it at Pond creek. The demandants then, with a view to sustain Kincaid, and to support the statements going to his interest, offered witnesses to prove the statements and conversations of Kincaid at other times, corresponding with the statements made in his deposition, relative to his making the surveys of Thompson and Remey; and it being suggested by the demandants, upon an inquiry from the court, that these statements and conversations were subsequent to those testified to by the tenants' witnesses, the court, upon an objection taken by the tenants, excluded the evidence. In our opinion, the evidence was rightly excluded.

§ 2019. — *except where the testimony is assailed as a fabrication of recent date, or a complaint recently made.*

Where witness proof has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time, we are of opinion that, in general, evidence is not admissible, in order to confirm his testimony, to prove that at other times he has given the same account as he has under oath; for it is but his mere declaration of the fact, and that is not evidence. His testimony under oath is better evidence than his confirmatory declarations not under oath; and the repetition of his assertions does not carry his credibility further, if so far as his oath. We say in general, because there are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case; as where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.

It is true that in *Lutterel v. Reynell*, 1 Mod., 282, it was held that, though

hearsay be not allowed as direct evidence, yet it may be admitted in corroboration of a witness' testimony to show that he affirmed the same thing upon other occasions, and that he is still constant to himself. Lord Chief Baron Gilbert has asserted the same opinion in his *Treatise on Evidence*, p. 135. But Mr. Justice Buller, in his *Nisi Prius Treatise*, p. 294, says: "But clearly it is not evidence in chief; and it seems doubtful whether it is so in reply or not." The same question came before the house of lords, in *The Berkeley Peerage Case*, 4 Camp., 401; and it was there said by Lord Redesdale, that he had always understood that, for the purpose of impugning the testimony of a witness, his declarations at another time might be inquired into; but not for the purpose of confirming his evidence. Lord Eldon expressed his decided opinion that this was the true rule to be observed by the counsel in the cause. Cited in 1 Phillips on Ev., ch. 8, p. 213, note [230, note]; 1 Starkie's Ev., 187, second London edition, and note *n*. Lord Chief Justice Eyre is also represented to have rejected such evidence, when offered on behalf of the defendant in a prosecution for forgery. Cited in 1 Phillips on Ev., ch. 8, page 213, note [230, note]; 1 Starkie's Ev., 187, second London edition, and note *n*. We think this is not only the better, but the true opinion, and well founded on the general principles of evidence. There is this additional objection to the admission of the confirmatory evidence in the present case, that it is of subsequent declarations; which would enable the witness at any time to control the effect of the former declarations, which he was conscious that he had made, and which he might now have a motive to qualify or weaken or destroy.

§ 2020. *A party cannot impeach his own witness.*

In the further progress of the cause, the tenants, in order to prove the boundaries of the demandants' land, as laid down in the plat, and claimed by them, gave in evidence the original plats and certificates of survey of Kincaid's two thousand and one thousand acre tracts; and then examined M'Neal, a witness of the demandants, who was first introduced to prove their boundary, who stated that the water-courses, as found on the ground, did not correspond with those represented on the said plats; and after being examined by the demandants, for the purpose of proving that the marks on the trees, claimed by them as the corner and lines of their surveys, were as ancient as the said surveys, and also as to the position and otherwise of the lines and corners claimed by them and represented on the plat made and used at the trial, stated, on the cross-examination of the tenants' counsel, that some of the lines, marked to suit the call of the said surveys, appeared to be younger, and others, from their appearance, might be as old as the date of the said plats. The demandants, to counteract this evidence, and to sustain their claim, offered in evidence a survey, made out by M'Neal, in an action of ejectment formerly depending between the same parties for the same land, of which survey Pearl had due notice. The tenants objected to the reading of the explanatory report accompanying this survey, and the court refused to allow so much thereof as stated the appearance as to age and otherwise of the lines and corners to go in evidence to the jury; and accordingly caused to be erased from the plat the words following, namely, "ancient" (chops); "John Forbes, Jr., states he cut the same letters and figures;" "on the east side the chops appear to have been marked with a larger ax than the chops on the beginning tree;" and then permitted the residue of the report and plat to go in evidence. This constitutes the third exception of the demandants.

We are of opinion that there was no error in this refusal of the court.

Strictly speaking, the demandants had no right, upon the principles already stated, to give in evidence any other prior statements of M'Neal to confirm his testimony. But in truth the evidence was offered to discredit, in part, his present testimony; and certainly the demandants were not at liberty to discredit their own witness by showing his former declarations on the same subject, though they might show by other witnesses that he was mistaken. But, independent of these objections, the evidence was inadmissible upon general principles. It was mere hearsay.

§ 2021. *A public survey is evidence as to things within the surveyor's official duty. Statements therein of other facts are hearsay.*

The survey, made by a surveyor, being under oath, is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plat the lines, corners, trees and other objects on the ground, and to subjoin such remarks as may explain them; but in all other respects, and as to all other facts, he stands, like any other witness, to be examined on oath in the presence of the parties, and subject to cross-examination. The reason why a survey, made by a public surveyor in discharge of his public duties, is admitted as evidence in suits between other parties, is not that it is hearsay, but that the act is officially done under oath, and in discharge of his duties to the government and the public. But it has never been supposed that if in such a survey the surveyor should go on to state collateral facts, or declarations of the parties, or other matters not within the scope of his proper official functions, he could thereby make them evidence as between third persons.

§ 2022. *Statute of limitations. Adverse possession, actual and constructive.*

In the further progress of the trial, the demandants, after the evidence was closed on both sides, moved the court to instruct the jury that if they believed from the evidence that the survey of Remey and the adjoining survey of Thompson were, in point of fact, made at the mouth of Pond creek, by beginning at or near the letter L, on the plat, that the law locates the patent on the ground where it was actually surveyed, notwithstanding the call or reference on the said patents, or either of them, to [for] the mouth of Raccoon creek; and if they found that the patent of Remey, as surveyed, does not interfere with the claim of the demandants, that they ought to find for the demandants, unless they find that the defendants have had possession, by an actual residence or fence, within the patent of the demandants, thirty years or more before the bringing of these [suits]. The court refused to give this instruction, as moved; but gave the instruction as moved after substituting for the word "fence" the words "improvements with the intention of taking possession." To which refusal the demandants excepted.

It is wholly unnecessary for us to consider whether the instruction, as given, is maintainable in point of law or not; and the only question is, whether the refusal to give it as prayed for was incorrect. But this resolves itself into the point, whether it is absolutely necessary to constitute a possession of land, sufficient to bar an adverse title thereto under the statute of limitations limiting writs of right to thirty years, that there should be an actual residence or fence by the party claiming the benefit of the statute; that is, an actual residence on the land, or a *pedis possessio* of it by an inclosure. The argument in support of the instruction as prayed assumes that there can be no possession to defeat an adverse title, except in one or other of these ways; that is, by an actual residence or an actual inclosure; a doctrine wholly irreconcilable with

principle and authority. Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts which are equally evincive of such an intention of asserting such ownership and possession; such as entering upon land and making improvements thereon; raising a crop of corn; felling and selling the trees thereon, etc., under color of title.

An entry into possession of a tract of land, under a deed containing specific metes and bounds, gives a constructive possession of the whole tract, if not in any adverse possession; although there may be no fence or inclosure round the ambit of the tract, and an actual residence only on a part of it. To constitute actual possession, it is not necessary that there should be any fence or inclosure of the land. If authority were necessary for so plain a proposition, it will be found in the case of *Moss v. Scott*, 2 Dana's Kent. Rep., 275, where the court say, that "it is well settled that there may be a possession in fact of land not actually inclosed by the possessor." But this subject will naturally arise and be considered more fully under the next instruction prayed for; and it is only necessary to say that we perceive no error in the refusal of the court to give that which was here prayed for.

The demandants then prayed the court to instruct the jury "that unless they find that Remey's survey covers the patents under which the demandants claim, the settlement of M'Cammon within the two thousand acres does not give a claim to a possession within the one thousand acres patent; nor does the possession within the one thousand acres patent give any possession within the two thousand acres patent. That, as to the two thousand acres, the statute runs as to that from the time a possession was taken by an actual residence, or by fencing, and the same as to the one thousand acres; consequently, that if they [the jury] find that one has been thus possessed adversely for thirty years next before the bringing of this suit, and the other not, that as to the other not so held they should find against such tenants as were within such patents at the date of the demandant's writ; provided these settlements are not included in Remey's or Thompson's surveys, as originally surveyed."

§ 2023. *Interfering patents. The patentee who first enters into possession, construed to be in possession to the extent of his claim.*

The latter part of this instruction as prayed is disposed of by the considerations already suggested under the preceding head. The other part may require some further explanations, in order to show its bearing and pressure. The tract of seven thousand acres conveyed by Edwards to Pearl included, as has been already stated, both of the tracts of two thousand acres and one thousand acres claimed by the demandants within its boundaries. The house and settlement of Pearl were on the southern side of the one thousand acres tract; and the house and settlement of M'Cammon were within the two thousand acres tract, and near the center of the eastern line of that tract. Pearl entered into possession of the seven thousand acres tract under his deed from Edwards; and as that deed described the tract by metes and bounds, Pearl must, upon the principles already stated, be deemed to have been in possession of the whole tract; unless some part of it was, which is not shown, in the adverse possession of some other claimant. In short, his entry being under color of title by deed, his possession is deemed to extend to the bounds of that deed, although his actual settlement and improvements were on a small parcel

only of the tract. In such a case, where there is no adverse possession, the law construes the entry to be co-extensive with the grant to the party, upon the ground that it is his clear intention to assert such possession. This doctrine is well settled. It was affirmed by this court in *Barr v. Gratz*, 4 Wheat., 222, 223; and it has been fully recognized and acted upon by the state courts of Kentucky. In *Fox v. Hinton*, 4 Bibb, 559, it was held by the court, that where two patents interfere in part, and, before possession is taken under the elder patent, the junior patentee enters upon the land within the interference with an intention to take possession, he shall be construed to be in possession to the extent of his claim. In *Thomas v. Harrow*, 4 Bibb, 563, the same court held that a person entering on land, under a deed of conveyance specifying the boundaries, is in possession to the extent thereof; although the person making the conveyance had only an entry, which did not appear to cover the land, and which had not been perfected by survey or patent. The cases of *Smith's Heirs v. Lockridge*, 3 Litt., 19, 20; *Cates v. Loftus*, 4 T. B. Mon., 442; *Moss v. Currie*, 1 Dana's Kent. Rep., 267; *Boyce v. Blake*, 2 id., 127; *Smith's Heirs v. Frost's Devisee*, 2 id., 148, 149; and *Harrison v. M'Daniel*, 2 id., 354, are to the same effect, and contain a full exposition of the doctrine.

M'Cammon having entered under Pearl, his possession must be deemed consistent with the title of Pearl. There is, however, no proof of the nature or extent of his claim in the case. If he entered under a deed from Pearl, then his possession would be co-extensive with the boundaries prescribed in that deed. If he entered without deed, his possession must either be deemed a continuation of that of Pearl, or bounded by his actual occupancy. In *Jones v. Chiles*, 2 Dana, 28, it was held by the court that, if a landlord settles a tenant without bounds upon a tract of land, he is in possession to the limits of the claim. But if the tenant is restricted by metes and bounds to a part only of the land, the landlord's possession is in like manner limited. And, upon the same principles, the court held that, if the proprietor of a tract sells a portion of it designated by metes and bounds, and the vendee enters into possession, his entry must be deemed of his own land only; and it has no effect as an entry upon or possession of the rest of the tract.

If, with these principles in view, we examine the instruction asked of the court, it will be found open to much objection. It assumes certain facts as its basis which were not in evidence; or, if in evidence, they were for the decision of the jury. The court were asked to instruct the jury "that the settlement of M'Cammon within the two thousand acres tract did not give a claim to a possession within the one thousand acres tract," without ascertaining whether the claim or title of M'Cammon extended into the latter or not. Now, it is plain that if his claim or title did extend into the latter, he would have had a constructive possession to the extent of that claim or title. The other part of the instruction asked is extremely vague. It is: "Nor does the possession within the one thousand acres patent give any possession within the two thousand acres." It is not said by whom the possession is supposed to be, whether by M'Cammon or by Pearl, or by any other person. If the possession intended was that of Pearl, as both tracts were within his tract of seven thousand acres, it is clear that his possession would extend over both tracts, upon the principles already stated. If the possession intended was that of M'Cammon, it is open to the objection already stated, that the boundaries of his claim or title are not ascertained, so as to enable the court to give the instruction as matter of law. In truth, the instruction asked seems to have proceeded upon a

ground perfectly untenable in itself; and that is, that, as to third persons, who are in under title or color of title, their possession is to be bounded and limited by the nature and extent and origin of the distinct titles of their adversary, and not by that under which they themselves have entered and taken possession. For these reasons we are of opinion that the instruction was properly refused by the court.

The last exception now insisted on is in the following instruction given by the court upon the prayer of the tenants: "That, if they [the jury] find from the evidence that Remey's patent does not cover the land in contest, yet if they find from the evidence that the tenants, or any of them, or those claiming under them, have had possession of the land in contest for thirty years next before the commencement of the demandants' suit, they must find for the tenants." It is probable that the actual form in which this instruction was asked was occasioned by the agreement of the parties that all these actions against the different tenants, upon the different writs of right, "should be heard at the same time," without prejudice to the rights of either party; and that the evidence "should be heard as to all, and to be applied to each respectively," and, therefore, that the instruction should be construed accordingly, *reddendo singula singulis*. But we see no objection to it in the form in which it was actually given, under the circumstances of the present case, and the titles set up by the parties respectively. The demandants claimed adversely to all the tenants, upon a title independent and distinct from theirs. The tenants all claimed under the title of Pearl, by his deed of the seven thousand acres; that is, under a title common to them all. The demandants could not recover any tract in controversy unless they were seized thereof within thirty years, the period prescribed by the statute of limitations for writs of right. If, therefore, there had been thirty years' adverse possession of the particular tract in controversy by any of the tenants, the demandants had failed in their suit, and were barred from any recovery. This was the whole purport of the instruction given, and, in our judgment, it was perfectly correct. It has been supposed, at the argument, that the instruction was defective in not stating that the possession was adversary and uninterrupted during the whole thirty years, and the case of *Forman v. Ambler*, 2 Dana's Kent. Rep., 109, 110, is relied on to sustain the objection. But the court, in that case, admitted that the instruction was free from legal exception, as understood by the court and the parties. And whatever ground there might be for the court, in that case, to come to the conclusion that the jury might have been misled by it (with which we do not intermeddle), under the peculiar circumstances of the case, we are of opinion that, under the circumstances of the present case, the instruction was definite and unambiguous in its purport and effect, and such as the law justifies.

Upon the whole, the judgment of the circuit court is affirmed, with costs.

ELLIOTT v. PEIRSOL.

(1 Peters, 328-342. 1828.)

Opinion by MR. JUSTICE TRIMBLE.

STATEMENT OF FACTS.—This is an action of ejectment, brought in the circuit court for the district of Kentucky by the lessors of the defendant in error and against the plaintiffs in error, who were defendants in the court below. The lessors of the plaintiff, in that court, claimed the land in controversy, as heirs

at law of Sarah G. Elliott, formerly Sarah G. Peart, deceased; who, in her life-time, had intermarried with the defendant, James Elliott. The defendants claimed by virtue of a deed of conveyance, made by James Elliott and Sarah G. Elliott, his wife, in her life-time, to Benjamin Elliott, and a deed reconveying the land from Benjamin Elliott to James Elliott.

On the trial of the general issue between the parties the defendants took a bill of exceptions to certain opinions of the court, in overruling motions made by the defendants for instructions, etc., and in granting instructions to the jury, moved by the plaintiff, in the progress of the trial; and, a verdict and judgment having been rendered against the defendants, they have brought the case before this court by writ of error.

The bill of exceptions states that, upon the trial of this case, the plaintiffs read as evidence a patent from the commonwealth to Griffin Peart, dated the 1st of May, 1781, covering the land in controversy (which patent is made part of the bill of exceptions), and sundry depositions, taken and filed in the cause (also made part of the bill of exceptions), and proved that, upon a division of the land granted to Griffin Peart, by said patent, the part in contest was allotted to the late Sarah G. Elliott, formerly Sarah G. Peart, and that she was seized thereof in severalty; that the said Sarah G. Elliott died before the institution of this suit, about the year 1822, without issue; and that the defendants were in possession of the land allotted to her as aforesaid. And after the plaintiffs had closed their evidence, touching their derivation of title, the defendants, as they had reserved the right to do, moved the court to instruct the jury that the evidence adduced on the part of the plaintiffs was insufficient to prove title in the lessors of the plaintiffs, and that the same ought to be rejected; but the court refused so to instruct or to exclude the evidence; and, on the contrary, instructed the jury that the said evidence, if believed by them, was *prima facie* evidence that the lessors were the legal heirs of the patentee, Griffin Peart, etc. To which opinion of the court, in all its parts, the defendants except.

The defendants then gave in evidence the deed of conveyance from Sarah G. Elliott and her husband to Benjamin Elliott (dated the 12th day of June, 1813), for the land in contest, and the deed from Benjamin Elliott to the said James, together with all the indorsements upon and authentications annexed to the first mentioned deed; which indorsements and authentications are in the following words and figures, to wit:

“Acknowledged by James Elliot and Sarah G. Elliott, September 11, 1813.

“Attest:

J. M'KINNEY, Jr., Clerk.

“WOODFORD COUNTY, *set*.

September 11, 1813.

“This deed, from James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

“JOHN M'KINNEY, Jr., C. W. C. C.”

“WOODFORD COUNTY, *set*.

November County Court, 1823.

“On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court by the indorsement on the deed from James Elliott and wife to him, under date of 12th June, 1813, and by parol proof, that said deed was acknowledged in due form of law by Sarah G. Elliott before the clerk of this court, on the 11th of September, 1813; but that the certificate thereof was defectively made out. It is ordered that the said certificate be amended to conform to the provisions of the law in such cases, and that

said deed and certificate, as amended, be again recorded. Whereupon said certificate was directed to be amended, so as to read as follows, namely:

“WOODFORD COUNTY, *set.*

September 11, 1813.

“This day, the within named James Elliott, and Sarah G. Elliott, his wife, appeared before me, the clerk of the court of the county aforesaid, and acknowledged the within indenture to be their act and deed; and the said Sarah being first examined, privily and apart from her husband, did declare that she freely and willingly sealed the said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded. The said deed, order of court, and certificate, as directed to be amended, are all duly recorded in my office.

“Attest:

JOHN M’KINNEY, Jr., C. W. C. C.”

It was proved by John M’Kinney, a witness examined on the part of the defendants, that the indorsement made on the back of the deed from Elliott and wife to Benjamin Elliott, in these words, to wit:

“Acknowledged by James Elliott and Sarah G. Elliott. September 11, 1813.

“Attest:

J. M’KINNEY, Clerk,”

Was in the handwriting of the said clerk of the Woodford county court, and was the minute made by him, at the time said deed was acknowledged; and it was also proved that the certificate of the acknowledgment and recording of the said deed, indorsed on said deed, was, at some subsequent time, written and drawn out by a deputy of said clerk, from the said minute. And the clerk deposed that although he had not a particular recollection of all the facts, that he remembered the circumstance of James Elliott and his wife coming to his office to acknowledge said deed; that he knew what his duty required in such cases, and that the acknowledgment and privy examination, and an explanation of the instrument to her, was requisite, in order to its being recorded as to her. And that he did not doubt he had done his duty in this instance, and that said deed had been acknowledged by Mrs. Elliott, in all respects. Other parol evidence was given conducing to prove that, in point of fact, the said deed from Elliott and his wife was regularly acknowledged by the wife before the clerk, upon his privy examination of her.

The said M’Kinney, upon cross-examination, further proved that, after the said deed and certificate of the acknowledgment thereof had been recorded, and in the life-time of Mrs. Elliott, he had, at the instance of her counsel, made out a true copy of the record of said deed, and certificate of the acknowledgment thereof, by Elliott and wife, as they were then upon the record; which copy the plaintiff gave in evidence; that, after the death of Mrs. Elliott, application was made to him by the counsel of the defendants to alter the certificate of the acknowledgment of the deed from Elliott and wife to Benjamin Elliott, so as to state her privy examination; but which he declined. It was also proved that the deed had remained in the possession of the clerk, from the time of its first acknowledgment till after the certificate ordered by the county court was made upon it.

After the defendants had closed the evidence on their side, which was as above stated, the court, upon the motion of the plaintiffs’ counsel, instructed the jury that the parol evidence which had been given on the part of the defendants, conducing to show a privy examination of Mrs. Elliott, was incompetent for that purpose; that a privy examination and acknowledgment of a *feme covert*, so as to pass or convey her estate, could not legally be proved by parol testimony, but by record; and that, although they might believe from

the parol evidence that said deed had been acknowledged by Mrs. Elliott, in all due form of law, upon her privy examination, and all proper explanations given to her, yet it constituted no defense to the action, unless such privy examination had been duly certified and recorded.

The court further instructed the jury that the certificate of the acknowledgment of said deed, by Elliott and wife, and the after certificate, by order of the county court, of her privy examination, were not sufficient in law to pass her estate, because the first shows no privy examination, and the county court had no jurisdiction to order the second to be made. To all which opinions and decision of the court the defendants except, etc.

It is argued by the learned counsel in this court that the motion of the defendants to exclude the evidence adduced on the part of the plaintiffs, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff, ought to have been granted. The argument in this court has not put the question on the ground that, taking the whole of the plaintiff's evidence together, touching the derivation of the title of the lessors of the plaintiff, it is insufficient to deduce the title to them down from the patentee, through Sarah G. Elliott, who was seized thereof in severalty.

We have, however, reviewed the evidence with a view to that question, and are satisfied it is sufficient for that purpose.

The ground of argument relied on here is, that a part of the evidence was incompetent and inadmissible. It is said that so much of the depositions as detail Mrs. Elliott's conversations, concerning the manner of her acknowledgment of the deed, and so much of Mrs. Braugh's deposition as speaks of the letter of her deceased husband, and the letter itself, made part of her deposition, were incompetent and ought to have been rejected; and that the reservation of the right to move to reject the evidence, admitted in the bill of exceptions, shows that the defendants' counsel had the right to insist upon the rejection of any part of the evidence as incompetent. The argument admits of several answers deemed satisfactory. Mrs. Elliott's conversation, detailed in some of the depositions in relation to the defendants' deed, can by no fair construction be brought within the motion. It related not to the title of the lessors of the plaintiff, but to supposed defects in the title of the defendants; and, to use the language of the bill of exceptions, it was the plaintiff's evidence "touching the derivation of the title of the lessors of the plaintiff," which the defendants moved to exclude. Besides, at that stage of the case the defendants had not introduced the deed; and when we come to consider the defendants' title after the deed was introduced, it will appear that Mrs. Elliott's declaration could in no manner have influenced the verdict, and was therefore harmless. We are not prepared to admit that Mrs. Braugh's letter on the subject of the family pedigree, proved by her evidence and made part of her deposition, was not competent evidence to be left to the jury upon a question of pedigree or heirship. She was an aged member of the family, and traces back the pedigree and several branches of the family for about seventy years.

§ 2024. *Pedigree—proof of; declarations of aged and deceased members of the family, made ante litem motam, admissible in evidence when lis mota exists.*

The rule of evidence, that in questions of pedigree the declarations of aged and deceased members of the family may be proved and given in evidence, has not been controverted. But it is argued that this rule is qualified by this exception, that declarations made *post litem motam* cannot be given in evidence;

and it is insisted this case comes within the exception; for although no suit had been commenced, yet a controversy had arisen or was expected to arise.

We doubt the application of the exception to this case. A controversy had arisen or was expected to arise between the heirs of Mrs. Elliott and the defendants, concerning the validity of the deed of Mrs. Elliott, made while she was a *feme covert*. But it does not appear that any controversy had arisen or was expected to arise about who were her heirs. The *lis mota*, if it existed, was not who were heirs, but whether Mrs. Elliott's deed made a good title against the heirs, whoever they might be. It is not necessary, however, to give any positive opinion on this point, as other grounds exist upon which the motion was rightfully overruled.

§ 2025. *Courts may rule on motions as made. A general motion to exclude the whole evidence may be overruled if part is competent. Incompetent portion may be excluded.*

It is conceded that the defendants' counsel had a right to move the court below to exclude any part of the plaintiff's evidence which he might choose to designate as incompetent, but it is not admitted that he exercised that right. It does not appear from the bill of exceptions that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude it. But on the contrary, resting his case upon the assumption that the whole evidence of the plaintiff, taken together, was either incompetent or insufficient, he moved the court either to exclude the whole, or to instruct the jury that the whole was insufficient to prove title in the lessors of the plaintiff. This could not be done on the ground of incompetency unless the whole was incompetent, which is not pretended; the court was not bound to do more than respond to the motion in the terms in which it was made. Courts of justice are not obliged to modify the propositions submitted by counsel so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. We have already said the evidence, taken all together, was sufficient to prove title in the lessors of the plaintiff. If any part of it was incompetent, the court might, on a general motion to exclude the whole, have excluded such parts; but the court was not obliged to do so. There is, therefore, no error in the decision of the circuit court overruling the motion of the defendants; nor in the instructions given to the jury upon that motion.

We now proceed to an examination of the questions arising out of the instructions given to the jury on the motion of the plaintiff, in relation to the deed of James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott, set up by the defendants in their defense.

§ 2026. *Parol evidence incompetent to prove the privy examination and acknowledgment of a deed by a feme covert. Contracts and conveyances of married women are void ab initio at common law.*

The general question involved in the first instruction is, can the privy examination and acknowledgment of a deed by a *feme covert*, so as to pass or convey her estate, be legally proved by parol testimony? We hold that they cannot.

By the principles of the common law, a married woman can in general do no act to bind her; she is said to be *sub potestate viri*, and subject to his will and control. Her acts are not like those of infants and some other disabled persons, voidable only, but are in general absolutely void *ab initio*.

§ 2027. *Right of a feme covert to convey her estate is wholly statutory in Virginia and Kentucky.*

In Virginia and Kentucky, the solemn modes of conveyance by fine and

common recovery have never been in common use; and in those states the capacity of a *feme covert* to convey her estate by deed is the creature of statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued.

§ 2028. *Acknowledgment of deeds by married women under Kentucky statutes; privy examination must be certified to; if it is not, the deed will not pass title.*

The Virginia statute of 1748, chapter 1, after making provisions to enable *femes covert* to convey their estates by deed upon acknowledgment and privy examination according to prescribed forms, in the seventh section has these words: "Whereas it has always been adjudged that where any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." The eighth section enacts and declares: "That the law herein shall always be held according to the said judgments, and shall never hereafter be questioned," etc. This law was adopted by Kentucky at her separation from Virginia, and is understood never to have been repealed.

The fourth section of the Kentucky statute of 1796 (see 1 Litt. Laws, 569) provides for the privy examination and acknowledgment of *femes covert* in open court, and, where they cannot conveniently attend, authorizes a commission to issue to two justices to take and certify the acknowledgment and privy examination, and declares that "in either case the said writing, acknowledged by the husband, and proved by witnesses to be his act, and recorded, together with such privy examination and acknowledgment, etc., shall not only be sufficient to convey or release any right of dower, etc., but be as effectual for every other purpose as if she were an unmarried woman."

The first section of this act authorizes clerks of the county courts, general court and court of appeals to take in their offices the acknowledgment or proof of the execution of deeds, and to record them upon acknowledgments or proofs so taken by themselves; but did not authorize them to take the acknowledgment and privy examination of *femes covert*.

But, by a subsequent statute, clerks are authorized to take in their offices the "acknowledgment of all deeds according to law." And the act of 1810 (4 Litt. Ky. Laws, 165), which authorizes the clerk of one county to take and certify the acknowledgment of a deed to be recorded by the clerk of another county where the land lies, etc., declares that, "if the due acknowledgment or privy examination of the wife, etc., shall have been taken, etc., by the clerk receiving the acknowledgment of the deed, etc., and that, being duly certified with the deed and recorded, shall transfer such wife's estate," etc., as fully as if the examination had been made by the court or the clerk in whose office the deed shall be recorded.

It is by construction of these last-recited laws that the clerks are held in Kentucky to be authorized to take the acknowledgments and privy examination of *femes covert*, in all cases of deeds made by them and their husbands.

The Kentucky statutes above recited show clearly that the legislature of that state has never lost sight of the principle declared by the Virginia statute of 1748, "that when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." What the law requires to be done and appear of record can only be done and made to appear by the record itself or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact, or not, if there be no record made of

the privy examination; for, by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.

It is now only necessary to state the second instruction given to the jury on the plaintiff's motion to manifest its entire correctness. It was "that the first certificate of the acknowledgment and recording of the deed of Elliott and wife was not sufficient in law to pass her estate, because it showed no privy examination of the *feme*." The last instruction given by the court to the jury presents a question of more difficulty. It is "that the after certificate made by order of the county court of her privy examination is insufficient in law to pass her estate, because the county court had no jurisdiction or authority to order the said second certificate to be made."

§ 2029. *If a court has jurisdiction, its decision cannot be impeached collaterally. If it acts without authority, its judgments and orders are nullities.*

It is argued that the circuit court of the United States had no authority to question the jurisdiction of the county court of Woodford county; and that its proceedings were conclusive upon the matter, whether erroneous or not. We agree that if the county court had jurisdiction its decision would be conclusive. But we cannot yield an assent to the proposition that the jurisdiction of the county court could not be questioned when its proceedings were brought collaterally before the circuit court. We know nothing in the organization of the circuit courts of the Union which can contradistinguish them from other courts in this respect.

Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers. This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.

§ 2030. *County courts of Kentucky have no supervising or controlling power over the acts of clerks in taking acknowledgments.*

It is well known that the jurisdiction and authority of the county courts of Kentucky are derived wholly from the statute law of the state. In argument we were referred to no statute which was supposed, either in terms or by fair construction, to confer upon the county court any supervising or controlling power over the acts of the clerk, in taking, in his office, the acknowledgment of a deed, or in recording it, upon an acknowledgment there taken by him. We have sought in vain for such a provision, and it is believed none such exists. No such supervising and controlling power can result to the court from the general relations which exist between a court and its clerk; for, in this case, the statutes confer upon the clerk, in his office, a distinct, independent, personal authority, to be exercised by him upon his own judgment and responsibility. We think, therefore, with the circuit court, that the county court had no jurisdiction or authority to order the after certificate of Mrs. Elliott's privy examination to be made and recorded.

§ 2031. *A certificate of acknowledgment may be altered before it is recorded, but not afterwards.*

But the argument which seemed to be relied on most confidently by the learned counsel is, that the order of the county court may be disregarded, and the amendment considered as an amendment made by the clerk, of his own authority; and that the clerk was authorized to amend his own certificate, and record, at any time. It would be difficult to maintain that the second certificate or amendment, as it is called, could rightfully be regarded as the clerk's own act, independent of the order of the county court; it appearing that he refused to do the act until the order was made. But be it so.

Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed, at any time after the record was made? We are of opinion he had not. We are of opinion he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was *functus officio*, as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely.

If a clerk may, after a deed, together with the acknowledgment or probate thereof, have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it. The doctrine that a clerk may, at any time, without limitation, alter the record of the acknowledgment of a deed made in his office would be, in practice, of very dangerous consequence to the land titles of the country, and cannot receive the sanction of this court.

It is the opinion of this court that there is no error in the judgment and proceedings of the circuit court, and the same are affirmed, with costs.

IN THE MATTER OF HALL'S DEPOSITION.

(Circuit Court for Pennsylvania: 1 Wallace, Jr., 85-105. 1843.)

STATEMENT OF FACTS.—This was an action of ejectment, and the question presented was whether the deposition of Hall was admissible in evidence. It had been taken in 1822 in a suit then pending between this plaintiff and other parties for different lands, involving the same question of heirship. The depositions were offered, not as evidence of facts, but as declarations concerning pedigree.

Inquiry had been made without success in New York, where Hall had formerly resided. It was proved that, when he gave his deposition, he was fifty-nine years old and in bad health. There was no proof of inquiry as to his relatives or friends.

Opinion by BALDWIN, J.

Supposing Hall's death to be proven, the same question arises here as we find in *Boudereau v. Montgomery*, 4 Wash., 186 (§§ 2041-45, *infra*). That decision is one which I had occasion to consider a good deal in a suit which came before me a few years ago. I then felt reluctant to overrule it. The same reluctance yet exists. I feel that, in the first place, it is a precedent, and, yet more, that it is a precedent left to us by a judge of great learning, of the

utmost patience, and largely endowed with that finest, rarest, last betrayed of the qualities of human intellect; I mean with good judgment. I can never dissent from my honored predecessor, Judge Washington, without diffidence, and without feeling that in such a case he is likely to be right and I am likely to be wrong. Still, it is not in the nature of human minds to view everything in the same way; and where great principles are concerned, it may be obligatory on each to give utterance to his opinion.

§ 2032. *Declarations concerning pedigree, made post litem motam, are inadmissible.*

Before examining the state of the law as elsewhere existing, I will say a word as to the cases in this circuit. *Boudereau v. Montgomery* was in affirmance of a former ruling reported in 3 Wash., 243; the case, I mean, of *Banert v. Day*. Like many of the cases in what are called Washington's Circuit Court Reports (a book printed from Judge Washington's notes never originally designed for the press), this case is stated short and almost in the form of a syllabus; the grounds of the ruling and the arguments of counsel being wholly omitted. It appears only that the counsel who argued in favor of the depositions relied on the case of *Hurst v. Jones*, decided in this circuit under the organization of 1801-2 [1 Wall. Jr., App., iii; §§ 2049-50, *infra*]. We cannot tell what view of that case was given to the court; but I have been at some pains to learn what the case really was; and through the kindness of a friend am in possession of the original, contemporary MS. notes of the reporter of that court, and also with the notes of one of the judges. Each is full; and both accord. It is obvious that *Hurst v. Jones* was no precedent for *Banert v. Day*; quite the contrary; and if this last case was ruled on the authority of the former decision, and *Boudereau v. Montgomery*, in turn, settled upon the base of *Banert v. Day*, then, that we might exclude the deposition here offered, without so much disturbing the precedents of the circuit as making them conform to the case by which they were meant to be guided, and from which they have diverged only through imperfect observation.

It would appear, however, from the learned argument of Judge Washington, in *Boudereau v. Montgomery* (and, indeed, from his direct statement), that the ruling in that case conformed to what he deemed the prevailing temper of the American decisions (as well as of the English prior to the *Berkeley Peerage Case*), and to the better sort of principles in the law of evidence. Let these be shortly examined.

§ 2033. *Summary of English authorities on the question whether declarations made post litem motam are admissible in evidence.*

The first English case recorded is that of *Spadwell v. ———*, which arose before Chief Baron Reynolds, in 1730, where the declarations of an aunt, as to pedigree, were rejected because made after dispute had arisen. 4 Camp., 410. Thirty-six years afterwards came *Hayward v. Firmin*, before Lord Camden, where the declarations of a mother as to her marriage, though made subsequently to the commencement of the suit, were received after objection taken and debate had. Judge Washington remarks that Lord Camden's decision, being later in point of time, overrules that of Chief Baron Reynolds; and so truly it would do, but that it appears that the decision of Chief Baron Reynolds was not brought to the notice of Lord Camden, and, for aught that we can perceive, was unknown to him. 4 Camp., 417.

Both cases are *nisi prius* decisions, and neither is very copiously reported; they cannot, I think, be taken as of much significance, nor as settling a great

deal either way. In 1741, *The Duke of Athol v. Wilding* occurred (Strange, 1151), where a special verdict, given many years before against other defendants, was offered in evidence to prove pedigree. The court (Wright, J., dissenting) rejected it as being *res inter alios acta*, and because, for aught that appeared, the evidence on which the verdict was founded could itself be procured. In that case the right to admit as declaration what was inadmissible as deposition was a refinement of ingenuity to which the talent of neither court nor counsel was able to reach; and so the matter of *post litem motam* was not discussed. So far, however, as the decision is concerned, it is clearly against the offer made here. This case is supposed by some to have been overruled. The idea is founded on what occurs in Buller's *Nisi Prius*, where it is said: "Another case in which this exception (*res inter alios acta*) ought not to be allowed is, where the fact to be proven is such whereof hearsay and reputation are evidence; and therefore a special verdict between other parties stating a pedigree *would* be evidence to prove a descent. . . . And of this opinion was Mr. Justice Wright, etc., which opinion is generally approved, though the determination by the rest of the court was contrary: *perhaps founding themselves on the case of Sir William Clarges*," etc., etc. (p. 233, Lon. ed., 1793). The case of Sir Wm. Clarges, which the author proceeds to state, would appear to me a very proper one for the judges on which to found themselves. It is to be observed that no case is referred to but the Duke of Athol's; no precedent nor any practice is cited to contradict that case; we are told simply that Wright's opinion "is generally approved." Opposed to this evidence of approval, we have, however, the experience of Baron Wood, who says, in 1811, that it had been "the general rule," so far back as his experience and knowledge went, to reject declarations made *post litem motam*; and though his brother Graham had not become acquainted with any such rule in any book that ever came within his reading, and thought that if it were a rule at all, it was one confined to the breasts of a few particularly conversant with the business of *nisi prius*, we find Mr. Justice Lawrence declaring that in *his* experience and practice, "an experience of nearly forty years," whenever a witness admitted that what he was going to state, he had learned after the commencement of a controversy, his testimony had been uniformly rejected. With him agrees Mr. Justice Heath, who says: "In the course of my long experience, in all the circuits I have gone, I never heard till now of such evidence being receivable. When the objection that the declaration was *post litem motam* has been taken, it has been constantly acquiesced in;" and Lord Eldon, who tells us: "I have known no instance in which declarations *post litem motam* had been received;" and Lord Redesdale, who can take upon himself to say, that the practice of the western circuit was to reject such declarations; and that circuit, he remarks, was supposed by those who traveled it, to be more correct on subjects of evidence than any other.

The first edition of Buller's *Nisi Prius* appeared in 1772; and the direct or indirect experience of some of the judges just cited reached near the time to which the author must be taken to refer. I therefore presume that the statement made in it, that the dissenting opinion of Wright, J., was "generally approved," in opposition to a decision of the court, must be taken as a misapprehension as to the precise extent of professional approbation. I may here add, what is not always remembered in citing Buller's *Nisi Prius*, that though the book bears on its title the name of Francis Buller, it was printed pretty much from the note-book of Lord Chancellor Apsley, by whom it was pub-

lished, and to whom it was originally inscribed. Several of its *dicta* have been overruled. No other case worthy of note occurs to me as having been decided prior to our declaration of independence.

In the year 1777 we have *Goodright ex dem. Stevens v. Moss*, Cowp., 591, before the Earl of Mansfield; a case which Lord Eldon informs us that Lord Thurlow was "most studious to contradict." Mr. Justice Lawrence, referring to that case, says: "Notwithstanding what is said in *Goodright v. Moss*, I cannot think that Lord Mansfield would have held that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury;" and Lord Eldon acceded to the case "as it has been *practiced* and *acted upon*." For myself, I confess that it does appear to me to evolve the dry point which occurs in the case before us; but I think that it was a point which escaped inconsiderately, and only along with others which carried it through. Certainly it was one not necessary to be decided; and the question of *lis mota* was not taken nor argued either on the bench or at the bar.

Thus stood the law at the beginning of the present century. I may say that the precise question of *lis mota* does not seem to have been greatly agitated; that is, the books do not often speak of it; though it may have been discussed at *nisi prius* on the circuits. I regard all that is recorded as not very decided one way or the other.

With the beginning of this century we have much more perfect lights. In 1807 came *Whitelock v. Baker*, 13 Ves. Jr., 511, 514, a case not having, to be sure, anything to do with pedigree, but yet stating some salutary rules by which chancery is guided in the reception of evidence. It is in this case we find that expression of Lord Eldon's, which every one must have noted, that the statements should be "the natural effusions" of a party. Two years further on we have a decision of Sir W. Grant at the Rolls. The question was as to the admissibility of a pedigree found among a lady's papers after death, and which she had made after doubts had arisen as to the descent. The evidence was rejected. *Edwards v. Harvey*, Cooper's Cases, 39, 40. We now come in sequence to a case vastly more labored, more important and more entirely conclusive than any which preceded it; which excited great interest; was argued by distinguished counsel, and on which we have a decision of the house of lords after a full expression of opinion, only not unanimous, from ten very able judges; Mr. Justice Chambre, who had heard the argument, but was absent when the opinions were delivered, agreeing, in addition, with the majority.

The Berkeley Peerage Case, decided in 1811 (4 Camp., 401, 422), has settled the law in England on foundations not to be disturbed nor relaid. I need, therefore, not refer to subsequent cases otherwise than succinctly. *Rex v. Cotton*, 3 id., 444, was ruled by a judge who did not sit in the Berkeley Peerage Case; but he agrees with it, and on principle. Another judge has gone yet further than either of these cases. In 1834, Baron Alderson ruled that less than the existence of actual controversy is enough; that in intendment of law, a controversy is moved whenever that state of facts arises on which the claim is founded (*Walker v. Beauchamp*, 6 Car. & P., 552), and rejected evidence accordingly. And though Lord Brougham did not go so far as this in *Monkton v. The Attorney-General*, 2 Russ. & Mylne, 147, he did most clearly acknowledge the rule of the Berkeley Peerage Case. Observe his language: "One restriction, however, clearly must be imposed: the declarations must be *ante litem motam*. If there be *lis mota*, or anything which has precisely the

same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him or for those in whom he takes an interest after his death, it is excluded, both upon principle and upon the authority of the cases, and, among others, of *Whitelock v. Baker*." There is nothing contradicting this authority in *Slaney v. Wade*, 1 Mylne & Craig, 338, nor in any other case known to me. What is to be regarded as a *lis pendens*, in the understanding of law, is a point about which some of the later cases are not consentient; but the principle of the Berkeley Peerage Case (the only principle in the question before me) I take to be ineradicably fixed, in England. This, indeed, Judge Washington admits; but says that *Whitelock v. Baker*, and the Berkeley Peerage Case, having been decided since our Revolution, are not authorities; that the question must be, how has the point been understood in this country before and since that event? and remarks that as the *nisi prius* decisions referred to by the judges in the Berkeley Peerage Case (the decisions, I presume, of C. B. Reynolds and Lord Camden) were never in print, they could not have influenced the law in this country. This statement proceeds on a misapprehension of fact. Chief Baron Reynolds' decision, *excluding evidence post litem motam*, was in print, though I am not aware that the same thing is true of Lord Camden's *admitting* it. In Viner's Abridgment, the first edition of which was printed before 1776 (a book which, if we may infer from the number of American subscribers to the second edition, was very popular in this country), we have the following passage, which occurs in speaking about a statement made by a certain woman as to the birth of a child: "Objection was made," says Viner, "that the declaration of this woman was not evidence, seeing it was, etc., when there was a discourse about this matter; *but what this woman said soon after the birth* (the italicising is Viner's) *was allowed in evidence, when there was no prospect of a controversy*; per Reynolds, Ch. B., at Devon. Assizes, Lent, 1731." Viner's Abridgment, tit. Evidence, T. b., 91.

§ 2034. *Summary of American authorities on the question whether declarations made post litem motam are evidence.*

But what, at all events, is the state of the decisions in this country prior to *Boudereau v. Montgomery*? The oldest one known to me is in our own state; the case of *Strickland's Lessee v. Poole*, decided in 1765; a case which, remarkable to say, does not appear to have been remembered either by counsel or by the court in *Boudereau v. Montgomery*. That decision does make the absence of any controversy an element of the case in which hearsay is admissible. The report is thus: "To prove pedigree, evidence permitted to be given of hearsay a great while ago—before any dispute stirred." In *Hurst v. Jones*, A. D. 1801, the court evidently took a distinction between *ante* and *post litem motam*, and admitted the declaration because, as was declared, a controversy had *not* been raised. Coming nearer to the decision in question, we have an opinion of the supreme court of Connecticut, as delivered by Chief Justice Swift. Speaking of declarations concerning pedigree the chief justice says: "When they are made for the express purpose of being given in evidence on a question of pedigree they will not be received. If a person were to take up a

Bible, and, having the idea that it was afterwards to be produced in evidence, were to write down, at once, the births and deaths of his children, such an entry would not be admissible." *Chapman v. Chapman*, 2 Conn., 347, 349. This case was not cited before Judge Washington; but certainly the distinction is stated, though I admit that it was not the point in issue.

Now, I know not of any decisions contradicting these. In the cases quoted by counsel before Judge Washington, the question of *lis mota* does not appear to have been agitated; they relate rather to the effect of verdicts between parties, privies and strangers. Such are the cases, if I understand them, from Henning and Munford, and from Munford; while the additional references by the court give us nothing very pertinent on the subject; and, indeed, are cited for their general language only. Two of them, the one from 1st Yeates and that from 8th Johnson, assert only that, in matters of pedigree, the rules of evidence are greatly relaxed; a doctrine not disputable. The other is from Swift's Law of Evidence, and, I presume, to the same general effect. We have, at all events, the opinion of that writer specifically declared to us from the bench. Judge Washington, with the candor natural to him, says that he "had no opportunity of looking into the American cases." Had this opportunity been allowed, I cannot think that even with the decisions to be found in 1821, when *Boudereau v. Montgomery* was decided, he would have added, as he did: "But I am strongly inclined to think, from expressions to be met with in many of the state decisions, that the rule of *post litem motam* has never been recognized in the United States" (p. 190).

My limited reading suggests nothing from which I can infer that the main current of decisions since 1821 has gone in a course different from what it did prior to that date. In *Morgan v. Purnell*, 4 Hawks, 95, the supreme court of North Carolina went so far as to reject a deposition because it was not clear that it was made *ante litem motam*. "It must appear," says one of the justices, "that such declarations have not been made at a time or with a view to serve any particular purpose. In this case it does not appear *when* Mrs. M. told the witness that she and Mr. M. were married; it might have been, for aught that appears, before or after the commencement of this suit. For these reasons I cannot say that the judge erred in the rejection of this deposition." . . . "It is necessary," says another member of the court, "that they (st. declarations concerning pedigree) should have been made not only without any view of benefiting the person making them, but also without a view of benefiting any other; that they should have flowed from a desire only of speaking the truth, which all are presumed to have when there is no motive to declare the contrary. The person, therefore, who offers such declarations must show that they were made under such circumstances; *it is a prerequisite to their admissibility*. . . . The depositions must be rejected." The chief justice assenting, the judgment of the court below, which had likewise rejected the depositions, was unanimously affirmed. This case went farther than I was disposed to do on a recent trial; though, indeed, the case just cited was not there brought before the court; and there was, too, in that case, another circumstance which on reflection occurred to me — that the fact of heirship was in dispute only incidentally; the main defense having been adverse possession. The North Carolina case, just quoted, was in 1825. It was affirmed, as of course, in 1837, the court having, moreover, changed. *Dancy v. Sugg*, 2 Dev. & B., 515.

§ 2035. *Declarations made post litem motam are not admissible in evidence. Case cited.*

But is not the question concluded in all inferior courts of the United States, by the decision of the supreme court in *Stein v. Bowman*, made in 1839 (13 Pet., 209, 220; §§ 2251-59, *infra*), though I did not entirely agree with the majority of the court on some other points, not important to be mentioned, of the opinion there delivered. After going through some of the errors assigned to the action of the district court below, Mr. Justice McLean proceeds: "But there is another ground on which the opinion of the district court can be sustained, and it is proper to state it. The declarations offered as evidence were made subsequent to the commencement of the controversy, and, in fact, after the suit was commenced. It would be extremely dangerous to receive hearsay declarations in evidence respecting any matter, after the controversy has commenced. This would enable a party, by ingenious contrivances, to manufacture evidence to sustain his cause. By interrogatories propounded in a cautious manner to unsuspecting individuals, he might elicit the answers he most desired. *It is therefore essential, when declarations are offered as evidence, that they should have been made before the controversy originated, and at a time and under circumstances when the person making them could have no motive to misrepresent the facts.*" I have gone through all the cases on my notes or which memory suggests. There may be others, in the multiplication of modern books, which I do not recall; but I presume that they are not numerous. How then does the question appear to stand? In England we have opinions from Lords Eldon, Redesdale, Ellenborough, Brougham; from Chief Baron MacDonal, Barons Wood and Alderson; from Sir William Grant, M. R., and from Justices Bayley, Lawrence, Heath, Chambre and Dampier. In our own country, from the supreme court of the United States, the supreme court of Pennsylvania, the supreme court of Connecticut, the supreme court of North Carolina (twice), and from the circuit court of this circuit as organized in 1801-2; a court which consisted of Chief Justice Tilghman of Pennsylvania, Justice Griffith of New Jersey (an able man), and Justice Basset of Delaware. All these judges and courts speak more or less fully, and all give it as their opinion that the declarations, to be admissible, must be before a controversy stirred.

§ 2036. *Analogy of the civil law rule.*

The rule of the civil law is sufficiently known, and is thus given by Mascard in his learned work "*De Probationibus*:" "*Nec vero tantummodo debent esse personæ graves, sed etiam debent deponere se audivisse ea quæ asserunt, ante litem motam: quod si post litem motam deponerent, non solum non probarent, sed nec ullam fidem facerent; quia facile contingere potest ut quispiam id audiverit ab alio, qui illud protulit in fraudem, vel quod lis ipsi mota traxerit istam famam.*" I am far from meaning to cite a civilian as authority; but in a question concerning the safety of a practical rule, the experience of old and corrupter countries is a source of information not wholly without value.

It is not necessary to place this matter upon the technical ground that the case of *Boudereau v. Montgomery* has been overruled by *Stein v. Bowman*. I am willing to look at it with more comprehension. We do then certainly find a power of authority and of judicial declaration not to be resisted. If the doctrine could not stand on principle, no judge could sustain himself against so commanding a body of names. They embrace the great masters

of law and of thought for more than fifty years together; I must bow to them.

It is scarcely needful that I say much as to general principles. They have been so fully discussed in the leading case quoted by me, that I will only refer to what is there said. I need not repeat it. I cannot improve it. Whomsoever the Berkeley Peerage Case leaves unconvinced I should not hope to satisfy. Necessity is the principal argument for admitting this sort of evidence. On this point only I will say, that this is a thing very easy to assume, whether it exist or not. I apprehend that if parties understand that they *must* bring purer evidence, the necessity will disappear; and if in a few cases the rule operates with severity upon individuals, it is in this, as in many other cases, only the sacrifice that is to be made to a greater and more general good.

My sincere respect for the learning and wisdom of Mr. Justice Washington, and the force with which on a former occasion (though before the decision in *Stein v. Bowman*, his ruling was pressed on me, have made me go thus at large into the subject. I need not, perhaps, have said so much; for the depositions in this case are inadmissible on another ground, and on that I prefer to decide the point: there is no evidence that Hall is dead, or that his deposition could not be had in a more regular way.

§ 2037. *Presumption of death does not arise after the lapse of any definite time. A man is not presumed to be dead because, if living, he is eighty years old.*

The life of a person once shown to exist is intended to continue till the contrary is proved, or is to be presumed from the nature of the case. Direct proof is not here offered. Are the facts which are shown sufficient to supply its place? The witness, if alive, is eighty years old; an age that we may admit is an advanced one, but is yet one to which life is occasionally, nay, not unfrequently, prolonged. The court cannot, therefore, presume, as of course, that Hall has not reached it. Lord Hale has indeed said that it shall be presumed life will not exceed ninety-nine years (*Weale v. Lower, Pollexfen*, 67), and it may be inferred that a man, if of any age already, will not live eighty years besides (*Napper v. Sanders, Hutton*, 118; *Keeble's Case, Littleton*, p. 370); but Chief Baron Reynolds refused to presume a witness dead, who had been examined sixty years before; there having been no proper searches or inquiry made after him. *Benson v. Olive*, 2 Str., 920.

§ 2038. *Presumption of death does not arise from the fact that the party many years before was "in bad health."*

Neither does the circumstance that the witness was in bad health in 1822, infer, as necessary consequence, that he is now dead. The difficulty is here: that the expression "bad health" is indeterminate. There are manifold sorts of bad health, and many degrees in most of them. Show me that Hall was the subject of some quick consuming disease, or of any specific malady at all, and you will change the case. Suppose that his bad health was temporary, or that the expression means only that his health was not robust. A man in bad health at one time may recover afterwards; that depends entirely upon the nature of his disorder, and mode of treatment, and the vigor of his constitution. And the valetudinarian often prolongs an existence beyond him who, in the carelessness of health, may be suddenly cut down.

§ 2039. *Presumption of life or death is entirely a question of fact.*

In the case cited from 13 Vesey, the health was "very bad" (the chancellor speaks of it as "desperate"), and the man was to have been heard of in six months after he went away, several years before. The case from *Nevile &*

Perry goes only to show that the presumption of life or death is a question of fact entirely. With both cases I agree.

§ 2040. *That a person is not known at the postoffice of a city, nor mentioned in its directory, is too feeble evidence to raise a presumption of death.*

Is the case essentially changed by the inquiries made at the postoffice? This difficulty occurs: that there is nothing to show that Hall was a person likely to be known there; that he was in the habit of receiving letters, or that he was a person of any note or consequence. It is no presumption of law that the runners of the postoffice know, so as to answer at first inquiry, the name and residence of every person in a populous city.

Remarks of a similar sort apply to the inference which would be drawn from the absence of the name from the directory. Indeed, in the insignificance of advanced old age, a man has generally ceased to make impression on the busy world, or to be enrolled in the register of its active concerns.

It seems to me difficult to suppose that direct evidence cannot be given of a death which, if it has occurred, has occurred close to us, and since 1822. Or did Hall ever leave the place of his former residence? let this fact be shown; and that his friends have not heard of him for seven years. Had he no friends? let that fact be shown. The difficulty is, that the plaintiff does not show that he has made proper search or inquiry for Hall. Had he done this, and been unable to hear anything of the person, I should be of opinion to receive the testimony. But there is a meagerness about all this part of the case which is unsatisfactory, to use no harsher adjective. It shuts up the access to presumption which would have otherwise been easy. The case is much like that of *Benson v. Olive*, already referred to. In short, I see nothing in any of the circumstances shown, nor in all of them together, which, in the absence of proper inquiry, brings that weight and conclusiveness which ought to exist before you set aside a wise and deep-laid rule of law.

BOUDEREAU v. MONTGOMERY.

(Circuit Court for Pennsylvania: 4 Washington, 186-190. 1821.)

STATEMENT OF FACTS.—This was a bill by a large number of persons who claim to be the heirs at law of Charles White of Philadelphia, against his administrators. There were commissions issued to take depositions in Louisiana, and objections were taken to the evidence.

Opinion by WASHINGTON, J.

As to the last objections, that would be attended to by the court upon the report of the master, to whom it might be proper to refer the depositions, to inquire whether any and which of the interrogatories are leading.

The objections to the execution of the commission strike at the entire depositions, and being in my opinion well founded, the depositions themselves must be suppressed.

§ 2041. *A commissioner cannot take depositions in one county which are directed to be taken in another.*

The commissioners act under a special authority, which it is not only their duty to pursue, but it should be made to appear to the court, by their own showing, that this authority was pursued. Whatever facts in relation thereto are stated in their report, the court is bound *prima facie* to give credit to; but the court cannot presume that they have duly executed their authority, when they are themselves silent upon that subject. It should particularly appear

when and where the depositions were taken. As to the depositions taken at Iberville by P., not only out of his district but within the district of another commissioner, it is impossible that they can be supported, any more than if they had been taken by a person not authorized by the court to take them. And having thus furnished the court with evidence of his total disregard of the authority given to him in those instances, I am well warranted in doubting, at least, whether he has been more attentive to it in others where he is silent as to the place at which the commission was executed.

Depositions were offered by plaintiffs taken in an ejectment suit in Baltimore, brought by some of their number against the administrators. They were objected to as *res inter alios acta*.

§ 2042. *Where the parties are not identical, depositions taken in one suit cannot be read in another.*

Opinion by WASHINGTON, J.

As depositions, the evidence is inadmissible, inasmuch as it was taken in a cause between different parties from those who are now before this court, though in relation to the same question. Were the plaintiffs the same, I think the objection would not hold, on the ground that Mr. Cross was not a party to the suit in which the depositions were taken, since Montgomery was, and as representing his co-administrator, as well as the estate of the intestate, he had every opportunity of cross-examining the witnesses.

§ 2043. *One administrator may release or dispose of property without the other.*

The executors or administrators of the deceased are considered in law as but one person, representing the testator; and the acts done by any one of them, which relate to the estate of their testator or intestates, are deemed the acts of all, inasmuch as they have a joint and entire authority over the whole. Godol., 134; Roll's Ab., 924; 2 Ves., 265; Shep. Touch., 484, 485. A release of a debt, or judgment confessed by one executor, binds his companions. Dyer, 23, pl. 146. Surely then there is a privity of interest and estate between executors or administrators, at least as apparent as between several remainder men claiming in succession under the same deed or will, in which case a subsequent remainder man may give in evidence, in an action by or against him, a verdict rendered in favor of a prior remainder man; for they both claim under the same deed. Phil. Ev., 227; 1 Ld. Ray., 730; Com. Dig., Ev., A., 5; Bull. N. P., 232.

§ 2044. *Rule of evidence.*

But the plaintiff not being the same, and it being perfectly clear that if the depositions had been in favor of the defendants in that cause—as if, for example, they had proved Mrs. Montgomery to be the sole heir of the intestate—they could not have been read against such of the present plaintiffs as were not parties to that suit, neither can they be used by these plaintiffs against the defendants on that suit. For I conceive, that if any rule of law can be considered as established, that is, which Gilbert lays down in his Treatise on Evidence, p. 28, “that no one can take benefit by a verdict (or deposition) who had not been prejudiced by it had it been contrary.” See, also, Bull. N. P., 232; 11 State Trials; The Duchess of Kingston's Case, Hardw., 472.

§ 2045. *Rule as to proof of pedigree. Hearsay and reputation.*

But I am of opinion that the depositions are admissible as *declarations* in relation to pedigree, and are at least as satisfactory to prove that matter as

hearsay or reputation. It is admitted by the defendants' counsel that, as a general rule, hearsay and reputation may be given in evidence to prove a pedigree, but that a special verdict finding a pedigree, or depositions taken to prove it in one cause, cannot be given in evidence in another cause, between different parties, because they are only equal to declarations made after the question of pedigree had become the subject of controversy, and consequently after an improper bias may have been impressed upon the mind of the witness or person making the declaration. This exception from the admitted general rule is taken in the case of *Whitelock v. Baker*, 13 Ves., and in the *Berkeley Peerage Case*, 4 Camp., 401. These cases are of modern date, the latter having been decided in the house of lords in the year 1814. They cannot, therefore, be considered as authorities to control the judgment of this court; and I feel perhaps less disposed to yield an assent to the reasoning on which they proceed in consequence of impressions made upon my mind from the time I was a student of law until these cases were cited, that the long and well established rule was otherwise than what they state it to be. In the case of the *Berkeley Peerage* two decisions only are referred to, and these at *nisi prius*. The first by Chief Baron Reynolds, in the year 1730, in support of the exception to the general rule; and the other in 1766, by Lord Camden, which, being much later in date, overrules the former case and establishes the rule so far as a *nisi prius* decision could have that effect.

Buller, in his *Nisi Prius*, which was published before the American Revolution, states as an exception to the general rule, that wherever hearsay and reputation are evidence, as in questions of pedigree, a special verdict between other parties, stating a pedigree, is evidence to prove a descent. Bull. N. P., 233. He mentions the *Duke of Athol's Case*, 2 Stra., 1151, in which Mr. J. Wright stated this to be the rule, and that his opinion in that respect was generally approved, although the determination of the other judges was contrary. But why were they contrary? Not because the rule, as laid down by Mr. J. Wright, was not considered the correct one, but because it did not appear in that case but that the witnesses upon whose testimony the verdict was found might have been examined in the case under consideration; and there can be no doubt but that depositions taken in one case cannot be read in another where the parties are different, even in a question of pedigree, unless the witnesses are shown to be dead. But it may fairly be concluded from the reasons which govern the majority of the court, that if this proof had been given, there would have been no difference of opinion between the judges. The case of *Goodlittle ex dem. Stevens v. Moss*, Cowp. Rep., is no otherwise important upon this point than as it gives us the opinion of Lord Mansfield, who, although deeply learned in the civil law, and by no means disinclined to adopt its principles upon all proper occasions, was not influenced by the distinction between evidence of declarations *ante* and *post litem motam*; and although Mr. Justice Aston concurs in awarding a new trial upon another ground, he expresses no dissent from the opinion of Lord Mansfield, or which can be construed to favor this distinction.

It is stated by some of the judges in the case of the *Berkeley Peerage*, that the rule at *nisi prius*, as far back as they could recollect, had been to exclude evidence of declarations made after a controversy had commenced. I must therefore take the fact as it is stated, that this had been the experience of those judges; but I must also believe that the rule was unknown to Mr. Jus-

tice Buller, as well as to the judge who dissented from the opinion delivered in the above case.

This point is, I presume, now settled in England by the two decisions above alluded to; but the question is, how has it been understood in this country before and since the American Revolution? As the *nisi prius* decisions alluded to by the judges in the Berkeley Peerage Case were never in print, it may fairly be presumed that they were unknown in this country, and consequently they could not have influenced the decisions of the courts of the different states. The only authoritative rule known was that which was laid down by Mr. Justice Buller and by Mr. Justice Wright in the Duke of Athol's Case. I have had no opportunity of looking into the American cases, but I am strongly inclined to think, from expressions to be met with in many of the state decisions, that the rule of *post litem motam* has never been recognized in the United States. See the cases cited by the plaintiffs' counsel on this point, to which I add the case of Jackson *ex dem.* Ross *v.* Cooley, 8 Johns., 128; 1 Yeates, 17, 152; Swift's Law of Evidence, 122.

It is not without great diffidence that I venture to dissent from the reasoning of the judges in the Berkeley Peerage Case. But it seems to be rather artificial than solid when directed against the *admissibility* of the evidence; although I acknowledge that the possibility of an undue bias having been produced by the existence of the controversy might with propriety be urged against the credit to be given to the evidence, where the proofs in the cause are contradictory and to be weighed. I am apprehensive that great mischief and injustice might be the consequence of excluding the only species of evidence which circumstances, not within the control of the parties interested, may have left to them, on the ground of a presumed bias created by an existing or even presumed controversy. I am persuaded that, carried to the extent stated in that case, the rule would exclude hearsay and reputation in a great majority of cases, where it can alone be resorted to to prove pedigree.

I am of opinion that upon proof being made of the death of the witnesses, the depositions may be read.

DUSSERT *v.* ROE.

(Circuit Court for Pennsylvania: 1 Wallace, Jr., 39-46. 1843.)

STATEMENT OF FACTS.—This case came up on a question of evidence, *i. e.*, the admissibility of certain depositions taken in France (and in French), tending to prove the pedigree of the plaintiff. The first, second and third witnesses derived their information, they said, from the plaintiff herself, and "*par la notoriété publique*," and knew plaintiff altogether from business relations; the fourth witness knew plaintiff by social and friendly intercourse with her and her sister, and derived his knowledge of her pedigree from her mother, her brother, and *la notoriété publique*.

The action was ejectment, brought in 1832, and the defense was adverse possession of twenty-one years. There had been no cross-examination.

§ 2046. *Courts, in a proper case, are more indulgent to foreign testimony than similar testimony at home.*

Opinion by BALDWIN, J.

The rules of evidence are not absolutely inflexible; and where testimony bears strong general marks of candor, and an opposing party has neither cross-examined the witness nor attempted to impeach the testimony by adduc-

ing counter evidence, a court, generally speaking, is not extreme in its requirements; especially where, as in this case, the evidence comes through the channels of a foreign language and a foreign commission. In such cases, testimony will sometimes be received in regard to which, in other circumstances, the court would be more strict.

§ 2047. *La notoriété publique, or common reputation, was intended to include general reputation in the family.*

We think that, under the circumstances of this case, it may be intended that the witnesses, two of whom appear to have been considerably acquainted with the family of Madame Dussert, designed, by the expression *notoriété publique*, to include general reputation in the family.

§ 2048. *Query, whether the declarations proving pedigree must be made ante litem motam.*

The point being thus rested, it is not so important that we express an opinion as to the statements of the mother and brother, which it is matter of doubt whether they were made *ante* or *post litem motam*. The defendant's counsel has argued very well against the reception of such testimony, but we rather incline, on first impression, to think that it is admissible. You may read the testimony, but we will reserve the point of law for future consideration, should it be rendered necessary.

HURST v. JONES.

(Circuit Court for Pennsylvania: 1 Wallace, Jr., Appendix, iii-viii. 1801.)

STATEMENT OF FACTS.—In this action of ejectment a deposition taken in 1787 was offered to prove descent. The deponent stated that he had “many conversations with ancient people of reputation, and had been by them informed,” etc., giving what five persons had said on the subject of the descent. The deposition then goes on to say that he saw the affiants subscribe certain (*ex parte*) affidavits annexed to the deposition, and these affidavits contain exactly what deponent had stated that the “ancient people” had said. The deponent made these inquiries because required by the secretary of the land office, in order to get a warrant of survey under the title on which he claimed. This title was the same as the title in suit.

§ 2049. *Hearsay as to pedigree, if otherwise admissible, is not incompetent because contained in or based on sworn affidavits.*

Opinion by TILGHMAN, J.

Is it clear that Morris' information is wholly derived from the affidavits? I think not. He says that he had several “conversations” with ancient persons, and was informed, etc. But regarding the case as the defendant's counsel view it, is that which is stated under the sanction of an oath less persuasive or less likely to be true than the prattle of casual conversation? or is the truth of conversation rendered less probable by being afterwards sworn to? Suppose this case:—A person, hearing another giving an account of the lineage of one whose pedigree he wishes to establish, thereupon asks that other to go and swear to it. Is the statement, when sworn to, rendered less probable? I am not aware that any court has decided that the only declarations admissible are those dropped in passing conversation; nor do I see that the value of the declaration is essentially impaired because responsive to inquiry, or even to interested inquiry, provided no controversy has been stirred. Suppose that, being interested to know my descent, I go to an aged friend and ask him such and such questions, and he tells me what he knows: is not this

hearsay, and admissible? subject of course to the restriction which I have named, that it must be made before controversy moved.

§ 2050. *Hearsay as to pedigree is admissible if made ante litem motam.*

For the rest, I do not see that any controversy had been stirred in 1768, when these affidavits were made; and I therefore think that Morris' deposition should be submitted to the jury. Under the court's direction, they will decide upon its credibility and weight.

Opinion by GRIFFITH, J.

I agree with the chief justice. Hearsay is admissible when made *ante litem motam*. That is this case. The present suit, it is admitted, was not stirred when the affidavits were made; nor, in fact, were they made in any controversy properly so called. The secretary of the land office, it would appear, wanted a chain of title produced for his own satisfaction. The rules of his office probably required that the evidence of an applicant's title to a warrant should appear among the records, and Morris produced such evidence. So far as appears, there was no dispute nor doubt as to the descent; nor was there any opposing claimant of the warrant. I infer that the affidavits were made in compliance with the technicality and routine of office. They are, then, nothing more nor less than sworn declarations *ante litem motam*. I do not see that the jurat destroys their credibility; for if that which is dropped in the laxity of conversation be credible, why ceases it to be so when reduced to form and sworn to after calm, solemn and thoughtful recollection? The case from Dallas does not conflict with our opinion; for that case is inclusive rather than restrictive.

In short, while I have always admired the wise sentiment of Lord Talbot, that it is better to suffer a particular mischief than a general inconvenience, and feel in great strength that the rules of evidence are founded upon large, general principles never to be broken away by the hardness of circumstances, I must yet admit that in excluding this deposition we should narrow a rule of law beyond what is found in precedent. I may add, at the same time, that I should not be disposed to go greatly further than we do in this case.

Opinion by BASSET, J.

If we give to the deposition that favorable interpretation which in support of probable intent human language may reasonably claim, it will by no means appear that Mr. Morris records only what is found in the affidavits. On the contrary, he had been inquiring in regard to the subject, "had many conversations with ancient people," and as he might remember generally that the essence of what he learned was accurately set forth in their affidavits, we can understand why he presents documentary language (if it be the fact that he does so) rather than the less accurate recollections of an exhausted memory. I agree with the chief justice and my brother on the other points. In 1768, when the affidavits were taken, there does not appear to have been what, in the understanding of law, is a "controversy stirred;" and though I was, at first, much oppressed by the argument that what Morris heard was in answer to his own inquiries made on the very point now in question, and with an interested view, yet I think, upon the whole, that as the witnesses must be presumed to have been indifferent, as they cannot be regarded as officious volunteers, what they stated is not to be rejected purely because it was in answer to inquiry, or because (being, doubtless, desired so to do) they attested with

their oath what they had said in conversation. The evidence ought to be received, but is open, of course, to observation from the court.

Depositions received.

§ 2051. **In general.**—Hearsay evidence is incompetent to establish any specific fact which is in its nature susceptible of being proved by witnesses who speak from their own knowledge. *Queen v. Hepburn*, 7 Cr., 290 (§§ 2001-3).

§ 2052. The certificate of a physician is not evidence. It is merely hearsay. He must give his evidence under the sanction of an oath, as other men. *United States v. Mercer*, Deady, 502.

§ 2053. What a witness has heard two settlers say as to a sale of his right by one to the other is hearsay and not evidence. *Lanning v. Case*, 4 Wash., 169.

§ 2054. In proving the testimony of a deceased witness, his very words must be given; substance or effect not sufficient. *Bennett v. Adams*,* 2 Cr. C. C., 551.

§ 2055. Where the names and ages of the members of his family had been entered in a book by a person since deceased, such book was admitted in evidence to prove the age of one of the persons as a witness. *Negro Clara v. Ewell*,* 2 Cr. C. C., 208.

§ 2056. In a suit for infringement, it cannot be asked of a witness what certain others told him as to the reputation of the name and invention of the machine. *Evans v. Hettick*, 3 Wash., 408.

§ 2057. **Pedigree.**—In cases of pedigree, evidence of general reputation in the family as to relationships or declarations of deceased persons is admissible, but this is confined to members of the family, who may be supposed to have knowledge of such relationships. Such declarations, however, must be made before the question upon which they are offered as evidence had arisen. *Stein v. Bowman*, 13 Pet., 220 (§§ 2251-59).

§ 2058. Evidence by hearsay from persons deceased, and by general reputation, is admissible to prove the pedigree of a slave petitioning for freedom, but not to prove that the petitioner's ancestor was free. *Davis v. Wood*, 1 Wheat., 6.

§ 2059. The general report of the neighborhood on a question of pedigree cannot be entirely disregarded. But the weight to which this and all other hearsay evidence is entitled depends on the circumstances of the case, the remoteness of the time when the fact occurred, and the difficulty of producing any positive testimony respecting it. *Stegall v. Stegall*, 2 Marsh., 256.

§ 2060. A witness may prove general reputation as to pedigree, although he is not a member of the family or intimately acquainted with it. *Barnet v. Day*,* 3 Wash., 243.

§ 2061. A deposition may be used to prove pedigree, though taken in another cause, between different parties. *Ibid.*

§ 2062. **A boundary** may be proved by what a person now dead heard another person say, who is also dead; the rule applies to all cases of pedigree, prescription, or ancient landmarks. *Beard v. Talbot*,* 1 Cooke (Tenn.), 142. See § 1861.

§ 2063. Reputed boundaries are often proved by the testimony of aged witnesses, and even by the hearsay evidence of such witnesses, in opposition to the calls in an ancient patent. *Conn v. Penn*, Pet. C. C., 496.

§ 2064. The competency of hearsay evidence, on questions of public right, is well established, however widely judges may differ on its force and effect. Where the question is as to territorial limits, and where the boundary concerns the extent of a public municipal jurisdiction, either public reputation, or the particular declarations of deceased persons, made *ante litem motam*, are receivable in evidence. *McCall v. United States*,* 1 Dak. T'y, 320.

§ 2065. The declaration of a deceased surveyor that a particular spring was on the land of one of the parties cannot be proved on a question of boundary, nor is general reputation as to the fact admissible. *Fraser v. Hunter*, 5 Cr. C. C., 470.

§ 2066. Notes, made by a surveyor on his map, of facts which he is required or authorized to ascertain in the discharge of his duty, are admissible in evidence. But notes made by him as to whether the chops of a former survey are ancient or modern, or appear to have been made by a large ax or a small one, or as to what some third person said, are mere hearsay and not evidence. *Ellicott v. Pearl*, 1 McL., 206.

§ 2067. **Historical facts.**—Historical facts of general and public notoriety may be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But this evidence is confined mostly to ancient facts, which do not presuppose better evidence in existence, and where from the nature of the transactions or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. *Morris v. Harmer*,* 7 Pet., 558.

§ 2068. The work of a living author, who is within reach of the process of the court, is not the best evidence of recent facts, and will not be received as evidence. *Ibid.*

§ 2069. Maps of early explorers of a river, and reports of travelers, as to its channel at an early day, being mere hearsay, are entitled to little weight, if the fact is within the memory of living witnesses, and will be overcome by the testimony of such witnesses, if differing from it. *Missouri v. Kentucky*, 11 Wall., 395.

§ 2070. Reputation — Notoriety — Tradition.— Notoriety or reputation cannot be established by the testimony of one witness. *Watts v. Lindsey*, 7 Wheat., 158.

§ 2071. Evidence of general reputation can only be given when the reputation was among free white persons who are dead or presumed to be dead. *Negro Joice v. Alexander*, 1 Cr. C. C., 528.

§ 2072. It is competent to prove death and heirship by reputation. And the deposition of a witness stating the time of the death of the ancestor, and the names of the children who died prior to his decease, "as appears from the entries in the family Bible, and which this deponent believes to be true;" and the names and times of death of others, as the deponent is informed and believes, is not objectionable because the Bible is not produced, or because the deposition is upon information and belief. *Secrist v. Green*, 3 Wall., 744.

§ 2073. Testimony that the witness was in the place where a person resided and there heard that such person was dead is admissible evidence of the fact. *Scott v. Ratliffe*, 5 Pet., 81.

§ 2074. Reputation or hearsay is competent proof of the name of a person, place or house. So, where a person named Dodge was indicted for selling liquors, it was competent to prove that the house where the liquors were sold "was called Dodge's," and that the man who kept it "was called Dodge." *United States v. Dodge*, Deady, 186.

§ 2075. On an indictment for keeping a bawdy-house, the prosecution cannot prove the general reputation of the house. *United States v. Rollinson*,* 2 Cr. C. C., 13.

§ 2076. In a prosecution for keeping a disorderly house, the general reputation of the house may be proved. *United States v. Gray*,* 2 Cr. C. C., 675.

§ 2077. On an indictment for keeping a house of ill-fame, the court rejected evidence of the ill-fame of defendant herself. *United States v. Nailor*,* 4 Cr. C. C., 372.

§ 2078. In a prosecution for keeping a house of ill-fame, the court permitted proof of the ill-fame of the occupants, but would not permit their names to be disclosed. The attorney for the United States was not permitted to prove that his own witness was a woman of ill-fame. *United States v. McDowell*,* 4 Cr. C. C., 423.

§ 2079. Upon an indictment for keeping a disorderly house, where it is averred that defendant suffered persons of ill-fame to come together, evidence of the general reputation of such persons is admissible. *United States v. Stevens*,* 4 Cr. C. C., 341.

§ 2080. Upon an indictment for keeping a bawdy house, or a disorderly house, the general reputation of the house is not admissible in evidence, *United States v. Jourdine*,* 4 Cr. C. C., 338; nor that of the defendant. *United States v. Warner*,* 4 Cr. C. C., 342.

§ 2081. General reputation not admissible to prove a partnership. *Wilson v. Colman*,* 1 Cr. C. C., 408.

§ 2082. A power to release a debt cannot be proved by general reputation. *Bennett v. Adams*,* 2 Cr. C. C., 551.

§ 2083. Traditions existing in the neighborhood are not sufficient to prove a title by devise. *Moore v. Greene*, 2 Curt., 202.

§ 2084. The depositions of witnesses to prove a dedication by common reputation are inadmissible, where the dedication is alleged to have been made within the memory of living witnesses, and the public repute to which the depositions refer is subsequent to the controversy and appears to have grown out of it. *Chapman v. School District No. 1*, Deady, 139.

§ 2085. Hearsay or reputation is admissible to prove ancient boundaries and landmarks; but it must be pertinent and material to the issue between the parties. If it refer to a fact which is immaterial to the point of inquiry, and from which the jury cannot draw any inference of material facts, it is rightly rejected. *Boardman v. Reed*, 6 Pet., 328.

§ 2086. Reputation is admissible evidence to prove boundaries. But what an individual may have said respecting certain lines or corners does not constitute public reputation, and is not admissible. The reputation must be general in the neighborhood. *Nelson v. Hall*, 1 McL., 518.

§ 2087. The map of the city of St. Louis, known as Chouteau's map, made when that city was founded, and placed in the office of the record of land titles, is evidence, though not conclusive, of the extent and boundaries of lots in that city. *The Schools v. Risley*, 10 Wall., 91.

§ 2088. Evidence of reputation as to location of a given boundary was refused unless such reputation was traditionary in its character, or was derived from ancient sources, or was from persons who had peculiar means of knowing reputation as to such boundary at an early date. *Held*, that the limitation was proper. *Shuttle v. Thompson*,* 15 Wall., 151.

§ 2089. Hearsay and reputation are not admissible to prove particular facts in a contest as to private rights. Such evidence cannot be received to prove that a corner-stone was established to designate a private grant. *Winter v. United States*, Hemp., 344.

X. EXPERT AND OPINION EVIDENCE.

§ 2090. **As to who are experts.**—Whether a witness is shown to be qualified as an expert is a preliminary question for the court. If the court admits the testimony, it is then for the jury to decide as to its weight. *Spring Company v. Edgar*, 9 Otto, 645.

§ 2091. The owners of a steamboat, claiming that their engine had been broken by being compelled to tow some government schooners, introduced the captain and engineer of the boat to prove the fact. These witnesses having only given their opinions, the court held this evidence insufficient, because the character of the witnesses as experts, by being shown to be machinists, and free from suspicion of interest and bias and prejudice, was not established. *Schultz and Markley's Case*,* 2 N. & H., 380.

§ 2092. **Value of expert testimony.**—The value of opinions of experts differs largely in different cases. It is of first importance that the facts upon which they are founded be satisfactorily established. It is next of importance that the integrity and skill of the witness be known. Where the expert states precise facts in science, as ascertained and settled, or states the necessary and invariable conclusion which results from the facts stated, his opinion is entitled to great weight. Where he gives only the probable inference from the facts stated, his opinion is of less importance. Where the opinion is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight. *Gay v. Union Mutual L. Ins. Co.*, 9 Blatch., 143.

§ 2093. Opinions of experts as to the identity of two inventions are entitled to weight, but are not facts and binding upon the jury. *Spaulding v. Tucker*, Deady, 649.

§ 2094. The testimony of experts is to be considered like any other evidence, and the jury are to try it by the same tests that they apply to other evidence, and give it such weight as they deem it entitled to. *Carter v. Baker*, 1 Saw., 512.

§ 2095. It is for the jury to weigh the opinions of experts given in evidence, like any other testimony, and their decision is not to turn merely upon the number of witnesses on a side. *Brooks v. Jenkins*, 3 McL., 432.

§ 2096. In considering the testimony of experts, the jury should give weight to it according to the competency of the witnesses to judge of the matters sworn to. A witness is not a competent expert upon a question of science unless he understands the science in question. *Allen v. Hunter*, 6 McL., 303.

§ 2097. In an action for injuries received through a defective highway, mere opinions of physicians that subsequent debility and ill-health, proved to have been suffered by the plaintiff, resulted from the injury, or were consistent with such a theory, must be received with great caution, and weighed in view of all the uncertainties which surround the case. *Nichols v. Inhabitants of Brunswick*, 3 Cliff., 81.

§ 2098. Those best acquainted with any particular art, profession, or business, in all matters directly concerning them, are accounted more reliable and satisfactory witnesses than those who have no such skill or experience. Hence the testimony of intelligent and credible experts is entitled to the most respectful consideration. The opinions of those experienced in and familiar with the navigation of a river, as to the practical effect of a certain bridge upon the navigableness of that river, and to the correctness of the professional conduct of those managing a boat damaged in passing the bridge, may be given as evidence. *Jolly v. Terre Haute Draw Bridge Company*, 6 McL., 237.

§ 2099. Expert testimony as to the genuineness of signatures is of all kinds the most unsatisfactory. *Cowan v. Beall*,* 1 MacArth., 270.

§ 2100. **Hypothetical case.**—It is not the province of an expert to draw inferences of fact from the evidence, but simply to declare his opinion upon a known or hypothetical state of facts. If any of the hypothetical states of fact put to an expert are proved, his opinions thereon are admissible evidence to be weighed by the jury, otherwise not. The rule excluding opinions does not apply to expert testimony, but such opinions are not binding on the jury against their judgment. *United States v. McGlue*, 1 Curt., 1.

§ 2101. An expert cannot be permitted to state his opinion as to the sanity of a person, upon the evidence which he has heard, since to do this he must ascertain and determine what the facts are. He may state his opinion where the facts are established and uncontradicted, or upon a similar case hypothetically stated. *Dexter v. Hall*, 15 Wall., 9.

§ 2102. **When admissible.**—If the subject of a proposed inquiry is a matter of common observation and knowledge, such as the question whether one building would be considered as exposed to a conflagration in another, and not a question of science, experts are not permitted to state their conclusions. *Milwaukee & St. Paul R'y Co. v. Kellogg*, 4 Otto, 469.

§ 2103. If it is claimed that goods shipped and not delivered in good order have been in-

jured by a chemical cause, the carrier should be prepared to prove the point by experts. *Turner v. Ship Black Warrior*, 1 McAl., 181.

§ 2104. The opinions of professional men are admissible in evidence upon matters which relate to their professions, but not on other subjects. *Brooks v. Jenkins*, 3 McL., 432.

§ 2105. The opinions of experts are evidence as to matters of science within their peculiar departments of knowledge; but the value of such opinions must be tested by the reasons on which they are built. *Jordan v. Dobson*, 2 Abb., 398.

§ 2106. Opinions of experts, as to the construction of a patent, are not admissible. Experts may be examined as to the meaning of terms of art on the principle of *cuique in sua arte credendum*, but not as to the construction of written instruments. *Corning v. Burden*, 15 How., 252.

§ 2107. Opinions of experts, as to the proper construction of an instrument of writing—papers, filed by a patentee, describing his patent—are not admissible in evidence. *Winans v. New York & Erie R. Co.*,* 21 How., 88.

§ 2108. To be qualified to testify as an expert upon the quality of the iron described in a contract as “No. 1 Shott’s Scotch pig-iron,” the witness must show that he is skilled in the business of manufacturing iron. A clerk, or book-keeper, although he may have been long employed in an iron foundry, and may have seen the business conducted, is not competent to testify as an expert, unless he shows by his testimony that he has given the subject of examining and testing iron special attention and study, and has had experience in that art. If it appears that he relies upon the decision of others or upon the marks on the iron, he is not an expert. *Pope v. Filley*, 3 McC., 190.

§ 2109. Where vendors agree to ship “No. 1 Shott’s Scotch pig-iron,” the quality of the iron cannot be shown by proof of a custom of the foundry as to examining and marking. It must be shown by the testimony of competent judges who have examined it. *Ibid.*

§ 2110. An insurance expert may testify that a certain fact would have an influence with underwriters generally, in determining the amount of the premium. *Hawes v. New England Mut. Mar. Ins. Co.*,* 2 Curt., 229.

§ 2111. In an action on an insurance policy, statements or plans of the adjustment of the loss, made by an expert, and founded upon different theories of the law, may be given in evidence to the jury, not as evidence of the facts stated in them, or as obligatory upon the jury, but only for the purpose of assisting them in calculating the amount of liability of the defendant upon the several hypotheses of fact stated in them. *Home Insurance Co. v. Baltimore Warehouse Co.*, 3 Otto, 527.

§ 2112. On the question of the infringement of a copyright, the testimony of experts, as to the result of their comparisons of the books, though admissible, is in the nature of secondary evidence. *Lawrence v. Dana*, 4 Cliff., 1.

§ 2113. A manufacturer of steam-gauges, who has repeatedly tested fire hose, may be permitted to state as an expert what is and what is not a proper mode of testing fire hose. *Chicago v. Greer*, 9 Wall., 726.

§ 2114. In a suit for breach of a contract in which the plaintiff had agreed to manufacture for the defendant certain fire hose, it being claimed by the defendant that the hose would not bear the required test, it was held competent for the plaintiff to prove that the *ex parte* test applied by the defendant was not a fair one, and also to prove, by experts, what constituted a “fair and satisfactory test,” such as was provided in the contract. *Ibid.*

§ 2115. To prove that the consideration for which land was sold was inadequate, the opinions of farmers living in the vicinity, and acquainted with the value of farming lands there, may be given. The foundation upon which the admissibility of this evidence rests is the supposed superior knowledge or experience of the witness in relation to the subject. *Carpenter v. Robinson*, 1 Holmes, 67.

§ 2116. In a proceeding for the forfeiture of sugar imported, on the ground that it was invoiced below its fair market price at the place of export, the opinions of the appraisers and merchants engaged in the trade are admissible in evidence to prove the market value. This testimony is not mere hearsay, but is in the nature of expert testimony. And the opinions of home merchants engaged in the trade are as admissible as those at the port of export. *Alfonso v. United States*, 2 Story, 421.

§ 2117. In a suit for damages to goods, where experts have testified as to their value in the damaged condition, the mere fact that they were sold at auction, and that the owners bought them in, will be no ground for disregarding the expert testimony. *Ship Sabioncello*, 8 Ben., 90.

§ 2118. In a notice of special matter, a reference simply to Ure’s Dictionary of Arts, Manufactures and Mines is not sufficiently definite; the page or heading should be specified. That definiteness is a question for the court, and the testimony of scientific experts that they would know what part of the book to look in is not admissible. Notice in a plea that has been stricken out by the court is not sufficient legal notice. *Foote v. Silsby*, 1 Blatch., 445.

§ 2119. In a prosecution for counterfeiting coin, where pieces of counterfeit coin and machines and implements had been found in the house in which the defendant lived, the deputy marshal who assisted in making the discoveries was permitted to testify that, from his observation in many cases in which, while as a public officer, he had arrested persons in places where counterfeit money had been found, he had become capable of knowing to what purposes articles like those found in the house could be applied; and that they could all be used for counterfeiting coin; and that, though each one separately could be applied to some other purpose, there was no other purpose to which they could collectively be applied. *United States v. Tarr*,* 4 Phil., 405.

§ 2120. Where a libellant proved his demand for repairs by shop books, the court may well consider this evidence stronger than the contrary opinion of experts taken *ex parte* after the work was done. *Ship Potomac*, 2 Black, 581.

§ 2121. Where the master of a vessel is charged with having sailed on a voyage from the coast of Africa with a sick crew, whereby damage was caused, the evidence of the crew in such a case as to their own health is stronger than the opposing testimony of persons experienced in the trade of the African coast, as to the effect of the given sickness on the crew and the propriety of the master's leaving as he did. *The Gentleman*, 1 Blatch., 196.

§ 2122. To what depth a vessel can be loaded with safety to the lives of the passengers cannot be settled by any rule of law or mathematical computation, but is best decided by the testimony of experts. *Ogden v. Parsons*, 23 How., 167.

§ 2123. Sailing rules and regulations which have been enacted, in cases in which they apply, furnish the paramount rule of decision in cases of collision. But in cases in which they have no application, and for which the rules of practice of the admiralty courts, as framed by the supreme court, make no provision, persons of nautical skill and experience may be examined as experts as to what the general usage is in respect to any disputed question of navigation. And, in certain cases, where better guides are not furnished by law, it may be inquired of such witnesses what is and what is not good seamanship in a supposed state of the case, if the supposed state of the case is within the general scope and range of the evidence submitted for the consideration of the court. *The "City of Washington,"* 2 Otto, 31.

§ 2124. In a case of collision, an expert opinion, depending on a very nice calculation of courses and distances, cannot be safely adopted against the direct testimony of eye-witnesses. *The D. P. (Kelley v. Thompson)*, 1 Low., 124.

§ 2125. In a collision case experts may testify to show what effect a certain rate of speed would have upon any question of navigation — such as convenience of steering, etc., — but they cannot testify on the question whether it was prudent in the master to keep his vessel at such a rate of speed. *The Blackstone*, 1 Low., 485.

§ 2126. The testimony of experts upon the depositions of witnesses present at a collision is not admissible on a libel in admiralty based on the collision. *The Clement*, 2 Curt., 363.

§ 2127. The testimony of experts, as to rules of navigation, cannot be received in opposition to or qualification of well established rules of maritime law. Nor is such testimony admissible to prove a local usage, binding in point of law, that no attention is required to be paid by other vessels to pilot boats. *Ibid.*

§ 2128. In an action to recover damages for the loss of the plaintiff's barge, which the defendants had undertaken to tow from Jersey City to New Haven through Long Island Sound, it was held to be competent to ask of a captain of a tug-boat, who was familiar with the waters of the Chesapeake Bay but not with those of the Sound, whether, according to his experience, it would be safe and prudent for a tug-boat on Chesapeake Bay, or on any other wide water, to tug three boats abreast, with a high wind. *Transportation Line v. Hope*, 5 Otto, 297.

§ 2129. Experts were admitted to testify, in this case, that the male deer, at certain times of the year, is a dangerous animal. *Spring Company v. Edgar*, 9 Otto, 645.

§ 2130. **Non-experts.**—Testimony of persons who are not experts is competent on the question of insanity. *Insurance Co. v. Rodel*, 5 Otto, 232.

§ 2131. **Fees.**—Experts are not bound to testify as to their opinions for the ordinary witness fees. They may demand extra compensation, and the fact that they do should not, of itself, discredit their testimony with the jury. *Harvey v. Evansville, etc., Packet Co.*, 8 Biss., 99.

§ 2132. **Opinions and beliefs — In general.**—Witnesses must state facts and not their beliefs. *Ventress v. Smith*, 10 Pet., 161.

§ 2133. The belief of a witness, resting on facts within his own knowledge, is evidence; but his belief is not evidence where it rests upon facts not within his own knowledge. *Giltner v. Gorham*, 4 McL., 402.

§ 2134. The belief of a witness, accompanied by the facts upon which the belief is founded, is admissible. *The Bank v. McKenney*,* 3 Cr. C. C., 361.

§ 2135. A witness should give his reasons when he swears to inferences. *The Nereide*, 9 Cr., 388.

§ 2136. A witness cannot give his opinion as to whether other persons knew a certain fact, without stating the facts upon which his opinion is founded. *The Bank of Commerce v. Selden*,* 1 Minn., 340.

§ 2137. A witness stated that he believed certain goods were for the defendants because they were shipped to the defendants. It was held that as the witness stated the grounds of his belief his testimony was admissible. *Wilson v. McClean*, 1 Cr. C. C., 465.

§ 2138. Where in a deposition the deponent said he "believed the goods were for the house of McClean & Winterberry, as they were shipped to McClean & Winterberry at Alexandria," the court refused to strike out these words, because the witness had stated the grounds of his belief. *Ibid.*

§ 2139. The opinions of persons conversant with bank paper are admissible to prove whether bills are genuine, and also to prove the signatures of the president and cashier. *United States v. Holtsclaw*,* 2 Hayw. (N. C.), 379.

§ 2140. The statement of the master and sole owner of a ship that he considered a certain voyage illegal is admissible in proceedings against the vessel to condemn it for proceeding on the illegal voyage in question. *United States v. Bark Isla de Cuba*,* 2 Cliff., 295.

§ 2141. In a suit for breach of contract, where the question is whether the plaintiff has fulfilled or offered to fulfill his part of the contract, a witness cannot be permitted to give his opinion on the question whether the article delivered by the plaintiff would answer the purpose for which it was contracted for by the defendant. That the witness is not an expert is also an objection to such evidence. *Chicago v. Greer*, 9 Wall., 726.

§ 2142. In an action for maliciously holding the plaintiff to bail, upon a *ne exeat*, for a much larger sum than was due, a witness will not be permitted to state his opinion as to the fraud or fairness of the plaintiff's conduct, derived from the facts which appeared before him as an arbitrator. *Zantlinger v. Weightman*, 2 Cr. C. C., 478.

§ 2143. In an action for malicious civil prosecution the opinion of the counsel for the plaintiff in the original suit is admissible if given before the commencement of the suit, and if it appear that such opinion was asked upon the real facts in the case. *Blunt v. Little*, 3 Mason, 102.

§ 2144. The construction of treasury transcripts offered in evidence is for the court. If any obscurity rests upon them that requires or admits of explanation, it should be given by the officers of the treasury department where the accounts were kept and made out. Witnesses claiming to be acquainted with the manner of keeping accounts at the department cannot be permitted to give their opinions that moneys advanced to a paymaster to pay the militia should have been partly used in payment of the regular troops. *United States v. Willard*, 1 Paine, 539.

§ 2145. — **as to value.**— The mere opinion of a witness as to the value of services cannot be received. Before he can be permitted to testify to such value it must appear by his own or other competent evidence that he knows with reasonable certainty what the usual or market value of such or like services is; and then he testifies to the value as a fact, and not as a mere matter of opinion. *Elfelt v. Smith*,* 1 Minn., 125. See § 717.

§ 2146. The opinions of attorneys at law are not conclusive as to the value of legal services; the jury should exercise their own judgment on the facts on which those opinions are founded. *Head v. Hargrave*,* 15 Otto, 45.

§ 2147. It is error for the court to permit a witness, who has never seen a volunteer crop of oats, to form an opinion of its value from the other testimony in the case, and give such opinion in evidence to the jury. *Zachary v. Swanger*,* 1 Or., 92.

§ 2148. The opinion of the master and mate of a vessel as to the loss in earnings caused by the vessel's detention for repairs is not competent evidence. It should appear that they knew the price of charters of this description at the time. *The Isaac Newton*, 4 Blatch., 21.

§ 2149. — **of sanity.**— Except as to the testimony of medical experts, the mere opinions of witnesses, as to the sanity or insanity of a testator, are entitled to no regard, unless they are supported by good reasons, founded on facts which warrant them in the opinion of the jury. *Harrison v. Rowan*, 3 Wash., 580. See §§ 672, 1502.

§ 2150. A witness may be asked what opinion he formed of the sanity of a testator at or about the time of the making of the will; but not what he said to third persons on the subject. *Ibid.*

§ 2151. Opinions of witnesses not experts are competent evidence in cases where the object is to prove capacity or incapacity to contract, when the facts or circumstances are disclosed on which their opinions are founded. *Kilgore v. Cross*, 1 McC., 144.

§ 2152. — **in collision cases.**— In cases of collision, the court looks most sedulously to the facts sworn to, independent of the judgment of the witnesses, and in that aspect the knowledge of the witness is usually confined to what was done, ordered or attempted to be done on his own ship. *The Steamboat Narragansett, Olc.*, 246. See §§ 667, 1727.

§ 2153. The opinions and judgments of witnesses on board the vessels are entitled to little weight in cases of collision. The court in such cases looks chiefly to the facts stated by the witnesses to have occurred within their personal knowledge. What a witness asserts he did at the time or did not do on his own vessel is generally more satisfactory evidence of the fact than the opinions and beliefs of a dozen others, formed from what they supposed they saw or heard on another vessel. *The Steamboat Neptune, Olc.*, 483.

§ 2154. The estimate or judgment of witnesses, as to the bearings, distances or relative positions of objects on the water looked at in the night-time, and particularly when the witnesses are placed on vessels in motion, cannot be considered entitled to confidence as facts. *The Sloop Argus, Olc.*, 304.

§ 2155. In a case of collision, the opinions and inferences of witnesses on one of the vessels under way, in relation to the maneuvers of the other, also in motion, afford no satisfactory or reliable evidence of the actual facts of the transaction. *The Steamboat Narragansett, Olc.*, 246.

§ 2156. In a libel for damages occasioned by negligent towage, the opinion of the owners of the tug, who were also the master and crew, as to the proper management of the tug, is entitled to very little weight. *The Armstrong*, 1 Brown, 130.

§ 2157. In a collision case the testimony of the two pilots on the libelant's boat as to what occurred within their own knowledge on their own vessel, when weighed against the opinions of a greater number of witnesses on the respondent's boat as to that occurrence, will constitute a preponderance of evidence. *The Governor*, Abb. Adm., 108.

XI. CHARACTER.

§ 2158. In general.—On a question of the confiscation of certain land by attainder, the political character and conduct of the person whose estate has been sold may be proved, to show, not that the person intended by the proclamation under the attainder laws was not guilty, but that the person whose estate has been sold is not the person intended by the proclamation. *Hylton v. Brown*, 1 Wash., 298.

§ 2159. The character of the plaintiff being put in issue in a suit for libel, he may give evidence of his character before the defendant has attacked it. *Romayne v. Duane*, 3 Wash., 246.

§ 2160. Proof of the bad character of the plaintiff is inadmissible for any purpose in actions for malicious prosecution. *Hickman v. Jones*, 9 Wall., 197.

§ 2161. In an action against the sureties of a United States official, on his official bond, for a default in his duty, evidence of the good character of the official, and the faithful performance of his duties generally, is inadmissible, although he is dead and many of his papers destroyed. *United States v. Wood*,* 13 Blatch., 252.

§ 2162. In criminal cases.—The previous good character and reputation of the defendant in a criminal proceeding, so far as it respects the crime charged, is competent evidence, and is a fact to be weighed and considered by the jury, in the light of which they should view all the evidence and determine the question of his innocence or guilt of the crime charged against him in the indictment. *United States v. Babcock*, 3 Dill., 620. See §§ 1475, 1972.

§ 2163. Proof of previous good character is admissible in criminal prosecutions, but it cannot negative or set aside clear proof of guilt. Such proof can only be considered by the jury in cases where a well founded doubt of guilt exists in the minds of the jury. *United States v. Smith*, 2 Bond, 323.

§ 2164. Proof of general good character is available for the defendant in a criminal prosecution, only where the case is doubtful. *United States v. Roudenbush*, 1 Bald., 514; *United States v. Allen*,* 7 Int. Rev. Rec., 163.

§ 2165. Evidence of the previous good character of a person accused of crime may be given in evidence in his favor, and also of the standing, character and condition of his family in society, but this evidence is of no avail except in doubtful cases. If the evidence of guilt is clear, these circumstances are unavailing and cannot be considered by the jury. *United States v. Roudenbush*, Bald., 515.

§ 2166. In criminal cases it is only when the guilt of the defendant is doubtful that his good character is important. No proof of good character can be considered where guilt is plainly proven. The fact that a person has a good character in respect to the offense charged is only a circumstance against the probability of guilt. *United States v. Mayer*,* Deady, 127.

§ 2167. The general good character of the defendant ought to have weight with the jury in all cases where the facts are doubtful and admit of different interpretations. But where the evidence is positive, and satisfactory to the jury, such good character cannot overcome the just presumption of guilt arising therefrom. *United States v. Freeman*, 4 Mason, 505.

§ 2168. If a defendant, being indicted for a breach of a criminal law, admits all the elements that enter into and constitute the crime, evidence of good character is of no avail. *United States v. Buntin*, 10 Fed. R., 730.

§ 2169. In a criminal case the prosecution cannot introduce evidence of the general bad character of the defendant unless the defense has first introduced evidence of his good character. *United States v. Carrigo*, 1 Cr. C. C., 49; *United States v. Kenneally*,* 5 Biss., 122; *United States v. Holmes*, 1 Cliff., 98 (§§ 4339-51).

§ 2170. The defendant cannot offer evidence to support his character when it has not been impeached. *Ketland v. Bissett*, 1 Wash., 144.

§ 2171. Upon the trial of an indictment for the felonious possession of counterfeit treasury notes, the prosecution cannot give evidence of the general bad character of the accused, unless he first introduces evidence of character himself. *United States v. Kenneally*,* 5 Biss., 122.

§ 2172. Upon an indictment under section 3 of the act of March 3, 1875, for importing a woman for purposes of prostitution, it is proper to admit evidence of the character of a house of assignation kept by the defendant, and of acts done at the house after the woman was brought there, and while she lived there with the defendant, the house being the place named in the indictment as that where the purpose of prostitution was to be carried out. *United States v. Johnson*, 19 Blatch., 257.

§ 2173. On an indictment for embezzling letters while postmaster, evidence of good character is entitled to weight among the other facts in the case in favor of the defendant. *United States v. Emerson*,* 6 McL., 409.

§ 2174. Where a teacher is indicted for depriving a colored child of his civil rights in excluding him from the school of which he was teacher, and he admits that he excluded the prosecuting witness from the privileges of the school, and that he excluded him under color and by authority of a statute of the state, because of his color, evidence of the defendant's good character is immaterial, and is entitled to no consideration by the jury. *United States v. Buntin*, 10 Fed. R., 730.

§ 2175. In defense to an indictment for having in his possession, with intent to utter and pass, counterfeit notes of the United States, the defendant may show his good character; and the absence of such evidence is a strong circumstance to show that he has no such evidence to produce. *United States v. Kenneally*,* 5 Biss., 122.

§ 2176. In a prosecution for conspiring to defraud the revenue, evidence of the previous good reputation of the defendant is competent. *United States v. McKee*, 3 Dill., 551.

§ 2177. Evidence of previous good character is admissible in a prosecution for conspiracy to defraud the United States, and, in cases of well-founded doubt, is to be taken into consideration as affording a presumption in favor of innocence; but it cannot be held to negative or set aside clear proof. *United States v. Smith*, 2 Bond, 323.

§ 2178. In a prosecution for conspiracy to defraud the revenue, the good character of the defendant may be considered, where there is doubt as to his guilt. *United States v. Allen*,* 7 Int. Rev. Rec., 163.

§ 2179. Upon an indictment for stealing, proof of good character can seldom fail to protect the accused from a mere suspicion. *United States v. Poage*, 6 McL., 89.

§ 2180. In a prosecution for stealing letters from the mail, evidence of the previous good standing and character of the defendant in the community in which he lived, and the fact that, on hearing the charge against him, he immediately returned to his former residence and courted an investigation, is not only competent, but entitled to consideration by the jury. *United States v. Crow*, 1 Bond, 51.

§ 2181. Where it was proved that a letter containing a promissory note had been stolen, and the only evidence against the defendant charged with the theft was that he was associated with one Coyle when the latter collected the note from the maker, under false pretenses, the two receiving a pair of gloves each in change, and that he lodged in the same room with Coyle on the night of the same day; the facts being sufficient to make out a *prima facie* case against Coyle, if he were on trial, the jury were told that the proof of the good character of the defendant was sufficient to exonerate him from mere suspicion founded on such circumstances. *United States v. Poage*, 6 McL., 89.

§ 2182. Where an officer of a ship was charged with manslaughter in allowing a sailor falling overboard, while at work upon the ship, to drown, without any effort to save him, when by proper efforts, promptly made, he could have been saved, it was held that any doubt as to the conduct of the defendant rendered his past life and character entitled to consideration by the jury. *United States v. Knowles*, 4 Saw., 517.

§ 2183. Upon an indictment of the master of a vessel for murder upon the high seas, by compelling a seaman who was ill to go aloft, whereby he fell from the mast and was drowned, the court stated to the jury that the general good character of the defendant might be brought into the case and weighed by them in all cases where the facts were doubtful, or admitted of

different interpretations; but that such character could not overcome the just presumption of guilt arising from positive and satisfactory evidence. *United States v. Freeman*, 4 Mason, 505.

XII. HANDWRITING.

SUMMARY — *Opinion of witness, when admissible*, §§ 2184-85. — *Proof by comparison*, § 2186.

§ 2184. When a witness appears to the court to have a proper degree of knowledge of the handwriting of a party, whether such knowledge is acquired by seeing him write, or otherwise, he may be permitted to give the jury his opinion as to the genuineness of a writing. *Rogers v. Ritter*, §§ 2187-89.

§ 2185. When a witness swears to handwriting, his testimony is competent without first proving that the witness had ever seen the party in question write. *Goodhue v. Bartlett*, § 2190.

§ 2186. At common law, proof of handwriting by comparison of several writings is not generally allowed, but when a paper, admitted to be in the handwriting of a party, or to have been subscribed by him, is in evidence in the cause for some other purpose, the doubtful signature may be compared with it by the jury. *Moore v. United States*, §§ 2191-92.

[NOTES. — See §§ 2193-2219.]

ROGERS v. RITTER.

(12 Wallace, 317-322. 1870.)

ERROR to U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—The objection to the grant, which, supposing it genuine, is insisted on in the first place, in this court, by the counsel of the plaintiff in error, presents a question which in the state of the record this court is not called upon to decide; for it does not appear that the objection was taken in the court below. It is true that the grant was attacked there, but on an entirely different ground. The main controversy concerning it was, whether or not it was genuine. Its validity, if genuine, does not seem to have been questioned. We are not, therefore, required to travel through the various laws of Mexico, the acts of California governors, and the proceedings of departmental assemblies to determine at what period of time the powers of justices of the peace, acting as alcaldes, to grant building lots within their jurisdiction, ceased.

§ 2187. *Whatever rules may be in force as to comparison of handwriting, any witness who knows the writing of the person in question may prove a paper to be in his handwriting.*

It is insisted, in the second place, that comparison of handwriting is in no case legal evidence, and as it was admitted to prove the genuineness of the disputed paper, the judgment should on that account be reversed. It is certainly true that the ancient rule of the common law did not allow of testimony derived from a mere comparison of hands, and equally true that there has been a great diversity of opinion, in the different courts of this country, in relation to this species of evidence. But in England this rule of the common law, as it respects civil proceedings, has been abrogated by the legislature, so that in the courts there, at the present day, in civil suits, the witness can compare two writings with each other, in order to ascertain whether they were both written by the same person. 2 Taylor on Ev., §§ 1667-8. It is, however, not necessary for the purposes of this case to discuss the subject in all its bearings, nor to depart from the rule laid down by this court in *Strother v. Lucas*, 6 Pet., 763, that evidence by comparison of hands is not admissi-

ble when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands. The witnesses who testified in this case had previous knowledge of Sanchez's handwriting. It is true this knowledge was not gained from seeing him write, nor from correspondence with him, but in a way equally effectual to make them acquainted with it. Sanchez was for many years, under Mexican rule in California, in official position, acting as justice of the peace, transacting the duties of alcalde, corresponding with the governor, and exercising for a time the power conferred upon him to grant small parcels of land to deserving persons. Colonial History of San Francisco, by Dwinelle. Necessarily, in the course of the administration of the duties of his office, he had occasion frequently to attach his signature to papers of importance. These papers, after the United States took possession of the country, were deposited in the recorder's office of San Francisco, and the surveyor-general's office, where the Mexican archives are kept. Sanchez also, as did most of the native Californians and Mexicans who had been in public life, appeared before the United States land commission, which sat in San Francisco to determine the validity of Spanish grants, and gave his depositions. These depositions, with the other papers of the commission, at the expiration of it, were taken to the office of the land commissioner at Washington. As no question was raised on the trial of the genuineness of these various writings — Sanchez was present and interposed no objection — they must be considered, if not as having been acknowledged by him, at least as having been proved to the satisfaction of the court.

In this condition of things, Sears, Hopkins and Fisher were called upon to testify upon the subject of the disputed signatures; and the inquiry is, did the court err in its ruling on this point? Obviously, the evidence is not obnoxious to the objection that it is a mere comparison of hands; that is, a comparison by a juxtaposition of two writings, in order to enable a witness, without previous knowledge of the handwriting of the party, to determine by such comparison whether both were written by the same person.

§ 2188. — *such knowledge may be acquired in different ways, besides seeing the party write his name, or corresponding with him.*

The witnesses in this case were conversant with the signature of Sanchez, and swore to their belief, not by comparing a disputed with an acknowledged signature, but from the knowledge they had previously acquired on the subject. The text-writers all agree that a witness is qualified to testify to the genuineness of a controverted signature if he has the proper knowledge of the party's handwriting. The difficulty has been in determining what is proper knowledge, and how it shall be acquired. It is settled everywhere, that if a person has seen another write his name but once he can testify, and that he is equally competent, if he has personally communicated with him by letter, although he has never seen him write at all. But is the witness incompetent unless he has obtained his knowledge in one or the other of these modes? Clearly not, for in the varied affairs of life there are many modes in which one person can become acquainted with the handwriting of another, besides having seen him write or corresponded with him.

§ 2189. — *and if the court, on preliminary examination of the witness, can see that he has the degree of knowledge of such party's handwriting to enable him to judge of its genuineness, he should be permitted to give the jury his opinion thereon.*

There is no good reason for excluding any of these modes of getting infor-

mation, and if the court, on the preliminary examination of the witness, can see that he has that degree of knowledge of the party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject.

This was done in this case, and it is manifest that the three witnesses told enough to satisfy any reasonable mind that they were better able to judge of the signature of Sanchez, than if they had only received one or two letters from him, or saw him write his name once.

Judgment affirmed.

GOODHUE v. BARTLETT.

(Circuit Court for Ohio: 5 McLean, 186-188. 1850.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is an action of *assumpsit*. The plaintiffs being commission merchants in New York, the defendant, having consigned to them a large amount of pork, drew several drafts upon them, all of which were accepted and paid. On the final adjustment of the account, there appeared to be a balance due to the plaintiffs of \$2,800. To recover this balance this action was brought. A great number of drafts were produced in evidence, purporting to have been drawn by Bartlett and paid by plaintiffs, which were charged in the accounts. Robert Hewett, a witness, was sworn, who stated he was book-keeper of the firm, and he swears that the accounts of sales of provisions shipped by Bartlett to the plaintiffs, to be sold on commission, is an accurate account as recorded in the books of the company, and also of the charges and disbursements which were all actually paid; and also that the charges of interest and commissions were the customary charges, etc.

The drafts referred to were drawn by M. R. Bartlett, one by Joseph Neville in favor of said Bartlett, and are produced by witness, and are stated in the accounts from the letter H. to W. The handwriting of Bartlett was admitted on all the drafts, except the one drawn by Neville. To prove the signature of Bartlett on that draft, the deposition of Hewett was taken, who swore that the draft was indorsed by Bartlett.

§ 2190. *Where a witness swears to handwriting, it is sufficient without stating his means of knowledge.*

The defendant objected to this deposition, because the witness does not say that he was acquainted with the handwriting of Bartlett, or had ever seen him write. But the court overruled the objection, observing that the source of the knowledge is proper to be inquired into, but when he swears to the fact, it must be received as competent. The other side may examine whether he has ever seen the party write, or has corresponded with him, etc., but this is not necessary to be inquired into by the person taking the deposition.

In *Slaymaker v. Wilson*, 1 Penn., 216, "the deposition of a witness who swore positively to her father's hand was rejected, because she did not say how she knew it to be his hand." But in *Moody v. Rowell*, 17 Pick., 490, such evidence was (Mr. Greenleaf in his Evidence, vol. 1, p. 612, note 1) "very properly held sufficient, on the ground that it was for the other party to explore the sources of the deponent's knowledge, if he was not satisfied that it was sufficient."

It is no answer to this that the party who objects to the deposition was not present when it was taken. If the deposition were taken under the act of congress, without notice, the defendant might have taken it again. That

part of the statement of the witness which relates to charges in the books, of which he had no personal knowledge, is overruled.

The property was shipped by the way of New Orleans, and the commission merchants at that place drew on the plaintiffs for warehouse charges, which drafts were paid. These charges were the same in amount as usual in such cases. This evidence was objected to, unless the drafts were produced, the charges were examined and entered in the book. The court overruled the objection, and admitted the evidence.

MOORE v. UNITED STATES.

(1 Otto, 270-274. 1875.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—According to the facts found in this case, we think no error was committed by the court below. The only question of importance is, whether the signature to the document bearing date December 17, 1863, and purporting to be executed by the claimant, was properly proved. The court compared it with his signature to another paper in evidence for other purposes in the cause, respecting which there seems to have been no question; and from that comparison adjudged and found that the signature was his. Had the court a right to do this?

§ 2191. *Where congress has not provided, and no special reason demands, a different rule, the rules of evidence of the common law govern the court of claims.*

The court of claims, like a court of equity or admiralty, or an ecclesiastical court, determines the facts as well as the law; and the question is, whether they may determine the genuineness of a signature by comparing it with other handwriting of the party. By the general rule of the common law, this cannot be done either by the court or a jury; and that is the general rule of this country, although the courts of a few states have allowed it, and the legislatures of others, as well as of England, have authorized it. In the ecclesiastical courts, which derived their forms of proceeding from the civil law, a different rule prevails. The question is, by what law is the court of claims to be governed in this respect? May it adopt its own rules of evidence? or is it to be governed by some system of law? In our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived. The language of the constitution and of many acts of congress could not be understood without reference to the common law. The great majority of contracts and transactions which come before the court of claims for adjudication are permeated and are to be adjudged by the principles of the common law. Cases involving the principles of the civil law are the exceptions. We think that where congress has not provided, and no special reason demands, a different rule, the rules of evidence as found in the common law ought to govern the action of the court of claims. If a more liberal rule is desirable, it is for congress to declare it by a proper enactment.

§ 2192. *Where a paper admitted to be a party's handwriting or signature is in evidence for some other purpose, the paper in question may be compared with it by the jury.*

But the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the

rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper in question may be compared with it by the jury. It is not distinctly stated in this case that the writing used as a basis of comparison was admitted to be in the claimant's hand; but it was conceded by counsel that it was, in fact, the power of attorney given by him to his attorney in fact, by virtue of which he appeared and presented the claim to the court. This certainly amounted to a declaration, on his part, that it was in his hand; and to pretend the contrary would operate as a fraud on the court. We think it brings the case within the rule, and that the court of claims had the right to make the comparison it did.

The decree is affirmed.

MR. JUSTICE DAVIS took no part in the decision.

§ 2193. **In general.**—The testimony of neighbors who are acquainted with a person's handwriting, that, in their opinion, the signature to a bond is not genuine, is material and competent, but should be received with caution. *Risley v. I., B. & W. R'y Co.*,* 7 Biss., 408.

§ 2194. Where a witness swears that he was present and saw a person sign a disputed instrument, his evidence ought to outweigh the statement of another, equally credible, who testifies that he is acquainted with the handwriting of the alleged signer, and that he does not believe the signature to be genuine. *Ibid.*

§ 2195. A witness is incompetent to prove the execution of a document, when he is not asked if he knew the person said to have executed it, or was familiar with his handwriting or with his signature, or if he had ever seen him write; and only says that he knows the signature of the person and that the signature to the paper appears like his. *Fuentes v. United States*, 22 How., 443.

§ 2196. The burden of proving the genuineness of a signature is on the party producing the instrument. And whether the proof of handwriting is attempted to be made by the direct testimony of witnesses professing to be acquainted with the party's handwriting, or by comparison with other writing admitted to be genuine, the jury must judge from all the evidence and the circumstances surrounding the transaction. *Murati v. Luciani*,* 1 Bald., 49.

§ 2197. The testimony of a witness, that an assignment appeared to be made by the party, implies knowledge of his handwriting. *Bouldin v. Massie*, 7 Wheat., 122.

§ 2198. It was held competent for a witness to testify that, having once seen the plaintiff sign his name, it was his opinion that a paper in the case, purporting to be in the plaintiff's handwriting, was in his handwriting. *Hopkins v. Simmons*, 1 Cr. C. C., 250.

§ 2199. It was held incompetent to test the knowledge of an expert in handwriting by placing before him irrelevant papers for the mere purpose of contradicting his testimony as to the handwriting thereof. *United States v. Chamberlain*, 12 Blatch., 390.

§ 2200. **Comparison of handwritings** is inadmissible in a criminal case. *United States v. Craig*, 4 Wash., 729.

§ 2201. The statutes of the state permitting a comparison of handwritings for the purpose of determining handwriting has no effect upon criminal proceedings in the courts of the United States. *United States v. Jones*, 10 Fed. R., 469.

§ 2202. Comparison of handwritings will not be received as evidence to prove forgery. Nor can the papers be submitted to a witness skilled in handwriting, and his opinion given in evidence whether the paper was forged by the prisoner. *United States v. Prout*,* 4 Cr. C. C., 301.

§ 2203. Upon the trial of an indictment for stealing from the mail a letter containing a draft, in order to prove possession of the draft by the defendant by proof that a letter transmitting the draft to a banker to be cashed, and signed by a fictitious name, is in the handwriting of the defendant, the testimony of a witness who has never seen the defendant write but once, and then under circumstances showing that his attention was not specially directed to the peculiarities of the penmanship, is not sufficient. *United States v. Crow*, 1 Bond, 51.

§ 2204. Upon the trial of an indictment for abuse of the mail in sending a letter offering for sale counterfeit moneys, the jury will not be permitted, in order to determine the handwriting, to compare the letter mailed with a copy of it made by the accused in their presence. *United States v. Jones*, 10 Fed. R., 469.

§ 2205. Handwriting cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine. *Turner v. Foxall*, 2 Cr. C. C., 324.

§ 2206. Evidence of the handwriting of the subscribing witness to a deed, by comparing it with other writings of the same person, where the witness has no previous knowledge of the handwriting of such person, is not admissible, except in cases where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write. *Strother v. Lucas*, 6 Pet., 763.

§ 2207. The handwriting of a party cannot be proved by comparison with a power of attorney filed in the cause, there being no proof as to the signature to the power. *Shannon v. Fox*,* 1 Cr. C. C., 133.

§ 2208. Comparison of handwritings is inadmissible to prove a receipt. *Martin v. Taylor*, 1 Wash., 1.

§ 2209. The court would not permit the jury to compare a receipt in this case purporting to be signed by the plaintiff with a note filed in another case, on which note the plaintiff had confessed judgment, and from thence to infer that the signature to the receipt was in the plaintiff's handwriting. *Macubbin v. Lovell*, 1 Cr. C. C., 184.

§ 2210. Where the witness is familiar with the handwriting of one accused of forgery, he may compare the paper in question with the genuine handwriting of the accused. *United States v. Larned*,* 4 Cr. C. C., 312.

§ 2211. A witness may compare a writing with a receipt which he saw the party sign, and give his opinion whether it is by the same hand. *Hopkins v. Simmons*, 1 Cr. C. C., 250.

§ 2212. Comparison of handwriting admissible to prove the publication of a libel. *Brooke v. Peyton*,* 1 Cr. C. C., 96.

§ 2213. Handwriting of a person need not be proved by a witness who has seen him write; a witness may testify who has seen such person's correspondence. *Reid v. Hodgson*,* 1 Cr. C. C., 491.

§ 2214. In this case a witness was permitted to testify to the similarity of the handwriting of letters shown to him with letters which he had received from the alleged writer, though the letters which the witness claimed to have received were not produced. *United States v. Wright*, 2 Cr. C. C., 296.

§ 2215. In an action by indorsee against a remote indorser, the plaintiff was allowed to prove the handwriting of one of the indorsers by comparing it with the signature of the bail bond filed in the case. *Dunlop v. Silver*, 1 Cr. C. C., 27.

§ 2216. Where, in a suit brought to forfeit wines for undervaluation, the invoices purported to be signed by one of the claimants, and there was a consul's certificate of that fact attached to them, the deputy collector before whom such invoices passed in the due course of business is competent to prove that the signature upon other invoices is that of the claimants though he has never seen them write. 3109 Cases of Champagne, 1 Ben., 242.

§ 2217. Comparison of handwriting may be made by courts and juries without the aid of witnesses, if the comparison be restricted to established writings previously and properly in the case for other purposes and not put in for the mere purpose of comparison. It was held proper for the court to compare the handwriting of a letter purporting to be written by the claimant with the original verified petition of the claimant, for the purpose of showing that the letter was written by her. *Medway's Case*,* 6 Ct. Cl., 421.

§ 2218. In a prosecution under the law for the suppression of the slave trade, where it was necessary to show the national character of the vessel, in order to show that the name of the person appearing as owner on the registry was a simulated one, it was held that the prosecution might show by an expert that two different signatures on the registry were made by the same person under different names. *United States v. Darnaud*, 3 Wall. Jr., 143.

§ 2219. On an indictment for sending scurrilous matter through the mails, it was held competent for the jury to compare the handwriting of documents proved to have been written by the defendant, with the handwriting of the cards in dispute, for the purpose of ascertaining the origin of the cards. Where standard specimens of the defendant's handwriting were in evidence, it was held admissible for an expert to point out to the jury features in the writing of such specimens identical with those displayed by the cards in question. *United States v. Chamberlain*, 12 Blatch., 390.

XIII. SUBSCRIBING WITNESSES.

§ 2220. In general.—In weighing evidence of the sanity of a testator, the testimony of the subscribing witnesses to the will is to be most regarded. *Harrison v. Rowan*, 3 Wash., 580.

§ 2221. In this case a subscribing witness to an agreement, who stated that he was called into the room to sign the paper as a witness, that he did not see the parties execute the same, or acknowledge that they had done so, but that they told him that it was their agreement, was permitted to testify. *Munns v. Dupont*, 3 Wash., 31.

§ 2222. It is sufficient to entitle an instrument executed in another state to be received in evidence that the signature of the maker and of one subscribing witness be proved. *Manchester v. Milne*,* Abb. Adm., 115.

§ 2223. Number of witnesses.—Although two witnesses are required to a will disposing of lands, in Kentucky, the evidence of one may be sufficient to prove it. *Davis v. Mason*, 1 Pet., 503.

§ 2224. Two witnesses to the proof of a will devising lands being necessary in order to its admission in evidence in Pennsylvania, a copy of a will proved before the surrogate in New York, by one of the subscribing witnesses, who also proved that the other two witnesses attested the same in the presence of the testator, and authenticated by the seal of the surrogate's office, cannot be received. *Hylton v. Brown*, 1 Wash., 298.

§ 2225. When testimony may be dispensed with.—Where a paper is executed abroad, the presumption is that the subscribing witnesses are beyond the jurisdiction of the court. *Savage v. D'Wolf*,* 1 Blatch., 343.

§ 2226. When a contract is proved to have been made out of the state of Louisiana, having subscribing witnesses to it, the state courts presume that the witnesses reside at the place where the contract was made, and are not subject to the process of the court; and they therefore allow secondary evidence to prove the execution of the contract. The same rule is properly applied by the United States circuit court, when sitting in that state. *Wilcox v. Hunt*, 13 Pet., 378.

§ 2227. If the subscribing witness to a bond be dead, it seems that proof of his handwriting, if unopposed by other testimony, is a sufficient circumstance from which to infer the execution of the bond. But, as this evidence is merely circumstantial, it may be met by other circumstances. It is, therefore, advisable always to support it by other testimony if it be in the power of the party. *Murdock v. Hunter*, 1 Marsh., 135.

§ 2228. A copy of a power of attorney to convey land was offered in evidence forty years after the original (supposing it to be genuine) was executed. *Held*, that the genuineness of the original could be proved by other evidence than that of the subscribing witnesses, who are presumed to be dead. *Winn v. Patterson*,* 9 Pet., 663.

§ 2229. The handwriting of a subscribing witness to a deed may be proved, where it is shown that he has gone to sea and has not been heard of for four years, although inquired for by his creditors. *Spring v. South Carolina Ins. Co.*, 8 Wheat., 268.

§ 2230. Where the obligor and subscribing witnesses reside abroad, proof of their handwriting will be admitted as *prima facie* evidence of the execution of the bond. *Davies v. Davies*,* 2 Cr. C. C., 105.

§ 2231. In the ordinary course of legal proceedings, an instrument under seal, purporting to have been executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for. The taking away of the original and leaving a copy during the trial, under an agreement between the parties, is not a waiver of due proof of the original. *Clarke v. Courtney*, 5 Pet., 319.

§ 2232. Where a document discloses the fact that there is upon it an official witness of its execution and record, he should be called to prove it, if living. If he is absent beyond the jurisdiction of the court, his signature should be proved by a witness familiar with his signature and handwriting, before secondary evidence is received of his own signature, or that of the official who is said to have executed the paper. *Fuentes v. United States*, 22 How., 443.

§ 2233. The subscribing witness to a promissory note must be produced or his absence accounted for. *Turner v. Green*,* 2 Cr. C. C., 202.

§ 2234. Where inquiries for a subscribing witness have not been made at the place where he was last heard from, evidence of his handwriting, and of that of the person who executed the instrument, cannot be received. *Cooke v. Woodrow*, 1 Cr. C. C., 437.

§ 2235. Though proof of the admission by a party of the execution of negotiable paper, or proof of his handwriting, without producing or accounting for the subscribing witness, has been held sufficient in New York, yet whether this rule extends to all unsealed instruments may admit of some doubt. *Savage v. D'Wolf*,* 1 Blatch., 343.

§ 2236. Where land is claimed in California under an alleged grant of the Mexican government, although the grant purports to be signed by the governor, there being no record evidence of it, the proof of the governor's handwriting, by a third person who did not subscribe the instrument as witness, nor see it executed, is not sufficient to establish the validity of the claim, without other confirmatory evidence. *United States v. Osio*, 23 How., 273.

§ 2237. Where plaintiff and defendant each held part of a charter-party, and the defendant produced his part, he was not permitted to prove the handwriting of the subscribing witness, who lived one hundred and twenty miles from the place of trial. *Sampson v. Johnson*,* 2 Cr. C. C., 107.

§ 2238. In a suit in the District of Columbia, the testimony of a subscribing witness who resides in Massachusetts cannot be dispensed with. *Whann v. Hall*,* 2 Cr. C. C., 4.

§ 2239. Where it appears that a subscribing witness is in the country, an affidavit by plaintiff that he had made diligent inquiry, and could not hear where he lived, will not dispense with his testimony. *Broadwell v. McClish*,* 1 Cr. C. C., 4.

§ 2240. An affidavit that the subscribing witness had removed about two years before; that affiant understands that he is working on the shore of the Chesapeake Bay, but on what part he knows not, nor does he know that he is within one hundred miles of the court, is not sufficient to dispense with the testimony of such witness. *Rhodes v. Rigg*,* 1 Cr. C. C., 87.

§ 2241. If there are no subscribing witnesses to a deed, the signatures may be proved by any one acquainted with the handwriting. Such evidence is as competent and valid as the testimony of the parties themselves, and is in no sense secondary evidence. So held where a Mexican land grant, executed by the governor of the department of California, and attested by the secretary, was offered in evidence. *United States v. Moreno*, 1 Wall., 400.

§ 2242. Where a power of attorney to convey land is alleged to be lost, and all the witnesses thereto presumed, from lapse of time, to be dead, the affidavit of one who, as county clerk, had recorded it, that he was well acquainted with one of the witnesses, a justice of the peace, and his handwriting, and that the record of the power of attorney, made by himself while clerk, is a copy of an original power of attorney which he believes to have been genuine, for that the official signature must have induced him to commit the same to record, is sufficient *prima facie* proof of genuineness to be left to the jury. *Winn v. Patterson*,* 9 Pet., 663.

§ 2243. Where there were two subscribing witnesses to a bill of sale, and the handwriting of one who was beyond the jurisdiction of the court was proved, and the other testified to the genuineness of his signature, although he had no recollection of the bill of sale, the bill of sale was properly receivable in evidence, and its rejection was error. *Hemphill v. Dixon*,* Hemp., 235.

§ 2244. The order of proof of handwriting is in the discretion of the court; and where it is proved that the subscribing witness to a deed has left the country and has not been seen nor heard of for fourteen years, the signature of the grantor may be proved without first making proof of the handwriting of the witness. *Morgan v. Curtenius*, 4 McL., 366.

§ 2245. Where the testimony of the subscribing witness could not be obtained, the plaintiffs were allowed to prove his handwriting and that of the maker of the instrument; and the court refused to instruct that if the jury should not be satisfied of the handwriting of the witness, they were bound to disregard the evidence of the handwriting of the maker, the court thinking that the strongest evidence of the maker's handwriting was not proof of the handwriting of the witness but of the handwriting of the maker himself. *Cooke v. Neale*, 1 Cr. C. C., 493.

§ 2246. Where the subscribing witnesses to an instrument are dead, or their residence unknown, proof of their handwriting is admissible; and also proof of the handwriting of the obligor. Proof of the handwriting of the witness is higher and better proof than proof of the signature of the obligor. In ordinary circumstances, proof of the handwriting of one of the subscribing witnesses, the other being dead or absent, is sufficient. *Walton v. Coulson*, 1 McL., 120.

§ 2247. Parol evidence of the handwriting of a subscribing witness is inadmissible unless it appears that due diligence has been used to procure his attendance. So where it appeared in an action at law in the District of Columbia that a subscribing witness had left the District more than a year before, declaring that he would go north; that he had gone to Norfolk and there said that he would go further south; that he had not been heard of for twelve months, and was not found by the marshal with a subpoena, but it did not appear that he ever left Norfolk or that inquiries had been made there, it was held that parol evidence of his handwriting was inadmissible. *Cooke v. Woodrow*,* 5 Cr., 13.

§ 2248. A receipt more than thirty years old, apparently authentic, and connected with other facts proved which go to establish it, need not be proved by the subscribing witness. *Hinde v. Vattier*, 1 McL., 110.

§ 2249. If a subscribing witness is not within reach of the process of the court his testimony may be dispensed with. *Jones v. Lovell*,* 1 Cr. C. C., 183; *Wellford v. Eakin*,* 1 Cr. C. C., 264.

XIV. CONFIDENTIAL COMMUNICATIONS.

SUMMARY — *Between husband and wife; are inadmissible, when*, § 2250.

§ 2250. A wife cannot be allowed or compelled to testify as to confidential communications made to her by her husband, or to give evidence tending to criminate him, except in cases of violence to her person. *Stein v. Bowman*, §§ 2251-59.

[NOTES.— See §§ 2260-2275.]

• STEIN v. BOWMAN.

(13 Peters, 209-223. 1839.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.— This case was brought originally in the district court of the United States for the eastern district of Louisiana; and on the trial certain exceptions were taken to the ruling of the court by the plaintiff, and which he now brings before this court on a writ of error. The action was brought by petition, in the form peculiar to the courts of Louisiana, to compel the defendant to render an account as curator of the estate of Nicholas Stone, or Stein, deceased.

The plaintiff represents himself as an alien, and as the only heir at law of the deceased. Some time after the defendant had answered the petition, Johann Stein, and others, filed their petition of intervention, denying the statements in the plaintiff's petition, and representing themselves to be the true heirs of the deceased.

The cause was submitted to a jury, and on the trial, to sustain his case, the plaintiff offered in evidence certain German documents, for the purpose of using such parts of them as contained the depositions which related to the pedigree of the plaintiff, which were overruled by the court, on the ground that they were not duly authenticated. And this constitutes the first exception.

Several depositions appear to have been taken, but none of them were signed by the deponents. At the close of them it is stated:

"After the preceding depositions were read to the deponents, they gave their assent to them and approbation.

[Seal.]

(Signed)

"R. V. D. BUSSEKE.

"Seen, for attestation of the preceding signature, of the Royal Amtsvagtey Burgwedel.

"Luneburg.

"Royal British Hanoverian Landdrostey.

[Seal.]

"RUEMERN."

To which is added:

"The subjoined signature of the Royal Britannic Land Bailiwick at Luneburg is hereby attested.

"Hamburg, Sept. 19, 1834.

"Royal Britannic Hanoverian Minister Residentis.

"Im Ausftrage by authority.

[Seal.]

"G. W. KERN."

§ 2251. *A British minister in Hanover has no legal power to certify and authenticate a deposition. It is not connected with the functions of his office.*

In the case of *Church v. Hubbart*, 2 Cranch, 187, this court held that a certificate of a consul under his consular seal is not a sufficient authentication of a foreign law to go in evidence; it not being one of his consular functions to grant such certificates. And also that the proceedings of a foreign court, under the seal of a person who styles himself the secretary of foreign affairs in Portugal, is not evidence. On the principle of this case, it would seem that the court very properly rejected the depositions offered. The certificate and seal of the minister resident from Great Britain in Hanover is not a proper authentication for the proceedings of a foreign court, or of the proceedings of an officer authorized to take depositions. It is not connected in any way

with the functions of the minister. His certificate and seal could only authenticate those acts which are appropriate to his office.

The authority to take the depositions by the person before whom they were taken nowhere appears; and it is not shown that the Royal Britannic Hanoverian Land Bailiwick, Ruemern, was authorized to attest, as he has done, the signature of R. V. D. Busseke.

§ 2252. *Depositions in a foreign country must be taken under a commission, to be received in evidence.*

If the attestation of the signature, and right of the person who administered the oaths, were duly certified under the seal of a responsible officer, whose appropriate duty it was to give such certificate, it might be received, so far as the authentication goes, as *prima facie* evidence, though not under the great seal of the state. It may be proper, however, to remark (though the point was not raised in the court below), that if the authentication had been sufficient, the depositions would have been inadmissible, they not having been taken under a commission, which is the only mode by which depositions in a foreign country can be taken. In the course of the trial, Bowman, the defendant, was admitted as a witness by the court, and, being sworn, gave evidence to the jury respecting the merits of the case. And to this decision of the court, overruling the objection made, the plaintiff also excepted.

§ 2253. *A party to a suit, though released from liability to costs, is not a competent witness at common law.*

No rule is better established than that a party, in an action at law, cannot be a witness in his own case. In the case of *Scott v. Lloyd*, 12 Pet., 149, this court said: "The decision in 1 Pet. C. C., 301, where the court held a party named on the record might be released, so as to constitute him a competent witness, has been cited and relied on in the argument." "Such a rule," the court remarked, "would hold out to parties a strong temptation to perjury, and we think it is not sustained either by principle or authority."

Bowman was a party on the record, was curator, as represented, and was *prima facie* liable for the costs of suit. But if there could have been a release for the costs executed, or the money to cover the costs had been paid into court, his competency would not have been restored. The objection to his competency does not arise so much from the small pecuniary liability to the payment of costs, as from that strong bias which every party to a suit must naturally feel. And this influence is not the less dangerous, if the party be unconscious of its existence. Every individual who prosecutes or defends a suit is, in the nature of things, disposed to view most favorably his own side of the controversy, and, with no small degree of prejudice, the side of his adversary. We think, therefore, to admit a party on the record, under any circumstances, to be sworn as a witness in chief, would be attended with great danger. It would lead to perjuries, and the most injurious consequences, in the administration of justice. We think, therefore, the court erred in admitting Bowman as a witness.

The next exception of the plaintiff arises from the rejection of Stultz as a witness, who was introduced to prove that he had been in Hanover, in Germany, "last summer," and there heard, from many old persons of whom he inquired, that the plaintiff was the brother of Nicholas Stone, deceased. And this court have no doubt that this evidence was properly overruled by the district court.

§ 2254. *In cases of pedigree, general reputation is admissible evidence, but this is limited to members of the family.*

From necessity, in cases of pedigree, hearsay evidence is admissible. But this rule is limited to the members of the family, who may be supposed to have known the relationships which existed in its different branches. The declarations of these individuals, they being dead, may be given in evidence to prove pedigree; and so is reputation, which is the hearsay of those who may be supposed to have known the fact, handed down from one to another, evidence. As evidence of this description must vary by the circumstances of each case, it is difficult, if not impracticable, to deduce from the books any precise and definite rule on the subject.

“It is not every statement or tradition in the family that can be admitted in evidence.” The tradition must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken. 1 Phillips, 174; 2 Dall., 116.

The declarations proposed to be proved by the witness do not appear to have been made by members of the family, or by persons who had such connections with the deceased as to have a personal knowledge of the facts stated. And these persons, for aught that appears, are still living; and their depositions might be taken. On both these grounds, the evidence was inadmissible. But there is another ground on which the opinion of the district court can be sustained, and it is proper to state it.

§ 2255. *Declarations as to pedigree, made after the commencement of a suit, are not admissible in evidence.*

The declarations offered as evidence were made subsequent to the commencement of this controversy, and, in fact, after the suit was commenced. It would be extremely dangerous to receive hearsay declarations in evidence respecting any matter, after the controversy has commenced. This would enable a party, by ingenious contrivances, to manufacture evidence to sustain his cause. By interrogatories propounded in a cautious manner to unsuspecting individuals, he might elicit the answers he most desired. It is therefore essential, when declarations are offered as evidence, that they should have been made before the controversy originated, and at a time, and under circumstances, when the person making them could have no motive to misrepresent the facts. 4 Camp., 409, Case of the Berkeley Peerage.

§ 2256. *A wife is not a competent witness to criminate her husband or to disclose confidential communications.*

The plaintiff having read the deposition of Francis Stuffle, deceased, in evidence, the defendant called the wife of the deceased to prove, as stated in the bill of exceptions, that her husband had been bribed by John Rist to give evidence in that case, and also to prove that he had frequently told her he knew nothing of the plaintiff, or of Nicholas Stone, deceased. The plaintiff objected to the swearing of the witness, but the court overruled the objection and permitted the witness to give evidence. To this opinion the plaintiff excepted.

It is a general rule that neither a husband nor wife can be a witness for or against the other. Co. Lit., 6 b.; Hawk., b. 2, c. 46, § 70; Gilb. Ev., 11; Bull. N. P., 286; Fitch v. Hill, 11 Mass., 286. This rule is subject to some exceptions, as where the husband commits an offense against the person of his wife. 1 Hale, P. C., 301; Hawk., b. 2, c. 46, § 77; Bull. N. P., 287; 1 Bl. Com., 413.

The wife may exhibit articles of the peace against her husband. Bull. N. P., 287.

The husband and wife may be called as witnesses in the same case, and if in their statement of facts they should contradict each other, that would not destroy the competency of either. It would not follow, from such contradiction, that either was guilty of perjury. And, in some cases, the wife may be a witness, under peculiar circumstances, where the husband may be interested in the question, and, to some extent, in the event of the cause. 8 East, 203; Gilb. Ev., 139.

In the case of *The King v. Cliviger*, 2 Term R., 268, the court held that a wife should not be called in any case to give evidence even tending to criminate her husband. Mr. Justice Grose, in that case, observed: "In all the books which treat of evidence, there are certain technical rules laid down, which are highly beneficial to the public, and ought not to be departed from. Some of these relate to husband and wife; and we find the general rule as to them to be founded, not on ground of interest, but of policy, by which it is established that a wife shall not be called to give testimony in any degree to criminate her husband. And Lord Holt says that she shall not be called, indirectly, to criminate him. And the rule seems to have governed all the decisions from that time to the present."

In the case of *The Executrixes of Stead v. Pritchett*, 6 Term R., 680, the court said: "Ratcliff is one of the plaintiffs on the record; he has, therefore, an interest in the cause, and that cannot be prejudiced by any act, or by the evidence of the wife."

In the case of *Aveson v. Kinnaird*, 6 East, 192, the counsel asserted in the argument that the declarations of the wife could not be permitted as evidence to show that her husband had been guilty of fraud, or in any manner to criminate him. And he contended that the rule of law was general, and extended even to cases where the wife was afterwards divorced from her husband. Lord Ellenborough, assenting to the rule, observed: "That goes on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation." And his lordship observes in the same case: "It is sound doctrine, that trust and confidence between man and wife shall not be betrayed." In this case, however, the court permitted the declarations of the wife to be given in evidence, as to the bad state of her health about the time the policy of insurance on her life was executed, the action being founded on such policy.

The above case of *The King v. Cliviger*, 2 Term R., 263, has been somewhat considered in the court of king's bench, in the case of *The King v. Inhabitants of All Saints, in Worcester*, 6 Maul. & S., 194; and the court seemed to think that the rule laid down in that case was too large and general. But, at the same time, they observed that the rule in the case of *The King v. Cliviger*, admitting it to its utmost extent, did not exclude the evidence in the case then under discussion. Phillips, Ev., 69. It has been said that, on the grounds of state policy, the wife is a competent witness against her husband in case of treason. Bull. N. P., 289; 1 Brownl., 47; Bac. Ab., Ev., A. 1. But it has since been settled that the wife is not bound to discover the treason of the husband. 1 Brownl., 47.

The law does not seem to be entirely settled how far, in a collateral case, a wife may be examined on matters in which her husband may be eventually interested. Nor whether, in such a case, she may not be asked questions as to

facts that may, in some measure, tend to criminate her husband, but which afford no foundation for a prosecution. The decisions which have been made on these points seem to have been influenced by the circumstances of each case, and they are somewhat contradictory. It is, however, admitted, in all the cases, that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse.

Some color is found in some of the elementary works for the suggestion that this rule, being founded on the confidential relations of the parties, will protect either from the necessity of a disclosure, but will not prohibit either from voluntarily making any disclosure of matters received in confidence; and the wife and the husband have been viewed, in this respect, as having a right to protection from a disclosure, on the same principle as an attorney is protected from a disclosure of the facts communicated to him by his client.

The rule which protects an attorney in such a case is founded on public policy, and may be essential in the administration of justice. But this privilege is the privilege of the client, and not of the attorney. The rule which protects the domestic relations from exposure rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded, but it renders them incompetent to disclose facts in evidence, in violation of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard and embarrassed by searching interrogatories.

§ 2257. *A wife cannot be compelled or permitted to state facts or confessions of her husband which prove that he committed crime, or that render his character infamous.*

In the present case the witness was called to discredit her husband; to prove, in fact, that he had committed perjury; and the establishment of the fact depended on his own confessions,—confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule. Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence which render infamous the character of her husband? We think, most clearly, that she cannot be. Public policy and established principles forbid it.

This rule is founded upon the deepest and soundest principles of our nature; principles which have grown out of those domestic relations that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence. We think that the court erred in overruling the objections to this witness.

§ 2258. *A deposition taken in another case will not be admitted in evidence on proof that the witness had left the state and not been heard from since.*

The next exception by the plaintiff arises from the rejection of the deposition of Mouzat, which had been taken in the case of the parties in the parish

court. To lay the foundation for reading this deposition, John Rist, who represents himself to be the agent of the plaintiff, swore that the witness left Louisiana before the commencement of this suit, and ascended the Mississippi, with the intention of going to Ohio, and that since then he has not heard from him, although he has made inquiries. This does not amount to that degree of diligence which the law requires to introduce secondary evidence, and such was the deposition offered.

§ 2259. — *a subpoena returned non est inventus would be better evidence of due diligence.*

The plaintiff might have taken out a subpoena, the return of which, not served, would have been better evidence that the witness was not within the judicial district. We think, therefore, that the court did not err in rejecting the deposition. For the errors above specified, the judgment of the district court must be reversed and the cause sent down for further proceedings.

MR. JUSTICE BALDWIN dissented.

§ 2260. **Attorney and client.**—Confidential communications, made by a client to his attorney, are protected by section 858 of the Revised Statutes of the United States, and are not admissible in evidence in the courts of the United States. That the rule is different under the state law is immaterial. *Connecticut Mut. Life Ins. Co. v. Schaefer*, 4 Otto, 457; 16 Am. L. Reg. (N. S.), 393. See ATTORNEYS.

§ 2261. What an attorney has learned from his client in his capacity as counsel is privileged, and not admissible as evidence. *In re Martin*, 5 Blatch., 303.

§ 2262. Counsel for either party may be called by the other party as a witness, and will be obliged to testify, but not as to his client's confidential communications. *Rhoades v. Selin*,* 4 Wash., 718.

§ 2263. The rule of evidence, excluding confidential communications between client and attorney or counsel, extends to such communications between a bankrupt and his solicitor. *In re Krueger*, 2 Low., 182.

§ 2264. The testimony of an attorney or counsel is not competent to prove confidential communications to him by his client. It seems that the witness may be asked whether he was hired by a certain person to bring an ejectment suit, but he cannot be asked if the ejectment suit was for the client as landlord of the premises. *Chirac v. Reinicker*, 11 Wheat., 280.

§ 2265. Where an attorney was sworn as a witness, he was not compelled to answer whether there was a lease in writing, having obtained his information from his client. *Murray v. Dowling*,* 1 Cr. C. C., 151.

§ 2266. An attorney who is employed simply to prepare a mortgage acts as a scrivener merely, and disclosures made to him in that capacity are not protected as privileged communications. *Machette v. Wanless*,* 2 Colo. T'y, 169.

§ 2267. An attorney may testify to facts communicated by his client, when not done so in confidence. *Bank of Columbia v. French*, 1 Cr. C. C., 221.

§ 2268. The rule of evidence excluding communications between an attorney and his client does not extend to communications made by the client to a student in the office of the attorney, when not made professionally. *Andrews v. Solomon*, Pet. C. C., 356.

§ 2269. A letter from client to attorney, which is not confidential, or meant to be so, in the sense of its having any connection with the merits of the case, may be admitted in evidence. *Laflin v. Herrington*, 1 Black, 326.

§ 2270. Where an attorney is offered as a witness by his client, he cannot claim his privilege on cross-examination. *Crittenden v. Strother*,* 2 Cr. C. C., 464.

§ 2271. It seems that where an attorney has refused to be employed, and therefore the relation of attorney and client never existed, that which passed between him and the person seeking his services is not privileged. But where the privilege, in such a case, is not claimed by either the attorney or the other party, and he is examined without objection, his testimony is not to be rejected or discredited on account of the manner in which he acquired the facts. *Luco v. United States*, 23 How., 515.

§ 2272. On a question of legitimacy of children, depending on the fact of marriage between their parents, an attorney, who drew a will for the father who is since deceased, in which the children are described as his natural children, may testify that the children were so described by the express direction of the father, and may also prove what was said by the testator in their

interviews preceding the preparation of the will and in that connection concerning the illegitimacy of the children, and his relation to their mother. The rule as to privileged communications is not violated by the admission of such evidence. *Blackburn v. Crawford*, 3 Wall., 175.

§ 2273. In a proceeding to disbar an attorney from practice in the court, charging that he suggested, advised and incited his clients, parties to a suit in court, being at a distance from the state, to influence the action of the court by intimidation applied to its members, by publications in newspapers and printed circulars abusive of the members of the court, impeaching their motives and charging them with partiality, the suggestion is not privileged because made by an attorney to his clients. But, short of an attempt to pervert justice by bringing to bear upon the judge who is to decide the case influences of corruption, intimidation or the improper weight of personal influence in a secret and unjustifiable manner, a very large latitude is permissible to the lawyer in discussing the means of successfully asserting the rights of his client; and this extends to the discussion of the fitness of the judge before whom the case may come, to try it, and the peculiar influences which may work on his mind to favor one side or the other of the controversy. But a letter from the lawyer to his client proposing to visit with his family the family of the judge, and there, while an honored guest, to avail himself of the freedom of conversation to seek to commit the judge to the expression of opinions favorable to his client which are to govern him in court, is not privileged. *Ex parte Cole*, 1 McC., 405.

§ 2274. The head clerk of a partnership is not privileged from giving his testimony as to partnership affairs, in a suit where one is sought to be charged as a dormant partner. *Corps v. Robinson*, 2 Wash., 388. See §§ 597, 1339, 1886.

§ 2275. Letters from one partner to his copartner with reference to a litigation in which they are about to engage, and do engage, are privileged. And so are letters from one partner to his copartner which relate exclusively to their own case and do not relate to the case of the opponent. *In re Krueger*, 2 Low., 182.

XV. JUDICIAL NOTICE.

§ 2276. **Public records.**—The courts may take judicial notice of the journals of the legislature, and consult them for the purpose of determining whether the requisite forms of legislation have been observed in the passage of laws. *Brown v. Nash*,* 1 Wyom. T'y, 85. See §§ 362, 879, 914, 990.

§ 2277. **Treaties.**—The court will take notice of the terms of a treaty between this country and a foreign power. *United States v. The Peggy*, 1 Cr., 103.

§ 2278. **Courts, their jurisdiction, etc.**—The circuit court of the United States will take judicial notice that the district courts were vested with exclusive jurisdiction in all original proceedings under the bankruptcy act of 1841. *Lathrop v. Stuart*, 5 McL., 167.

§ 2279. The courts of the United States cannot take judicial notice of a justice of the peace of another state. *In re Keeler*, Hemp., 306.

§ 2280. A plea is not defective because it does not aver that the circuit court of Michigan, in which a certain judgment in the case is alleged to have been entered, had jurisdiction. This court takes notice of the fact. *Woodworth v. Spafford*, 2 McL., 168.

§ 2281. **Constitution and laws.**—The courts will take judicial notice of the provisions of the constitution of the United States. *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 116. See §§ 491, 920, 1006.

§ 2282. The courts of the United States take judicial notice of the acts of congress, and they need not be set forth or specially referred to in any proceeding before them. *United States v. Randall*, Deady, 524.

§ 2283. Upon the trial of an indictment for criminal violation of the internal revenue laws, it is not necessary that the government should prove that the bonded warehouse from which it is alleged the spirits were fraudulently removed was sanctioned or authorized by the officers of the government, since the court will take judicial notice that the law in force at the time of the transaction required every distiller of spirits to provide such a warehouse, and the jury may presume that the distiller has complied with this law. *United States v. Harries*, 2 Bond, 311.

§ 2284. The court is bound to take notice of the statute of limitations when the facts relied on as a bar are stated, and are found sufficient. *Harpending v. The Dutch Church*, 16 Pet., 455.

§ 2285. The courts of the United States do not require the common law as received in each state to be proved like the laws of foreign countries. Their statute books and judicial precedents are received as evidence without proof of witnesses. *Evans v. Cleveland & Pittsburgh R. Co.*,* 5 Phil., 512.

§ 2286. The courts take judicial notice of the public statutes. And this notice extends, not only to the existence of the statute, but to the time at which it takes effect, and to its true construction. And when either of these questions arises, the court may resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which is most appropriate, unless the positive law has enacted a different rule. *Gardner v. The Collector*, 6 Wall., 499.

§ 2287. The courts of the United States take notice of the laws of the respective states without pleading or proving them. *Jones v. Hays*, 4 McL., 521; *Bennett v. Bennett*, Deady, 299; *Merrill v. Dawson*, Hemp., 563; *Starr v. Moore*, 3 McL., 354; *Jasper v. Porter*,* 2 McL., 579; *Pennington v. Gibson*, 16 How., 65; *Miller v. McQuerry*, 5 McL., 469; *Cheever v. Wilson*, 9 Wall., 108; *Owings v. Hull*, 9 Pet., 607. Also of judicial decisions. *Cheever v. Wilson*, 9 Wall., 108; *Pennington v. Gibson*, 16 How., 65.

§ 2288. A law of any state may be read in the supreme court of the United States without proof. *Course v. Stead*, 4 Dall., 22, n.

§ 2289. The supreme court and its judges recognize without proof the laws of the several states and territories, and also the existence of slavery in those states where it is recognized. *Miller v. McQuerry*, 5 McL., 469.

§ 2290. The circuit courts of the United States take judicial notice of the laws of all the states, and when sitting in Maryland will judicially notice the laws of Louisiana. *Owings v. Hull*, 9 Pet., 607.

§ 2291. The courts of the United States take judicial notice of the laws of the respective states, and that by the law of the state the mayor of a certain city is a magistrate. *Gordon v. Hobart*, 2 Sumn., 401.

§ 2292. Public acts of state legislatures may be read in federal courts, but private acts, such as those concerning the estates of deceased individuals, are to be proved like other matters of fact. *Leland v. Wilkinson*,* 6 Pet., 317.

§ 2293. The courts will take judicial notice of an act conferring powers upon a municipal corporation, such an act being public in its nature. *Fauntleroy v. Hannibal*, 1 Dill., 118.

§ 2294. Wherever a law of a state is held to be a public one, to be judicially noticed by the state courts, it must be regarded in like manner in the courts of the United States when required to administer state laws. *Covington Drawbridge Co. v. Shepherd*, 20 How., 227.

§ 2295. Where the constitution of the state declares that every statute shall be a public act, the court will take judicial notice of a statute creating a corporation, without its being pleaded or offered in evidence. *Ibid.*

§ 2296. Certain averments in an indictment as to the existence and action of a board of inspectors of registry were held sufficient on demurrer, the court taking judicial notice of the state statutes in respect to such boards, such statutes being referred to in the indictment. *United States v. Quinn*, 8 Blatch., 48.

§ 2297. The courts of Indiana being authorized by its constitution to take judicial notice of all its laws, both public and private, the circuit court of the United States will likewise take judicial notice of all the laws of that state. *Railroad Co. v. Bank of Ashland*, 12 Wall., 226.

§ 2298. Courts are bound to take notice of the municipal powers of a corporation which are conferred by public law, and it is not necessary to go into proof of the election of any of the officers of the corporation. The authority of assessors to act for the corporation is evidenced by the fact that their return has been sanctioned by the officers of the corporation, and evidence of their appointment is not necessary. *Ronkendorff v. Taylor*, 4 Pet., 349.

§ 2299. Unless the statute requires evidence of official character to accompany the official act which it authorizes, none is necessary. And where one state recognizes acts done in pursuance of the laws of another state, its courts will take judicial notice of those laws, so far as may be necessary to determine the validity of the acts alleged to be in conformity with them. *Carpenter v. Dexter*, 8 Wall., 513.

§ 2300. Spanish laws, which formerly prevailed in Louisiana, and upon which titles to land in that state depend, must be judicially noticed and expounded by the court. Their existence presents questions of law for the court, and not of fact for the jury. *United States v. Turner*, 11 How., 663.

§ 2301. Our courts take judicial notice of the laws of Mexico in force in Texas prior to the Texan revolution. Such laws are not the laws of a foreign government, but of an antecedent government, to which the United States is a successor. *United States v. Perot*, 8 Otto, 428.

§ 2302. The court is bound to notice judicially the laws of the state defining the limits of a city in cases where the pleadings make it proper to do so; but not on a demurrer where the facts as stated in the bill make it the duty of the court to rule in favor of the plaintiff. *Griffing v. Gibb*, 2 Black, 519.

§ 2303. The existence of a county, organized by a public law, need not be proved. *Lyell v. Supervisors of Lapeer County*, 6 McL., 446.

§ 2304. The president's proclamation of December 25, 1868, granting pardon and amnesty to all persons engaged in the rebellion, is a public act of which all the courts of the United States are bound to take judicial notice. *Armstrong v. United States*, 13 Wall., 154.

§ 2305. The proclamation of pardon and amnesty made by the president on December 8, 1863, is a public and official act of which the courts will take judicial notice. *The Greathouse Case*, 2 Abb., 382.

§ 2306. **Foreign laws.**—The public laws of a foreign nation on a subject of common concern to all nations, promulgated by the governing powers of the United States, may be noticed as law in a court of admiralty without further proof. *Talbot v. Seeman*, 1 Cr., 1. See §§ 491, 920, 1006, 2281.

§ 2307. The court cannot be charged with knowledge of foreign laws. They must be proved. *Strother v. Lucas*, 6 Pet., 763; *Armstrong v. Lear*, 8 Pet., 52; *Vose v. Philbrook*, 3 Story, 335.

§ 2308. The laws and usages of the Ottoman Empire are foreign laws and usages, of which the court cannot take judicial notice; and what are the laws of Turkey and its usages in its intercourse with other Christian nations, in reference to the powers allowed to be exercised by their public ministers in judicial matters, cannot be judicially noticed by the court. *Dainese v. Hale*, 1 Otto, 13.

§ 2309. **National banks.**—The federal courts take judicial notice of the organization and existence of all the national banks; and therefore, in an indictment for the felonious possession of a counterfeit national bank note, it is not necessary to aver that the bank is a body politic and corporate. *United States v. Williams*, 4 Biss., 302.

§ 2310. A pardon cannot be judicially noticed by the court, and must be brought to the notice of the court by plea, motion, or otherwise. *United States v. Wilson*, 7 Pet., 150.

§ 2311. **Patents.**—A court will take judicial notice that a thing patented was known and in general use long before the issuing of the patent. *Terhune v. Phillips*, 9 Otto, 592.

§ 2312. The court will take judicial notice of what is in general knowledge and use among the people. It will take notice that an invention for the preservation of fish by cold is but the application of what was before generally known and used among the people. *Brown v. Piper*, 1 Otto, 37.

§ 2313. The courts will take notice judicially of the persons who from time to time preside over the patent office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts. *York & Maryland Line R. Co. v. Winans*, 17 How., 30.

§ 2314. **Notarial seals** need not be proved, but must be judicially taken notice of. Thus, papers purporting to have been executed before persons styling themselves as notaries of the Portuguese government, and bearing their seals, are to be taken as *prima facie* genuine. *United States v. Libby*, 1 Woodb. & M., 221. See § 488.

§ 2315. The court will take judicial notice of the seal of a notary public of a foreign country, and give it full faith and credit as authenticating a certificate of protest. An impression of the seal made upon the paper itself in such a manner as to be readily identified upon inspection is a sufficient sealing. *Pierce v. Indseth*, 16 Otto, 546.

§ 2316. The seal of a notary proves itself in all countries where the law merchant prevails, and it is only necessary that it should conform to the law of the place where the notary acts; an impression on paper is good. *Orr v. Lacy*, 4 McL., 243.

§ 2317. A notarial seal proves itself and is taken judicial notice of the world over. The character or make-up of the seal is determined by the local law; if there is none on the subject, by the common law. But it is the seal and not its make-up or character that raises the presumption of official character. The presumption is that it is the seal of the person whose seal it purports to be, and who subscribes the jurat. Where the notary subscribed the jurat, "A. E. Scott, Notary Public, Lucas Co., Ohio," and the seal contained the words "Notarial Seal, Lucas Co., Ohio," the seal was held entitled to judicial sanction as evidence of the notarial or official character of the person. *In re Phillips*,* 14 Nat. Bank. Reg., 219.

§ 2318. It is held that the supreme court of the District of Columbia can take notice of the power of a notary public in the state of Maryland to administer an oath to an affidavit to be used in an action pending in the said District, without a certificate that he was duly qualified to act as such notary, the jurat being properly certified and authenticated by his signature and seal. *Denmead v. Maack*,* 2 MacArth., 475.

§ 2319. **War.**—The court will take judicial notice of the existence of a civil war in the country. *The Prize Cases*, 2 Black, 635.

§ 2320. The existence of the rebellion is matter of public notoriety, and, like matters of general and public concern to the whole country, may be taken notice of by judges and juries without that particular proof which is required of ordinary facts. And, in an indictment for treason in engaging in and giving aid and comfort to the rebellion, the public notoriety, the proclamations of the president, and the acts of congress, are sufficient proof of the existence of

the rebellion, and that it was carried on under a pretended government called the Confederate States of America. *United States v. Greathouse*, 2 Abb., 364.

§ 2321. The federal courts take judicial notice of the general enactments of congress, and of the duly promulgated proclamations of the president. The late civil war, being a matter of public history, is likewise judicially known to the courts; and from this general historical fact they will also take judicial notice of particular acts which led to it, or happened during its continuance, whenever it becomes essential to the ends of justice to do so. *Cuyler v. Ferrill*, 1 Abb., 169.

§ 2322. It was held that the court could take judicial notice of the ending of the rebellion, although no proclamation to that effect had been made by the president. *United States v. Fifteen Hundred Bales of Cotton*,* 10 Int. Rev. Rec., 52.

§ 2323. The court will not take judicial notice of orders issued by a military commander in the exercise of the authority conferred upon him. *Burke v. Miltenberger*, 19 Wall., 519.

§ 2324. Miscellaneous.—The only kind of matches subject to stamp duty, under the internal revenue act, being called or designated by that act *lucifer* or *friction* matches, the court cannot take judicial notice whether there are any other kinds of matches known to the arts or commerce which are not subject to such duty. *United States v. Walsh, Deady*, 281.

§ 2325. The courts take judicial notice of the admission of states into the Union. *Wright v. Hollingsworth*, 1 Pet., 165.

§ 2326. Courts take judicial notice of the legally-established boundaries of the different states. *Thorson v. Peterson*, 9 Fed. R., 517.

§ 2327. The court will take judicial notice that, as a matter of public history, Oregon was settled while the sovereignty of the country was still in dispute between the United States and Great Britain; that, subsequently, a provisional government was organized and put into operation by the people, without any authority of the sovereign powers: that laws were passed temporarily regulating and protecting land claims made upon public lands; and that, afterwards, a territorial government was established under authority of congress, and put into operation long before there was any law or means by which the real title to any portion of the land in Oregon could be obtained. It will take judicial notice of the general condition of the country, and the condition of land titles in Oregon prior to the passage of the "donation act," September 27, 1850. *Lamb v. Davenport*, 1 Saw., 609.

§ 2328. The court takes judicial notice that the state of Oregon constitutes one judicial and representative district of the United States. *United States v. Johnson*, 2 Saw., 482.

§ 2329. It is a matter of which the court will take judicial notice, that, by law, the country is divided into collection districts for internal revenue purposes, and that in some states there are several of these districts with defined geographical boundaries. *United States v. Jackson*, 14 Otto, 41.

§ 2330. The court takes judicial notice of the geographical and political divisions of the country, and is therefore aware that a vessel bound to ports on the Columbia river may be bound to ports in the territory of Washington as well as in Oregon. *In re Bryant, Deady*, 118.

§ 2331. Being established by law, it is a matter of judicial cognizance that there is a county of Yamhill in Oregon, and that the place where the court-house is situated and its courts held is Lafayette. *Gager v. Henry*, 5 Saw., 237.

§ 2332. The court will take judicial notice that the military bounty tract is situated between the Illinois and Mississippi rivers, and all of it west of the fourth principal meridian. *McNitt v. Turner*, 16 Wall., 352.

§ 2333. The court will judicially notice the situation of New Orleans, for the purpose of determining whether the tide ebbs and flows in the river at that place. *Peyroux v. Howard*, 7 Pet., 324.

§ 2334. The court will take judicial notice of the situation of Matamoras, and of the depth of the water in the Rio Grande, on the bar at the mouth of the river. *The Peterhoff*, Bl. Pr. Cas., 463.

§ 2335. The court will take judicial notice of the fact that the province of Ontario is a British possession, but not of the fact that Rondeau is a town in such province. *Ex parte Lane*, 6 Fed. R., 34.

§ 2336. Upon an indictment for counterfeiting the coin made at the mint of the United States, or foreign coin made current in the United States, it is not necessary to prove that there are genuine coins of which those mentioned in the indictment are counterfeits. That coins named in the indictment as fifty-cent pieces, or twenty-five cent pieces, are legal subdivisions of the dollar, authorized to be coined at the mint of the United States, is a fact within the judicial cognizance of the court, upon which the jury may act without evidence. *United States v. Burns*, 5 McL., 23.

§ 2337. The court will take judicial notice of the fact that gold coin is no longer used in its

character as money, but is a standing article of trade. *United States v. 4000 American Gold Coin*, 1 Woolw., 217.

§ 2338. The court will take judicial notice of the public history of the country. The question is treated in its modes of ascertainment like a question of law, to be investigated in the same manner, from its own proper sources. If the court assumes judicial cognizance of a historical fact, it must decide it correctly. If it mistakes its date, it is error as much as if a question of law is erred on. *United States v. 1500 Bales of Cotton*,* 15 Int. Rev. Rec., 137.

§ 2339. It is a matter of history, of which the supreme court is bound to take notice, that corporations created in this country have been in the open practice of making contracts in England. *Bank of Augusta v. Earle*, 13 Pet., 519.

§ 2340. Where a vessel was destroyed because unfit to be sent in, the court was held to have judicial cognizance of the capture without having her within its territorial jurisdiction. *Schooner Zavalla*, Bl. Pr. Cas., 173.

§ 2341. The court will take notice of the notorious trade between Nassau and the blockaded ports of the enemy. *Schooner Mersey*, Bl. Pr. Cas., 187.

§ 2342. Where a cargo is captured as prize for an alleged attempt to violate the blockade, the court will take judicial notice that the shipper at Nassau is a person who is shown by the records of the court to have been actually engaged in trading to and from the blockaded ports. *The Minna*, Bl. Pr. Cas., 333.

§ 2343. The court will take judicial notice that the waters on which a contract was performed were navigable. *Lands v. A Cargo of 227 Tons of Coal*, 4 Fed. R., 478.

§ 2344. Where a usage has become so established as to become a part of the law, the court will act upon it without requiring it to be proved. *Consequa v. Willings*, Pet. C. C., 225.

§ 2345. Courts will take notice of a usage in transmitting bills from one part of the country to another for collection, where the forms of indorsements are influenced by the usage. *Lee v. Chillicothe Branch Bank*, 1 Biss., 325.

§ 2346. The ordinary usages and the usual course of the great inland commerce by which the products of the Mississippi valley find their way to market will be judicially noticed by the court. *Gibson v. Stevens*, 8 How., 384.

§ 2347. The court may take judicial notice of the historical fact that the rules of navigation prescribed in the British orders in council of January 9, 1863, and in our act of congress of 1864, have been accepted as obligatory rules by more than thirty of the principal commercial states of the world. *The Scotia*, 14 Wall., 170.

§ 2348. The courts of this country take judicial notice of all other nations and their seals of state, but not of their inferior departments and their officers and seals. *Schoerken v. Swift and Courtney and Beecher Co.*, 19 Blatch., 209.

§ 2349. The court cannot officially take notice that the "I. & C. Central R. R.," in a bill of lading, means the Columbus & Indianapolis Railway. *Dixon v. Columbus & Indianapolis R'y Co.*, 4 Biss., 137.

§ 2350. While courts must, *ex officio*, take notice of distances between well-known geographical points in the United States, they cannot notice how long it takes an express company to carry between such points. *Rice v. Montgomery*, 4 Biss., 75.

§ 2351. The court will not take judicial notice of the time it takes for the cars to travel from one city to another, nor the number of mails. *Wiggins v. Burkham*, 10 Wall., 129.

§ 2352. The supreme court cannot take judicial notice of law partnerships, or other private relations between members of the bar. And therefore service of citation on writ of error on the partner of the defendant's attorney of record is not sufficient. *Bacon v. Hart*, 1 Black, 38.

§ 2353. A court cannot take judicial notice of the pendency of bankruptcy proceedings in another court, however seriously they may affect the rights of the parties in the suit before it. *Eyster v. Gaff*, 1 Otto, 521.

§ 2354. The court cannot take judicial notice that a certain case is the one pleaded in the answer. *Lownsdale v. City of Portland*, Deady, 1.

XVI. LAND TITLES.

§ 2355. *In general.*—The record in the volume kept at the general land office at Washington, for the recording of patents of the United States, issued upon California confirmed Mexican grants, is evidence of the grant of equal dignity with the patent itself. If the instrument, as recorded, is sufficient on its face to pass the title, it is presumed that the grant was actually made; but if not sufficient no such presumption arises. *McGarrahan v. Mining Co.*, 6 Otto, 316. See §§ 242, 890, 898, 900, 907, 1015, 1292, 1606, 1626, 1661, 1861, 1867, 1903, 2062.

§ 2356. In order to show the boundaries of a grant, other adjoining grants may be received in evidence if they tend to show such boundaries. *Polk v. Robertson*,* 1 Overt. (Tenn.), 456.

§ 2357. In certain civil and criminal suits by the government against persons for trespassing upon its timber lands, the court held that the official plats and books in the office of the register of the United States land office, produced and explained by that officer, were admissible in evidence, on the part of the government, as tending to prove that the lands in question had not been sold by the United States. These official records, in connection with the testimony of the register, showing that the *locus in quo* was vacant land which had never been disposed of by the government, were held sufficient *prima facie* to establish that fact. The government having proved the trespass, and the defendants having introduced no evidence of right or title, parol evidence on their part was held inadmissible to prove that the *locus in quo* was "swamp" land within the meaning of the swamp land grant. *Bly v. United States*, 4 Dill., 464.

§ 2358. The state of North Carolina having no power, after the act ceding lands to the United States, to make a grant to lands in the ceded territory, unless where some incipient right had previously existed, it is competent for the court to inquire, in case of a grant made of such lands after the cession act, whether there was an entry previous to the cession, or whether the warrant was a forgery. This must be ascertained by legal evidence, such as would be competent on a *scire facias* by the state to repeal a grant, or such as might be receivable in equity. Copies of warrants of the same numbers as those upon which the grant was based are not admissible for this purpose. (This last proposition was overruled on error in 5 Wheat., 293.) *Polk v. Windel*,* 2 Overt. (Tenn.), 433.

§ 2359. A paper acknowledging the receipt of a certain sum in part payment for a military warrant is not of itself evidence of an assignment of the warrant. Receipt not Evidence of Assignment,* 2 Op. Att'y Gen'l, 56.

§ 2360. If, under the laws of Virginia, the warrant must be in the office of the surveyor at the time the survey is made, his certificate which states that the survey was made by virtue of the governor's warrant, and agreeably to his majesty's royal proclamation of 1763, is sufficient evidence that the warrant was in his possession at that time. *Craig v. Bradford*, 3 Wheat., 594.

§ 2361. A certificate of the commissioners of Virginia appointed under the law of that state to adjust the claims for settlement and pre-emption rights, being *ex parte*, is not evidence to prove that the holder was a prior settler to one known by him to be a claimant of the land and who had no notice of the obtaining of the certificate. *Swan v. Hughes*, 1 Wash., 216.

§ 2362. A warrant issued to another than the parties to the suit is not admissible in evidence. *James v. Stookey*, 2 Wash., 139.

§ 2363. An office copy of an abstract of the warrants on which a survey and grant were founded (the original book of entries being lost) is competent evidence to prove the fact of the existence of the entries therein specified, because it is expressly made evidence by the act of September 21, 1801. But it is not evidence to disprove other entries alleged to be spurious. Such a negative effect can only be given to the production of the whole abstract, from which the court may by inspection ascertain the fact of the non-existence of the contested entries; or from an examination of the keeper of that document as an ordinary witness, or inspection of it under a commission. But certificates from the secretary's office of the state of warrants and grants, introduced to prove that, on the entries of the dates specified as the dates of the contested entries, other warrants issued and other grants were obtained in the names of various individuals, but none to the person claiming under the contested entries, is competent circumstantial evidence. But parol evidence of the rejection of the return of the warrants and locations by a subsequent entry-taker is immaterial. *Polk v. Wendell*, 5 Wheat., 293.

§ 2364. Under the land laws of Texas a power of attorney from a grantee to obtain possession and title, and a power of substitution executed pursuant to the power of attorney, form a part of the title papers to land and are part of the public archives, and are admissible in evidence if properly authenticated. *Hanrick v. Barton*,* 16 Wall., 166.

§ 2365. Surveys.—The certificate and return of a private surveyor is a private paper, and not *prima facie* evidence of the facts it contains, like that of an official surveyor. *United States v. Hanson*, 16 Pet., 196. See § 1015.

§ 2366. A casual phrase in a letter of a surveyor accompanying a survey cannot be admitted in evidence to contradict the field-notes of the survey. *United States v. D'Auterieve*, 15 How., 14.

§ 2367. The plat and certificate of survey annexed to a patent may be admitted in evidence; also a copy of the entry on which the survey was made. Likewise a general plan and survey, made prior to the plaintiff's entry, by authority, and in conformity with an act of the legislature, may be submitted, with the other evidence, to avail as much as it may in ascertaining the boundary. But a demarcation, or private survey, made by direction of a party interested under the grant, is not admissible for the purpose of ascertaining the land contained in the grant. *Blake v. Doherty*, 5 Wheat., 359.

§ 2368. A survey made in another suit between the same parties respecting the same land, and on due notice, may be received in evidence in a suit to recover the land. *Ellicott v. Pearl*, 1 McL., 206.

§ 2369. The certificate of a public officer, stating that on a certain day, now twenty years past, a certain piece of land was regularly surveyed, cannot be discredited by the unsuccessful attempt of a stranger to find all the corners to the land. *Brown v. Galloway*, Pet. C. C., 291.

§ 2370. A survey made by a deputy surveyor out of the district for which he was appointed, although made under the special authority of the surveyor-general, not being a legal survey, cannot be used in evidence as such, nor as evidence *per se* to show the location of the warrant, because made on *ex parte* evidence. But the surveyor may use it as a memorandum to show the jury how the land might be located from the calls of the warrant. *Gordon v. Kerr*, 1 Wash., 322.

§ 2371. A diagram offered to show boundaries and the situation of land, not made under the authority of the court, cannot be received. *James v. Stookey*,* 1 Wash., 330.

§ 2372. An *ex parte* survey and location of the exterior boundaries of a rejected Mexican grant, made in pursuance of the directions of the commissioner of the general land office, many years after all the lands had been officially surveyed, and nearly all disposed of by patents, cannot be received in evidence for the government in a suit to vacate and annul a patent. *United States v. Central Pacific R. Co.*, 11 Fed. R., 449.

§ 2373. An extract from the surveyor-general's books is not admissible in evidence. *Griffith v. Evans*, Pet. C. C., 166.

§ 2374. *Ex parte* proceedings of a board of property, declaring a survey to be void, cannot be received in evidence as against a regularly issued patent. *Griffith v. Evans*, Pet. C. C., 166; *Griffith v. Tunckhouser*, Pet. C. C., 418.

§ 2375. Courses and distances laid down in a survey, especially if ancient, are not conclusive; but are liable to be changed by oral proof or other evidence tending to prove that the documentary lines are those not actually run. *Conn v. Penn*, Pet. C. C., 496.

§ 2376. The certificate of the surveyor-general of Florida, when it was a Spanish province, is *prima facie* evidence that the survey was made by him, and entitles the paper to be read. *United States v. Breward*, 16 Pet., 143.

§ 2377. A paper returned by the deputy surveyor into the land office, and there accepted as a survey of a tract of land, purporting to return a draft of a tract said to have been surveyed by a certain assistant, and certifying that upon examination of the ground the survey appeared to have been made as above stated, which paper was objected to because it spoke of a survey merely from hearsay, was received in evidence, though the court considered it open to the objections urged, no right of any third person appearing to have intervened, and it being permissible for the party to follow up this evidence by proof of an actual survey. *Dubois v. Newman*, 4 Wash., 74.

§ 2378. Explanatory notes of a surveyor appointed by order of the court to retrace and plot the lines of certain land in dispute are evidence only so far as they relate to the lines and marks on the ground, and other matters intended to explain his own work. They are not evidence to prove possession. *Lanning v. Case*, 4 Wash., 169.

§ 2379. The making of a survey and issuing of a grant upon the entry of A. in the name of B., calling him the assignee of A., is *prima facie* evidence that B. is the owner of the entry. *Ross v. Reed*, 1 Wheat., 482.

§ 2380. To prove that land for which a patent has been granted was covered by prior entries and surveys, the testimony of the county surveyors who profess to speak from their own knowledge of the lands in their capacity of surveyors, as well as officially, as to surveys recorded in their office; annexing to their depositions a connected map of certain surveys so recorded to show the situation of the land, and swearing that the land contained in this map covers the land in question, is good evidence, without producing the separate surveys. But their beliefs as to patents having been issued is not evidence, as the patents should be produced. *Jones v. Bache*, 3 Wash., 199.

§ 2381. The plat and certificate of survey may be resorted to to show a mistake in the calls of a grant. *Dallum v. Breckenridge*,* 1 Cooke, 152.

§ 2382. Where a claim to land in California, through a grant from the Mexican government, is supported by parol evidence of the grant, without any proof of survey and possession, the grant is not sufficiently authenticated. *United States v. Castro*, 24 How., 346.

§ 2383. Patents.—Under the legislation of congress in reference to the public lands, the patent is the superior and conclusive evidence of legal title. An entry, standing alone, is no evidence of a legal title, when opposed by a patent for the same land. *Bagnell v. Broderick*, 13 Pet., 436. See §§ 900, 1661.

§ 2384. For the purpose of showing the consideration on which a patent is founded, and the authority by which it is issued, the recitals are indisputable; but standing alone they do not

furnish sufficient evidence to establish that the title can take an earlier date than the patent, and thereby overreach an elder title. *Marsh v. Brooks*, 8 How., 223.

§ 2385. An entry on the books of the land office, that the balance of the purchase money for a piece of land had been paid by the person to whom a patent had issued, is evidence that a patent did issue, though it is not produced. *Willis v. Bucher*, 3 Wash., 369.

§ 2386. A memorandum on the margin of the record of a patent cannot be received in evidence to contradict the record, where it is not known by whom it was made, nor when. *Branson v. Wirth*, 17 Wall., 32.

§ 2387. Where the plaintiff claims under a patent, evidence, on the part of the defendant, of entries made by other and third persons subsequently to the date of the plaintiff's patent, for the purpose of proving a general opinion that the lands in question were vacant at the date of such entries, and to disprove notice to the defendant of the identity of the plaintiff's claim, when he made his entries, has no tendency to disprove such notice. *Stringer v. Young*, 3 Pet., 320.

§ 2388. In Virginia, a patent establishes the performance of every prerequisite to the completion of the title, and no inquiry into the regularity of those preliminary measures is made in a trial at law. *Ibid.*

§ 2389. An alteration in the date of the title in form of a grant is, unless explained, a ground of suspicion. *United States v. Galbraith*, 2 Black, 394.

§ 2390. Where a title is confirmed under an act of congress, a subsequent patent is only documentary evidence. *Morrow v. Whitney*, 5 Otto, 551.

§ 2391. An objection to the admission of a patent in evidence, in an action of ejectment, because the name of the patentee appeared to have been altered by scratching out a dot over the letter *i*, which made the name Bogardus instead of Bogardies, was overruled by the court on the ground that the alteration was immaterial and did not appear to have been made since the patent came into possession of the patentee. *Morgan v. Curtinius*, 4 McL., 366.

§ 2392. A patent for land in Pennsylvania is held to be evidence of the regularity of the proceedings antecedent to the consummation of the title, until the contrary is proved by the party attempting to impeach its validity. *Brown v. Galloway*, Pet. C. C., 291.

§ 2393. The act of March 3, 1843, relating to exemplifications of records of the general land office, does not dispense with the signing and countersigning of patents. *McGarrahan v. Mining Co.*, 6 Otto, 316.

§ 2394. Entries made by other persons subsequently to a patent under which a party claims cannot affect his title, and evidence of such entries is irrelevant for such a purpose. *Stringer v. Young*, 3 Pet., 320.

§ 2395. **Spanish and Mexican titles.**—Upon an application, under the acts of congress, for confirmation of title to land in Louisiana, the fact that the applicant had the requisite amount of property, having been passed upon by the officer deciding upon the application, did not have to be proved. *Chouteau v. United States*, 9 Pet., 147. See § 907.

§ 2396. Though the signatures to a grant present a suspicious appearance, and the expediente which might have dispelled or confirmed doubts as to the authenticity of the grant has been lost while in the custody of an officer to whom such documents are not usually intrusted, yet the grant will be confirmed upon the positive testimony of witnesses that they saw it executed, and that it was drawn by one of them. *United States v. Rico*, Hoff., 161.

§ 2397. A land grant in California, unsupported by evidence from the archives, or by proof of occupation, must appear suspicious. But even in such cases the court cannot, in the face of uncontradicted testimony of unimpeached witnesses, substitute its own suspicions for proofs. *Pico v. United States*, Hoff., 188.

§ 2398. When a grant for land in California is presented, of which the archives contain no record, and of which no possession has been taken, and to which no claim of ownership has been asserted during the former government, these facts raise a suspicion that it has been fabricated since the change of government. *Palmer v. United States*, Hoff., 249.

§ 2399. In land claims in California it is held that evidence from the archives is more satisfactory than the production of an alleged original title, because such evidence is less easily forged. *United States v. Rodriguez*, Hoff., 170.

§ 2400. A patent from the United States to land in Missouri, issued to one whose claim under the Spanish government had been confirmed by the board of commissioners, is conclusive evidence that the grantee was the owner of the title confirmed, and that he had the oldest and best claim to the land, as against every other claimant under the Spanish government. *Landes v. Brant*, 10 How., 348.

§ 2401. A patent issued by the United States upon the confirmation of a Spanish or Mexican claim is record evidence of the action of the government upon the title of the claimant. It is evidence that the claim was valid under the laws of the former government; that it was entitled to recognition and protection by stipulation of the treaty, and might have been located under

the former government, and is correctly located now so as to embrace the premises as they are surveyed and described. And as against the government and all parties claiming under it by title subsequent, this record, so long as it remains unvacated, is conclusive. *Beard v. Federy*, 3 Wall., 478.

§ 2402. A. presented a claim to the board of commissioners established by congress at St. Louis for settling French and Spanish land claims. He described the land as "formerly the property of" B. The minutes of the board showed that A., as "assignee," had presented a claim, and that the board had granted the land to the "representatives" of B. The formula "legal representatives" was used by the board to embrace representatives of the original grantee by contract, that is, assignees, as well as by operation of law. A. and his family had for many years been in possession of the land and cultivated it. It was held that these facts were evidence of an assignment from B. to A., and should be left to the jury. *Hogan v. Page*, 2 Wall., 605.

§ 2403. Under the act of congress of May 23, 1828, relating to land claims in Florida, a grant by the Spanish officers is evidence of the facts stated in it and that it was issued by competent authority. *United States v. Arredondo*, 6 Pet., 691.

§ 2404. A Mexican land claim will not be confirmed unless there is record evidence to support it. *Romero v. United States*, 1 Wall., 721.

§ 2405. Where the preliminary proceedings to the issue of a Mexican grant in colonization are produced from the archives of the former government, proof of the signatures of the grantor and attesting secretary will, on appeal, be deemed sufficient by the supreme court to prove the genuineness and due execution of the grant, no objection to its sufficiency having been taken in the first instance before one of the inferior tribunals. *United States v. Yorba*, 1 Wall., 412.

§ 2406. A copy of a paper certified by the register of the land office in Louisiana to have been taken from one of the records of his office, which paper is nothing more than the preamble usually inserted in Spanish grants, and contains no words of grant, is no evidence of title. *United States v. Le Blanc*, 12 How., 435.

§ 2407. Although the signatures of the officials to the documents making up a Mexican land grant are genuine, the official character of the signers is of no avail, if the fact certified be proved false *aliunde*. *United States v. Galbraith*, 2 Black, 394.

§ 2408. Documents showing a grant of land in California by Spanish public officers, purporting to be made by them in their official capacity, are *prima facie* evidence of the power of the officers to make the grant. *United States v. Peralta*, 19 How., 343.

§ 2409. Ejectment.—In ejectment or trespass *quare clausum fregit*, receipt of rent and payment of taxes is *prima facie* evidence of title. *Burt v. Panjaud*, 9 Otto, 180. See § 242.

§ 2410. Where, in an action of ejectment, by entering into the consent rule under a special rule of court, the defendants are bound to admit upon the trial that they are in possession of the land claimed by the plaintiff, and the boundaries of the plaintiff's patent are set out in the declaration, the proof of such boundaries may be dispensed with. *Dunn v. Games*, 1 McL., 321.

§ 2411. In an action of ejectment, or of trespass *quare clausum fregit*, possession by the plaintiff, at the time of eviction, is *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient. And it is more appropriate as evidence of a superior right of possession under the acts of congress, which respect the location and occupation of mining claims upon the lands of the United States. *Campbell v. Rankin*, 9 Otto, 261.

§ 2412. In ejectment, the plaintiff must show a right of entry. If he proves twenty years' possession, or the seizin of his ancestor, and a descent cast, it is in general sufficient *prima facie*, unless the defendant shows a better right. If the defendant relies upon the original title of the proprietary, he must show it to be a subsisting title, either in the proprietary, or some one claiming regularly under him. *Hylton v. Brown*, 1 Wash., 204.

§ 2413. In an action of ejectment a corporation plaintiff has a right to show a vested legal title, no matter how, if it was fairly acquired, or through whom it may have been derived. *New York Dry Dock v. Hicks*,* 5 McL., 111.

§ 2414. In an action of ejectment, parol evidence of a witness, who was not present at the survey returned in the cause, to establish the fact that the lessor of the plaintiff was, at a certain time, in possession of the land, designated by certain lines and letters on the plot, and demanded in the action under claim of title, is competent and admissible. *Greenleaf v. Birth*,* 5 Pet., 132.

§ 2415. An agreement signed by the lessor of the plaintiff in an action of ejectment, for the sale and conveyance of the land to the defendant, cannot be given in evidence, as it is at most only evidence of an equitable title. *Willink v. Miles*, Pet. C. C., 429.

§ 2416. In an ejectment suit, a deed made after the institution of the suit, purporting to correct mistakes in the calls of a former deed, is not admissible in evidence; as the plaintiff

must recover, if at all, upon the state of his title as it subsisted at the commencement of the suit. *Johnston v. Jones*, 1 Black, 210.

§ 2417. Where two lots are conveyed to different persons and described with reference to a recorded plat, the boundaries of the lots being incapable of location without such reference, in a suit in ejectment by the owner of one of the lots against the owner of the other for land claimed as an accretion to plaintiff's lot, the original of the recorded plat cannot be admitted in evidence to contradict the recorded plat. It is not material that the plat, as recorded, does not conform in all respects to the requirements of the statutes, the omission not being such as to invalidate the deeds. *Jones v. Johnston*, 18 How., 150.

§ 2418. Plaintiff in ejectment, where title is derived from a sale on execution, cannot give evidence to enlarge the legal estate taken by this debtor as trustee in the deed into a beneficial interest by proofs that the trusts in the deed were void. *Lessee of Smith v. McCann*, 24 How., 399.

§ 2419. The defendant in an execution under which his land has been sold cannot, when sued in ejectment by the purchaser at the execution sale, be permitted to prove that his title at the time of the sale was merely equitable, or was for any other reason defective. *Cooper v. Galbraith*, 3 Wash., 546.

§ 2420. If one bring a suit to recover land conveyed by him to the defendant while the plaintiff was an infant, a lease taken of a part of the land from the defendant by him, after attaining his majority, for a partnership of which he is a member, is evidence of an affirmance of his deed, though not covering the part of the tract sought to be recovered. *Irvine v. Irvine*, 9 Wall., 617.

§ 2421. The return by the marshal to a writ of *fiery facias*, made after the commencement of an ejectment suit against the purchaser under the marshal's sale, is admissible in evidence to show title at the commencement of the suit, where by the local law the sale and not the return passes the title. *Remington v. Linthicum*, 14 Pet., 84.

§ 2422. In a writ of right, the demandant has a right to introduce his evidence, if competent, and it is error to exclude it because the same evidence, in other suits by the same demandant against tenants of land in the same manor, has been held to be insufficient to establish his legal title. The court cannot judicially know what the legal effect of the evidence will be upon the demandant's title, until it has been received. *Bradstreet v. Thomas*, 12 Pet., 174.

§ 2423. In ejectment, where the plaintiff claimed under the act of congress of June 10, 1852, granting lands to the state of Missouri in aid of certain railroads, and the defendant claimed under the "swamp land grant" of 1850, it was ruled that the defendant might introduce witnesses to show that the land was swamp and overflowed within the meaning of the act. *Railroad Company v. Smith*, 9 Wall., 95.

§ 2424. **Limitations.**—If a defendant in ejectment, or the person under whom he claims, has been in possession more than twenty years, claiming the premises as his own, and without recognizing the title of the plaintiff or his lessor, and originally entered under claim of right, the jury may infer that the possession has been adverse. *Wilkes v. Elliot*, 5 Cr. C. C., 611. See § 246.

§ 2425. Under the limitation laws of Illinois, declaring in substance that whoever has resided on a tract of land for a period of seven successive years prior to the commencement of an action of ejectment, having a connected title in law or in equity, deducible of record from the state or the United States, can plead the possession in bar of the suit, it is not necessary that the entire title of the defendant be evidenced by acts of record. If the source or foundation of the title is of record, it is available to every person claiming under it who can connect himself with it by such evidence as applies to the nature of the right set up. *Dolton v. Cain*, 14 Wall., 472.

§ 2426. Possession of land under a claim of title for a sufficient length of time to afford a bar by the statute of limitations is, in the absence of conflicting evidence to remove the bar, conclusive evidence that a recovery obtained against the person in possession was not by paramount title, when a suit is brought upon a covenant against incumbrances, on account of such recovery. *Somerville v. Hamilton*, 4 Wheat., 230.

§ 2427. The uninterrupted payment of taxes on a lot for twenty-four successive years is strong evidence of a claim of right to it. *Ewing v. Burnet*, 11 Pet., 41.

§ 2428. Where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant, without interruption or an adverse entry by him during the whole time, such acts are evidence of an ouster of a former owner, and an actual adverse possession against him. *Ibid.*

§ 2429. Length of possession and payment of taxes, and the absence of notice to quit, may be given to the jury as evidence conducing to prove title. *Greenleaf v. Birth*, 9 Pet., 292.

§ 2430. Open and notorious adverse possession is evidence of notice; not of the adverse holding only, but the title under which the possession is held. *Landes v. Brant*, 10 How., 348.

§ 2431. The recital in a conveyance by notarial act, in Louisiana, that possession has been delivered, is not evidence of that corporeal possession which is the foundation of a prescriptive right. *Anderson v. Bock*, 15 How., 323.

§ 2432. **Miscellaneous — Deeds, leases, etc.**— In an action of *assumpsit*, for use and occupation, the plaintiff's witness testified that when the demand for rent was made the defendant said he had paid it by a check of a certain date, on a certain bank. Such a check, with the bank's canceling mark upon it, payable to the plaintiff or bearer, and the defendant's check-book, with a margin corresponding with the check in amount, name and date, and the words "on account of rent," were excluded when offered as evidence of payment. *Lowe v. McClery*, 3 Cr. C. C., 254. See §§ 890, 1015, 1292, 1661, 1867.

§ 2433. If a lessor receive rent from an under-tenant of a part of the premises, it is no evidence of his assent to an abandonment by the lessee. *Slacum v. Brown*, 5 Cr. C. C., 315.

§ 2434. A lease for ninety-nine years, not acknowledged nor recorded, may be used as evidence of the rate of renting in an action for use and occupation. *Brohawn v. Van Ness*, 1 Cr. C. C., 366.

§ 2435. An inquest of office, filed by the attorney-general, claiming land as an escheat to the commonwealth, upon which a judgment has been rendered and a writ of seizin executed, is evidence that the owner died without heirs. But it is not conclusive against the tenant unless he was a party or privy to the proceeding. *Stokes v. Dawes*, 4 Mason, 268.

§ 2436. A court of equity in directing an issue of *quantum damnificatus* for breach of covenants of seizin in a deed mentioning so many acres, "more or less," will direct that the defendant be permitted to give in evidence, in diminution or opposition to the damages, the value of the land over and above the quantity mentioned in the deed. *Thomas v. Perry*, Pet. C. C., 49.

§ 2437. In an action on a covenant of seizin, in order to prove that the survey on which the patent granting the land to the defendants was issued could not have been made, the plaintiffs produced two other surveys made by the same person, which were said to have been completed only two days succeeding the completion of the survey of the defendants, which three several surveys could not possibly have been made in the time intervening between the entries in the surveyor's office and the day on which they were alleged to have been completed. The surveyor being a sworn officer, and his survey having been returned on oath, this evidence was held to be inadmissible. *Pollard v. Dwight*, 4 Cr., 421.

§ 2438. Where the testimony of the parties is in conflict as to the purpose for which a quitclaim deed was executed, reference may be had to the acts, declarations and writings of the parties contemporaneous with the transaction. *Beadle v. Beadle*, 2 McC., 586.

§ 2439. A map made by the surveyor-general in 1840, exhibiting the boundary lines of the St. Louis out-lots and commons, is not binding on one who claims under a villager. *Glasgow v. Hortiz*, 1 Black, 595.

§ 2440. The fact that Manso, a Spaniard, the grantee of De Leon, left the country under the order by the successful party expelling all Spaniards, and went to reside in Louisiana, was held to be no evidence of his abandonment of the country, and consequent forfeiture of his land. *White v. Burnley*, 20 How., 235.

§ 2441. An original deed recorded in the land records of Washington county, D. C., under a decree in chancery, and certified to have been so recorded by the clerk, may be read in evidence in a subsequent action, although it did not continue to remain on file in the cause in which it was originally filed, and by the decree in which it was ordered to be recorded. *Bank of United States v. Benning*, 4 Cr. C. C., 81.

§ 2442. Inadequacy of consideration may be so great as to be evidence of fraud in a deed. *Wright v. Stanard*, 2 Marsh., 311.

§ 2443. Where a deed made by the owner in fee of land pursuant to a decree recites the decree, it is not necessary that an exemplification of the record of the suit in which the decree was rendered should be introduced in evidence with the deed. *Games v. Stiles*,* 14 Pet., 322.

§ 2444. Plaintiff, claiming land through B., failed in his proof of B.'s title, and declined to state that he expected to show any other title than that previously offered; he then offered in evidence a deed to him from B.'s heirs. *Held*, that the deed was inadmissible. *Hollingsworth v. Flint*,* 11 Otto, 591.

§ 2445. Where one claims under a patent issued to David Buchanan and a deed executed by David Garrick Buchanan, he may show that the patentee and grantor are the same person, and the deed may be admitted in evidence. *Dunn v. Games*, 1 McL., 321.

§ 2446. Where the meaning of an expression in a deed was doubtful, acts of the parties subsequent to the execution, showing what meaning they then attached to the words, were held admissible in evidence. *Goodyear v. Cary*, 4 Blatch., 271.

§ 2447. **Deeds — Proof of execution.**—Strict proof of the execution of an instrument is dispensed with after a great length of time, where a person has claimed under such instrument, and there are no circumstances which go to create doubts of its genuineness. *Walton v. Coulson*, 1 McL., 120. See §§ 890, 1015, 1292, 1661, 1867, 2432.

§ 2448. If the grantor and subscribing witnesses in an unrecorded deed reside without the state, the execution of the deed may be proved by proof of their handwriting. *Longworth v. Close*, 1 McL., 282.

§ 2449. The execution of a deed of bargain and sale of land need not be proved by the witnesses if the deed has been acknowledged and recorded. *Edmondson v. Lovell*, 1 Cr. C. C., 103.

§ 2450. The oath of the subscribing witness to a deed, to its due execution, made before the proper magistrate, and the certificate of the recording of it, are, under the laws of New York, *prima facie* evidence of its execution and delivery. *Carver v. Jackson*, 4 Pet., 1.

§ 2451. A deed more than thirty years old, offered in evidence by the plaintiff, and proved to have been in the possession of the plaintiff's lessors, and actually asserted by them as a ground of their title in a chancery suit, the decree in which forms a link in the plaintiff's title, is sufficiently accounted for, and is admissible in evidence without the regular proof of its execution by the subscribing witnesses. *Barr v. Gratz*, 4 Wheat., 213.

§ 2452. The grantor in a deed constituted two persons, naming them, "to be the lawful attorney or attorneys" for him, and in his name to make the acknowledgment of the deed. The attorneys severally appeared before different magistrates at several times and made a several acknowledgment in the name of their principal. *Held*, that there was a valid execution of the power of attorney, and the deed was properly acknowledged so as to authorize the reading of it in evidence. *Greenleaf v. Birth*,* 5 Pet., 132.

§ 2453. The delivery of a deed will be presumed, in the absence of direct evidence, from the concurrent acts of the parties in recognizing a transfer of the title. Thus the acts of the grantor in asking a reconveyance, and the acts of the grantee in making it, are satisfactory evidence that a delivery of the deed had been made at the time. *Gould v. Day*, 4 Otto, 405. See §§ 890, 1015, 1292, 1661, 1867, 2432, 2447.

§ 2454. It is not necessary to the admission of a deed in evidence that its delivery should be proved in the acknowledgment. The fact of delivery may be proved expressly, or may be proved by circumstances. Possession of the deed by the grantee is *prima facie* evidence of its delivery. *Dunn v. Games*, 1 McL., 321.

§ 2455. If a deed still remains in existence, proof of the handwriting, and the possession of it by the grantee, is *prima facie* evidence that it was sealed and delivered. But if the deed is lost, positive proof of the handwriting is not to be required or expected, and the grantee must depend on other proof. *Sicard v. Davis*, 6 Pet., 124.

§ 2456. The recording of a deed by the grantor, under circumstances which create no suspicion of fraud, may be considered evidence of delivery. *Bulkley v. Buffington*, 5 McL., 457.

§ 2457. In order to establish the delivery of a deed set up as against a will to answer the trusts of which the land may be needed, the statement of one of the subscribing witnesses, before the clerk authorized to take proof of deeds, that the testator acknowledged the deed, in his presence, to be his act and deed, for the purpose therein contained, made nearly seven years after the death of the testator, is not sufficient, without any explanation of the delay in proving the instrument. *Pulliam v. Pulliam*, 10 Fed. R., 23.

§ 2458. **Acknowledgment of deed.**—In Massachusetts, the certificate of acknowledgment of a deed is only *prima facie* evidence, and its date may be contradicted for the purpose of showing the deed to be fraudulent. *Holbrook v. Worcester Bank*, 2 Curt., 244. See §§ 890, 1015, 1292, 1661, 1867, 2432, 2447, 2453.

§ 2459. An acknowledgment of a deed before a man who styles himself a justice of the common pleas is *prima facie* evidence that he was such; and it is not necessary to produce the commission or give any other evidence on the point, until some evidence is given on the other side to render the fact questionable. *Willink v. Miles*, Pet. C. C., 429.

§ 2460. Parol evidence is inadmissible to contradict a certificate of acknowledgment of a deed. *Elliott v. Peirsol*, 1 Pet., 338 (§§ 2024-31).

§ 2461. It is no objection to a deed, offered in evidence, that it was acknowledged and recorded after the suit was brought. *Lanning v. Dolph*,* 4 Wash., 626. See § 2466.

§ 2462. Under the law of California a deed proved by a certificate of acknowledgment before a notary public is admissible in evidence. *Houghton v. Jones*,* 1 Wall., 702.

§ 2463. In an action of ejectment, the plaintiff gave in evidence a patent issued to his grantor, and the deed to himself. It was held to be no objection to the admission of the deed, that there was no proof of the identity of the grantor with the patentee, other than the certificate contained in the acknowledgment, or that the certificate of acknowledgment was not on the same piece of paper that contained the deed, but on a paper attached to it by wafers, or

that the seal of the court authenticating the acknowledgment was an impression stamped on paper, and not on wax or wafer. *Pillow v. Roberts*, 13 How., 472.

§ 2464. A deed of lands in Virginia, executed in another state, had a certificate of the clerk of the United States district court attached that the grantor personally appeared before him and acknowledged the instrument to be his free act and deed. The judge of the court certified to the official capacity of the clerk. *Held*, that the deed was proved strictly in accordance with the act of Virginia of December 8, 1792, and was entitled to be recorded, and having been duly recorded by order of the county court, an exemplification thereof was admissible in evidence. *Shutte v. Thompson*,* 15 Wall., 151.

§ 2465. Under the statute in Pennsylvania it was held that the magistrate's certificate of acknowledgment of a deed, though not under seal, authorized its admission in evidence. *Fellows v. Pedrick*, 4 Wash., 477.

§ 2466. In an action of trespass to try title to land, the title at the beginning of the action is the question to be tried. So it was held that a deed to the plaintiff, not acknowledged as required by law in order to pass the interest of the grantor, until after the commencement of the action, was inadmissible. *Hollingsworth v. Flint*,* 11 Otto, 591. See § 2461.

§ 2467. On a writ of error from the circuit court of Tennessee, it was held error to allow a deed for lands lying in Tennessee, which had been acknowledged in 1839 before a clerk of the court of another state, to be read in evidence. *McEwen v. Den*, 24 How., 243.

§ 2468. **Deeds—Recording—Common law proof.**—Section 38, chapter 109, of the Revised Statutes of Missouri, pertaining to the admissibility in evidence of certified copies of deeds for military bounty lands, is not repealed by the act of February 27, 1868, nor is the common law mode of proving the execution of deeds thereby abrogated; hence, a deed for such lands can be received in evidence where its execution is proved according to the common law mode in the same manner as any other deed not acknowledged or recorded properly. A certified copy of such a deed from the recorder's office, when the original has been recorded and acknowledged under section 35, chapter 109, of the Revised Statutes of Missouri of 1865, must be received in evidence upon proof of the loss or destruction of the original; and if duly acknowledged according to the laws of Missouri, a certified copy is to be received on the same terms as other deeds with valid acknowledgments. *Wright v. Taylor*, 2 Dill., 23. See §§ 890, 1015, 1292, 1661, 1867, 2432, 2447, 2453, 2458.

§ 2469. Under the law of Texas of May 11, 1846, where a copy of a record of a deed has been filed three days before the trial, and notice has been given of such filing, common law proof of the execution of the deed is not dispensed with if an affidavit is filed within one day charging that the deed is a forgery. *Younge v. Guilbeau*,* 3 Wall., 636.

§ 2470. The recording of a deed is *prima facie* evidence, and no more, that the deed was legally proved and admitted to record. *Talbot v. Simpson*, Pet. C. C., 188.

§ 2471. Where a deed offered in evidence wants a seal, the record of the deed is admissible to show that at the time it was recorded it had a seal. *Gillespie v. Reed*,* 3 McL., 377.

§ 2472. Where an original deed is not competent evidence, a recorded copy cannot be received. *Meegan v. Boyle*, 19 How., 130.

§ 2473. A copy of the record of a deed recorded after the time limited by law for such recording is inadmissible in evidence. *Ormsby v. Tingey*,* 2 Cr. C. C., 128.

§ 2474. A copy of a duly recorded deed which has been executed sixty-five years, and in conformity with which possession has gone on continuously, is admissible in evidence without proof of the loss of the original. *Stokes v. Dawes*, 4 Mason, 268.

§ 2475. If a deed is not recorded until so great a time after it purports to have been executed as precludes the party to be affected by it, from every reasonable opportunity of detecting any fraud, imposition or forgery that may have been practiced in the case, the deed cannot be considered as regularly recorded so as to authorize the reading of a copy of it in evidence. *Longworth v. Close*, 1 McL., 282.

§ 2476. Under the recording act of Ohio a certified copy of the record of a deed is *prima facie* evidence of the existence of the deed, which evidence is liable to be rebutted, as regards the delivery of the deed, by the acts of the parties to the deed and those who claim under it, which may be inconsistent with the presumption of a delivery. *Buckley v. Carlton*,* 6 McL., 125.

§ 2477. By the law of Illinois, an acknowledgment of a deed to land in that state, taken in conformity with the law of the state where the deed was executed, is sufficient to admit it to record, and to be received in evidence. *Little v. Herndon*, 10 Wall., 26.

§ 2478. A deed cannot be received in evidence without some evidence of its genuineness. *Wallace v. Dewey*, 3 McL., 548.

§ 2479. A deed of conveyance is not competent evidence of the legal estate until it is registered. *Patton v. Reily*,* 1 Cooke, 119.

§ 2480. The solemn probate of a deed by a witness on oath before a magistrate, for the pur-

pose of having it recorded, and the certificate of the magistrate of its due probate upon such testimony, are entitled to more weight as evidence than the mere unexplained proof of the handwriting of a witness after his death. *Crane v. Morris*, 6 Pet., 598.

§ 2481. Under the laws of Illinois, a deed offered in evidence must be proved as required by the rules of evidence, though entitled to be recorded under the laws of the state. *Gillespie v. Reed*,* 3 McL., 377.

§ 2482. A deed to lands in Missouri, executed in 1804, attested by two witnesses, acknowledged before a syndic, and followed by claim and possession thereunder, is, after the lapse of forty years, and in view of the unsettled condition of the country, admissible in evidence without further proof. *Stoddard v. Chambers*, 2 How., 284.

§ 2483. The ninth section of the act of the legislature of the state of Tennessee of 1839, providing that whenever a deed has been registered "twenty years or more, the same shall be presumed to be upon lawful authority, and the probate shall be good and effectual, though the certificate upon which the same has been registered has not been transferred to the register's books, and no matter what has been the form of the certificate of probate or acknowledgment," is not a retrospective law, when applied to deeds already recorded, but valid; and copies of such deeds stand on the same footing as other legally registered deeds, of which copies are made evidence by the law. *Webb v. Den*, 17 How., 576.

§ 2484. **Deed under decree.**—It is no objection to the admission in evidence of a deed purporting to have been made under a decree of court that the record of the decree is not in evidence, where the fee was vested in the grantor and he had a right to make the conveyance. *Dunn v. Games*, 1 McL., 321. See §§ 890, 1015, 1292, 1661, 1867, 2432, 2447, 2453, 2458, 2468.

§ 2485. **A sheriff's deed** cannot be given in evidence without producing the judgment and execution under which he made the sale; these documents being necessary to show his authority to sell. And a judgment and execution differing entirely from that recited in the deed is the same thing as if no judgment were produced. *Den v. Wright*, Pet. C. C., 64.

§ 2486. To entitle a sheriff's deed to admission in evidence, the record of the judgment under which the sale of land was made must be produced. *Lanning v. London*, 4 Wash., 513.

§ 2487. **An administrator's deed** cannot be given in evidence without producing the order of the orphans' court authorizing it. *Den v. Wright*, Pet. C. C., 64.

§ 2488. **Trustees' deed.**—A deed purporting to have been made by the trustees of a town is not admissible in evidence unless it is made to appear that the persons who signed it were the trustees of the town at the time, and had power to make the conveyance. *Wallace v. Dewey*, 3 McL., 548.

§ 2489. **The recitals in a deed** are evidence between the parties of the facts stated therein, and they are estopped to deny the truth of those facts. *Bank of United States v. Benning*, 4 Cr. C. C., 81. See §§ 890, 1015, 1292, 1661, 1867, 2432, 2447, 2453, 2458, 2468, 2484, 2485, 2487, 2488.

§ 2490. And where the deed is admitted in evidence only to show the transmission of the title, it is not necessary to prove the recitals. *Ibid.*

§ 2491. Recitals in an ancient deed, upon the truth of which the validity of the deed depends, and upon a supposition of the truth of which possession has been held under the deed from the time of its date to the present time, may be proved as against persons who are not parties to the deed, and who claim no right under it. *Deery v. Cray*, 5 Wall., 795.

§ 2492. The recital of a lease in a deed of release is conclusive evidence between parties and privies of the original existence of the lease, and supersedes the necessity of introducing any other evidence to establish it. *Carver v. Jackson*, 4 Pet., 1.

§ 2493. The recital of a lease in a deed of release is conclusive evidence, as between the parties and those who as privies claim under them, of the execution of the lease. *Crane v. Morris*, 6 Pet., 598.

§ 2494. **Consideration of a deed.**—The sum named in the consideration clause of a deed is only *prima facie*, and not binding on either party. The true consideration may be shown without an express denial that the sum mentioned in the deed is the true consideration. *Patrick v. Leach*, 1 McC., 250. See § 1282.

§ 2495. Where the operation or effect of a deed is not attempted to be impeached, it may be proved that a different consideration was agreed upon from the one stated in the deed. *Doe v. Beardsley*, 2 McL., 412.

§ 2496. Where a deed has a consideration named on its face the grantor cannot, at law, question the payment of the sum named, in any case, to affect the validity of the deed. But in an action for the consideration money, evidence is admissible to show, in contradiction to the deed, that the consideration has not been paid. *Taggart v. Stanbery*, 2 McL., 543.

§ 2497. **Tax deeds.**—A void tax deed is inadmissible in evidence in an action of ejectment to show title out of the plaintiff. *Shutte v. Thompson*,* 15 Wall., 151.

§ 2498. The recitals in a sheriff's deed, made under the direction of a judgment obtained by

the state for taxes, as to the manner in which the power is executed, are evidence against the grantee and those claiming under him. If these recitals show that the sale is made in an irregular manner, there is no room for presumptions to the contrary in favor of the action of the sheriff. *French v. Edwards*, 13 Wall., 506.

§ 2499. Under a law declaring that a tax deed "shall be taken and considered by the court as sufficient evidence of the authority under which the sale was made, the description of the land, and the price at which it was purchased," it is held that the deed is to be taken as *prima facie* evidence of these three facts. *Overman v. Parker*, Hemp., 692.

§ 2500. A tax deed made by the marshal under the act of congress of July 14, 1798, chapter 92, is not *prima facie* evidence of compliance with the prerequisites required by law. *Williams v. Peyton*, 4 Wheat., 77.

§ 2501. Under section 96 of the tax law of Arkansas, the deed of a collector of taxes, when acknowledged and recorded, is evidence of a valid title and the regularity and validity of the proceedings. *Pillow v. Roberts*, 13 How., 472.

§ 2502. The statutes of Arkansas make a tax deed *prima facie* evidence of the assessment, taxation and forfeiture of the land; of the regularity of every proceeding previous to the sale of the land forfeited; of the competency of the officer making the sale and conveyance; of the legality and validity of the sale; and cast upon the assailant of any of these prerequisites the burden of showing the absence or defectiveness of any of them. Without such showing that which was *prima facie* proof will be taken as conclusive. *Thomas v. Lawson*, 21 How., 331.

§ 2503. Under the statute of Minnesota of 1866, declaring that where lands sold for taxes are not redeemed within the time allowed by law, the deed executed by the auditor shall be *prima facie* evidence of a good and valid title, such a deed is not admissible in evidence unless it appears that the land sold had not been redeemed when the deed was executed and delivered. This statute only shifts the burden of showing a compliance with the law from the party claiming under the deed, and casts upon the party attacking it the burden of showing a non-compliance; and it is error to refuse evidence tending to show that the requisites of the law have not been complied with. *Williams v. Kirtland*, 13 Wall., 306.

§ 2504. An auditor's deed for land sold for taxes, under the law of Illinois of 1827, is not evidence of title unless it is shown that all the preliminary requirements have been complied with. *Arrowsmith v. Burlingim*, 4 McL., 489.

§ 2505. Under the laws of Minnesota a tax deed is not *prima facie* evidence of title until it is first proved that the county auditor had authority to make the deed; and the recital in the deed that the state auditor directed the sale is not sufficient. *Shearer v. Corbin*, 1 McC., 306.

§ 2506. Under the statute of Ohio of March 14, 1831, declaring that a tax deed "shall be received in all the courts as *prima facie* evidence of a good and valid title," such a deed, including all its recitals, is receivable in evidence, without extrinsic proof, as *prima facie* evidence of title; and its reception throws upon the party resisting the tax title the burden of impeaching it by proof that the prior proceedings were not in accordance with the statute. *Lamb v. Gillett*, 6 McL., 365.

§ 2507. Under the laws of Ohio, previous to 1824, a tax deed was not available as evidence of title, unless accompanied by proof that the requisites of the law relating to the sale of lands for taxes had been complied with. Such proof must be by the records, or certified copies of them, and a mere statement of what is shown by the record is insufficient. *Games v. Stiles*,* 14 Pet., 322.

§ 2508. Under the law of Illinois making seven years' possession under a tax deed a bar to the recovery of the land, a tax deed, void upon its face, is not admissible in evidence to lay the foundation for proof of a possession which will be protected by the statute. *Moore v. Brown*, 11 How., 414.

§ 2509. A deed from a tax collector, in connection with proof of possession under it, is admissible in evidence, as color of title, in order to show adverse possession. It is immaterial that the deed is irregular and worthless. *Pillow v. Roberts*, 13 How., 472.

XVII. PLEADINGS IN EVIDENCE.

§ 2510. **In general.**—An issue having been sent to the court from the orphans' court, to try the question of a testator's sanity, and, in ordering the issue, the orphans' court having directed the libel and answer to be sent to the court to which the issue was sent, they were admitted in evidence. *Evans v. Evans*, 2 Cr. C. C., 240.

§ 2511. When the allegations of a bill are distinct and positive they are to be taken as true without proof, if the bill is taken for confessed. But when they are in their nature so defective, or vague, that a precise decree cannot be rendered upon them, proof must be adduced from the necessity of the case. *United States v. Samperyac*, Hemp., 118.

§ 2512. An answer responsive to a bill in equity must be taken as true, unless overcome by evidence. *Garrow v. Davis*,* 10 N. Y. Leg. Obs., 225; *Hough v. Richardson*, 3 Story, 659; *Russell v. Clark*, 7 Cr., 69. It must be overcome by the testimony of two witnesses, or by that of one and strong corroborating circumstances. *Harper v. Dougherty*, 2 Cr. C. C., 284; *Hinkle v. Wanzer*, 17 How., 353; *Morgan v. Tipton*, 3 McL., 339; *Smith v. Babcock*, 2 Woodb. & M., 246. An answer not responsive has no such effect as evidence. *Hinkle v. Wanzer*, 17 How., 353.

§ 2513. It is a rule of equity that an answer responsive to the allegations of the bill, and which contains positive and clear denials thereof, must prevail, unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness and attendant circumstances which supply the place of another witness. *Daniel v. Mitchell*, 1 Story, 172; *Gould v. Gould*, 3 Story, 516; *Langdon v. Goddard*, 2 Story, 267; *Tobey v. Leonards*,* 2 Wall., 423; 2 Cliff., 40; *Delano v. Winsor*, 1 Cliff., 501; *Hughes v. Blake*, 1 Mason, 515; *McNeil v. Magee*, 5 Mason, 244.

§ 2514. Where a fact is denied by the answer in particulars responsive to the bill, it is not considered as sustained by sufficient proof, unless it be by more than the testimony of one witness. *Smith v. Babcock*, 2 Woodb. & M., 246.

§ 2515. Where a charge of fraud, made in a bill in equity, is positively denied in the answer, the answer must prevail, unless overcome by two witnesses to the substantial facts, or at least by one witness and such attendant circumstances as will supply the want of another witness. *Clark v. Hackett*, 1 Cliff., 269.

§ 2516. No decree can be made against a positive denial of the defendant of any matter directly charged in the bill, on the testimony of a single witness, unaccompanied by some corroborating circumstances. *Hughes v. Blake*, 6 Wheat., 453.

§ 2517. If the answer is responsive to the bill, positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the party making it, it is evidence in his favor, and unless overcome by the testimony of two witnesses, or one and corroborative circumstances and facts which give the opposing evidence greater weight than the answer, is conclusive. *Hayward v. Eliot National Bank*, 4 Cliff., 294.

§ 2518. Although it is the general rule that either two witnesses, or one witness with probable circumstances, will be required to outweigh an answer asserting a fact responsive to a bill in chancery, yet circumstantial evidence alone may be stronger than the testimony of any single witness, and may outweigh an answer in chancery, especially if the defendant asserts a fact which cannot be within his own knowledge. *Clark v. Van Riemsdyk*, 9 Cr., 153.

§ 2519. The rule requiring that an answer in chancery responsive to the allegations of the bill must be overcome by the testimony of one witness and corroborating circumstances applies to an answer by a corporation under its common seal. The reason of the rule is not that the answer is upon oath, but that the complainant, by calling upon the respondent to answer, makes him a witness. *Garey v. Union Bank of Georgetown*, 3 Cr. C. C., 233.

§ 2520. It seems that no corroborating evidence need support the testimony of a witness against an answer in chancery by a corporation, under their common seal, unsupported by an oath, and not made upon personal knowledge. *Union Bank of Georgetown v. Geary*, 5 Pet., 99.

§ 2521. The rule in equity requiring two witnesses to overcome an answer responsive to the allegations of the bill does not apply in proceedings in admiralty. *Sherwood v. Hall*, 3 Sumn., 127; *The Steamboat H. D. Bacon*, Newb., 274.

§ 2522. An answer in admiralty, unless called for, is not evidence for either side, and when called for, the court is not bound to require two witnesses to overcome it as in equity. *Jay v. Almy*, 1 Woodb. & M., 262.

§ 2523. An answer in chancery is not evidence unless the matter is alleged to be within the personal knowledge of the defendant. *The Steamboat H. D. Bacon*, Newb., 274; *Veazie v. Williams*, 8 How., 134. The only effect of such an answer is to present an issue and put the plaintiff to the proof of his allegations. *Dutilh v. Coursault*, 5 Cr. C. C., 349.

§ 2524. On a bill in equity the answer of one co-defendant cannot, in general, be read against another co-defendant. But where his confession would be admissible, his answer may be admitted. And therefore where the defendants are all partners in the transaction, the answer of one is admissible against another. *Van Reimsdyk v. Kane*, 1 Gall., 630.

§ 2525. It is the general rule that the answer of one defendant in a suit in equity cannot be read in evidence against another. But where one defendant succeeds to another, so that the right of one devolves on the other, and they become privies in estate, the rule does not apply. Thus in a suit to enjoin a public officer from paying away or using certain money which had been collected as taxes, and his successor was also made a defendant, the answer of the former was held to be evidence against the latter, into whose hands the money had come. *Osborn v. United States Bank*, 9 Wheat., 738.

§ 2526. An answer in chancery responsive to the allegations of the bill, though evidence against the complainant, is not evidence against a co-defendant. *Lenox v. Notrebe*, Hemp., 251.

§ 2527. In a suit in equity against the members of an alleged partnership to compel payment of a bill of exchange drawn by one of them, the answer of one defendant is not evidence against a co-defendant, unless such a partnership is established as authorized the draft by the drawer as one of the partners. *Clark v. Van Riemsdyk*, 9 Cr., 153.

§ 2528. The answer of a defendant is evidence against the plaintiff although it be doubtful whether a decree can be made against such defendant. The answer of one who is nominally a defendant, but substantially a plaintiff, is not evidence either for the plaintiff or against a co-defendant. *Field v. Holland*, 6 Cr., 8.

§ 2529. The answer of a defendant in another suit is not competent evidence against a co-defendant. *Dexter v. Arnold*, 3 Sumn., 152.

§ 2530. The answer of one defendant is not evidence against a co-defendant; and the answer of an agent is not evidence against his principal, nor are his admissions *in pais*, unless where they are a part of the *res gestæ*. *Leeds v. Marine Ins. Co.*, 2 Wheat., 380.

§ 2531. The answer of an agent as to a matter with which he is the only one who is acquainted is evidence in favor of his co-defendant, the principal, and against the complainant. *Lenox v. Prout*, 3 Wheat., 520.

§ 2532. In a proceeding in court for the exercise of its summary jurisdiction over one of its own officers to restrain him from doing a wrong in his official capacity, such a wrong being considered as a contempt, the sworn answer of the officer must be considered as evidence in his favor. *In re Pitman*, 1 Curt., 186.

§ 2533. Where a party to the suit is examined in admiralty upon interrogatories, the answers are evidence in the case. *The Australia*, 3 Ware, 240.

§ 2534. Where a bill in equity charges the defendants with fraudulently obtaining a deed from a debtor to the injury of his creditors, and to defeat their debts, and this allegation rests upon the ground of a want of consideration in the deed, an answer showing the consideration is responsive to the bill, and therefore to be received as evidence. *Pomeroy v. Manin*, 2 Paine, 476.

§ 2535. The rule that an answer in chancery, under oath, and responsive to the allegations of the bill, is received as evidence, prevails in the federal courts, although the rule is different in the state courts, from which the case has been made. *Ibid.*

§ 2536. Circumstances tending to show a fact are held not to be conclusive against a positive denial in a sworn answer. *Root v. Shields*, 1 Woolw., 340.

§ 2537. A fact distinctly alleged in the bill, and admitted in the answer, must be taken as established. *Jones v. Morehead*, 1 Wall., 155.

§ 2538. Matter in the answer not responsive to the allegations in the bill is not entitled to any more consideration as evidence than those allegations. *Randel v. Brown*, 2 How., 406.

§ 2539. If an equity cause is set down for hearing on the bill and answer and exhibits, without any replication, the whole of the answer must be taken as true. *Leeds v. Marine Ins. Co.*, 2 Wheat., 380.

§ 2540. An answer which is entirely impertinent to the bill is not evidence, though no formal replication is filed. *Gunnell v. Bird*, 10 Wall., 304.

§ 2541. An answer in chancery is not evidence of new matter set up in avoidance of the plaintiff's equity, and not responsive to the allegations of the bill. *Robinson v. Cathcart*, 3 Cr. C. C., 377; *Gear v. Parish*,* 1 Burn. (Wis.), 99.

§ 2542. So far as an answer in chancery sets up new facts by way of discharge or avoidance of the matter of the bill, or alleges separate and independent agreements, it is not evidence for the defendant; but all such allegations must be sustained by proof *aliunde*. *Randall v. Phillips*, 3 Mason, 378.

§ 2543. Under a statute of California, adopted as a rule by the circuit court of the United States for that district, declaring that new matter in an answer shall on trial be deemed controverted by the adverse party, the answer cannot be taken as true, and witnesses may be examined to contradict it. *Cheang-Kee v. United States*, 3 Wall., 320.

§ 2544. To a bill in equity which seeks to subject to the payment of a judgment against the defendant certain land in his possession, an answer which admits that the land was entered in the name of the respondent, but, in avoidance of this admitted liability, alleges that the money was paid by a third person in fulfillment of a previous agreement, is not evidence, when replied to, and must be proved. *McCoy v. Rhodes*, 11 How., 131.

§ 2545. In an action *in rem* against a vessel, by a cook, to recover compensation for extra services as a caulker, an answer setting up an agreement by the libellant to do duty as a caulker when required was held not to be, of itself, evidence of the agreement, not being responsive to the allegations of the libel, and the court doubting whether the claimants could be

permitted thus to vary the contract in the shipping articles, except by proof of fraud or deceit on the part of the libellant. *The Exchange, Bl. & How.*, 336.

§ 2546. Where a corporation in its answer, sworn to by its president to the best of his knowledge, denied the allegations of the bill, but the president had not held the office of president at the time the matters in question occurred, it was held that to outweigh this denial the testimony of more than one witness was required. *Carpenter v. Providence Washington Ins. Co.*, 4 How. 185.

§ 2547. The statement of one witness corroborated by strong circumstances is sufficient to disprove the respondent's denial in the answer to a bill. *Smith v. Shane*, 1 McL., 22.

§ 2548. When a bill in chancery is sworn to, it will, if supported by only one witness, prevail against the sworn answer. *Searcy v. Pannell*,* 1 Cooke, 110.

§ 2549. The answer of a defendant in chancery is admissible as evidence against him. *Kenah v. The Tug John Markee*,* 3 Fed. R., 46.

XVIII. BOOKS AND PAPERS REQUIRED BY LAW OR DUTY TO BE KEPT.

§ 2550. **Signal service records**, being of a public character, and required to be kept for public purposes, are, when properly proved, competent evidence of the facts they contain, although there is no statute authorizing their admission. It is not necessary that they should be required by statute to be kept, it being sufficient if they are kept in discharge of a public duty. Nor is it necessary that they should be kept by a public officer, if the entries are made under his direction by a person authorized by him. *Evanston v. Gunn*, 9 Otto, 660.

§ 2551. The official record of a signal officer, kept by him as a part of his official duty, is better evidence of the amount of rainfall than the loose statements of witnesses who kept no memoranda. *Lindsay v. Cusimano*, 12 Fed. R., 503.

§ 2552. **Officer's books and papers.**—Disbursing agents are required to settle their receipts and disbursements with the accounting officers of the treasury, and their private books are inadmissible to control that official adjustment. *Strong v. United States*, 6 Wall., 788. See §§ 382, 492, 945, 1574.

§ 2553. In a suit by the United States for duties, the collector's books, in the handwriting of a deceased clerk, are evidence for the United States. *United States v. Howland*, 2 Cr. C. C., 508.

§ 2554. The books of a paymaster of the marine corps are to be considered public books so far as to authorize the United States to use them as evidence in an action against him for a balance due. *United States v. Kuhn*, 4 Cr. C. C., 401.

§ 2555. **Log-book.**—An entry in the log-book is only *prima facie* evidence. *Thompson v. The Ship Philadelphia*, 1 Pet. Adm., 210. See §§ 674, 1305, 1734, 1737; also MARITIME LAW.

§ 2556. The log-book is not proof *per se* of the facts stated therein, except in certain cases provided for by statute. The time of sailing, the course and termination of the voyage, may be proved by parol, without first proving that the log-book is lost or missing. *United States v. Gibert*, 2 Sumn., 19.

§ 2557. The entry in the log-book is, by the act of congress, made legal evidence of the time of coming on board, and of the absence occasioning the mulct on the delinquent seaman of one day's pay for every hour's omission to render himself on board. *Malone v. Brig Mary*, 1 Pet. Adm., 139.

§ 2558. In cases of desertion the entry in the log-book is evidence of the fact; but not conclusive, though indispensably necessary. *Ibid.*

§ 2559. To justify the reception of a log-book in evidence, it should be shown to be the identical book used on the voyage. Proof that certain entries in the book in question are in the mate's handwriting, and that the title on the cover is in the mate's handwriting, is not sufficient. *United States v. Mitchell*,* 2 Wash., 478.

§ 2560. The log-book is, by the act of congress, legal evidence in proof of desertion, though not conclusive and incontrovertible. *Jones v. The Brig Phoenix*, 1 Pet. Adm., 201.

§ 2561. An entry in the log-book of the desertion of a seaman is *prima facie* evidence of its truth in every particular, and to be falsified must be disproved by satisfactory evidence. *Douglass v. Eyre, Gilp.*, 147.

§ 2562. The entry in the log-book, necessary to a statute desertion, stating the name of the seaman and that he was absent from the ship at least forty-eight hours without leave, may be controlled by parol evidence. *The Hercules*, 1 Spr., 534.

§ 2563. The facts stated in the official log required to be kept by a British steamer must, as against the ship, be taken to be true, especially where it is made and signed by those chiefly having knowledge of the facts, unless a mistake is clearly shown. *Bunge v. Steamship Utopia*, 1 Fed. R., 892.

§ 2564. Where it clearly appears that the log-book of a vessel, as produced in court, has been tampered with by the master or the mate, the court is justified in rejecting it as evidence, and also the evidence of the persons who attempt to impose it upon the court. *The Brig Anastasia*, 1 Ben., 166.

§ 2565. The log-book was considered to be sufficiently identified, in this case, to be admitted in evidence upon the testimony of a witness that bills of lading were made out from it, and that he was perfectly sure that it was the log-book kept on the voyage, though he did not recollect seeing the mate make entries regularly in it; and upon proof that the mate had been advertised for in the newspapers and not found, and due diligence having been used to obtain better evidence than that of the mate himself without success. *United States v. Mitchel*, 3 Wash., 95.

§ 2566. Upon the trial of an indictment for revolt and confining the master, the log-book kept by the mate cannot be received in evidence. *United States v. Sharp*, Pet. C. C., 118.

§ 2567. *Ship's papers.*—The *roll d' equipage* of a vessel, being an original paper, is evidence to prove that a certain person was a member of the crew, the shipping articles being proved to be lost. *Ketland v. Lebiring*, 2 Wash., 201. See §§ 674, 1305, 1734, 1757, 2555.

§ 2568. A book of original entries kept by the captain of a vessel, containing entries of payments made by him to members of the crew, he being a part owner of the vessel, is not admissible, without other proof, to prove such payments. *The Propeller B. F. Bruce*, Newb., 539.

§ 2569. In a libel for the forfeiture of a vessel licensed for the cod fisheries for engaging in other trade, a marked almanac introduced as a memorandum of the times of sailing and returning of the vessel on her several voyages was held not to be evidence that would relieve the vessel of any suspicions of bad faith, or fraud, or deceit. *The Schooner Harriet*, 1 Story, 251.

§ 2570. Upon the trial of an indictment for conspiracy to destroy a vessel with intent to defraud the underwriters, the agent of the chamber of commerce, whose duty it was to take an accurate account of all shipments, presented his record of entries made of articles shipped on the vessel destroyed. But he could not state positively, after refreshing his memory by examining the book of the freight agent of the vessel, whether he took the list of articles from the freight agent, or the second clerk of the vessel. *Held*, that the entry of the articles could not be received in evidence. *United States v. Cole*, 5 McL., 513.

§ 2571. *Church records.*—The private memorandum of a priest, by whom a marriage is claimed to have been solemnized, no official register of marriages being kept at his church, in which memorandum he entered or intended to enter each marriage as it occurred, being kept by the priest in the ordinary course of his business, is competent evidence to prove a marriage, or it may be used as negative evidence from which to draw the inference that the marriage did not occur, from the fact that no entry of it is found to exist. *Blackburn v. Crawfords*, 3 Wall., 175.

§ 2572. Entries in the register of burials kept by the officers of a church, and entries in the family Bible, are admissible in evidence to prove the date of the death of persons deceased. *Lewis v. Marshal*, 5 Pet., 470.

§ 2573. An entry in the baptismal record of a church, being made by the writer in the ordinary course of his business, are admissible in evidence to prove the baptism of a child, and the date of the baptism, but not of the fact that the child was baptized as the "lawful child" of the parents. *Blackburn v. Crawfords*, 3 Wall., 175.

§ 2574. *Poll-books.*—In a suit on municipal bonds, in order to show a ratification of the subscription by a vote of a majority of the tax-payers at an election called and held for that purpose, which ratification is necessary to the validity of the bonds, the poll-books of an election held for the choosing of city officers and for such ratification, at which none but tax-payers were allowed to vote, containing the name of every voter, with a record of his vote, whether for or against ratification, authenticated by the certificate of the judges and clerks of the election, stating the result, and specifying the number of votes cast for and against the ratification, and the proceedings of the council ordering the bonds to be issued, are competent evidence; and it need not be shown that each person voting was entitled to vote. *Hannibal v. Fauntleroy*, 15 Otto, 408.

§ 2575. A *tax-book*, made out and arranged by an officer in pursuance of a duty expressly enjoined by law, and certified by him, is competent evidence to show an assessment of property. *Ronkendorff v. Taylor*, 4 Pet., 349.

§ 2576. *Notary's book.*—If a notary does not remember that he made demand, he may refer to his book, and then testify that he made demand as therein stated. *Thornton v. Caldwell*,* 1 Cr. C. C., 524.

§ 2577. *Entries in private books.*—To render entries in private books admissible in evidence, it is required that they shall be contemporaneous with the facts to which they relate, shall be made by parties having personal knowledge of the facts, and be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead or insane, or be-

yond the reach of the process or commission of the court. *Chaffee v. United States*, 18 Wall., 516.

§ 2578. **Copy from books of insurance company.**—A copy taken from the copy of an insurance policy upon the books of the company, and proved by the deposition of a witness to have been compared by him with the written parts of said policy on the books, and to be a true copy, is not admissible in evidence, notice to produce the original having been given. *United States v. The Paul Shearman*, Pet. C. C., 98.

§ 2579. **Subscription books.**—A commissioner's book of subscriptions to the capital stock of a corporation is *prima facie* evidence that the subscriptions are genuine, or made by persons duly authorized; and the fact that one sued for his subscription has been elected one of the managers by the stockholders, and has acted as such, is *prima facie* evidence of an admission on his part of the existence of the corporation. *Rockville & Washington Turnpike Road v. Van Ness*, 2 Cr. C. C., 449.

§ 2580. **Minute-books.**—In an action against the maker of a note signed by him as agent for a certain corporation, the minutes of the proceedings of a meeting of the corporation were held to be admissible in evidence, without proof that the requisite notice of the meeting was given. *Bradley v. McKee*, 5 Cr. C. C., 298.

§ 2581. Books of a board of trustees established by the legislature for public purposes, in which their proceedings were recorded, are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved. *Owings v. Speed*, 5 Wheat., 420.

§ 2582. In an action on a life insurance policy, the record of the age of the deceased in the minute-book of the lodge of Odd Fellows to which he belonged, as recorded therein in the usual manner of keeping the records of the lodge, cannot be received as proof of his age. *Connecticut Mut. Life Ins. Co. v. Schwenk*, 4 Otto, 593.

§ 2583. **Inventory.**—In an action on a fire insurance policy for the loss of goods destroyed by fire, where it became necessary to prove the quantity and value of the goods on hand when the fire occurred, evidence was given to show that, before the fire, the plaintiff had taken a correct inventory of his stock, which was correctly reduced to writing by him in an inventory book; that the prices or values were correctly footed up therein; that at the same time the footings were correctly entered by the plaintiff upon the fly-leaf of an exhausted ledger, and afterwards transferred by him to the fly-leaf of a new ledger; that the plaintiff could not remember the amount of the inventory or the footings, and that both the inventory book and the exhausted ledger had been destroyed. It was held that the entry of the footings in the fly-leaf of the new ledger was admissible in evidence. *Insurance Companies v. Weides*, 14 Wall., 375.

XIX. JUDICIAL RECORDS.

SUMMARY—*Judgments, etc.; authentication*, §§ 2584-87.—*Judgment of district court admissible in territorial court*, § 2588.—*Record without a writ*, § 2589.—*Sworn copy*, § 2590.—*Surrogate's records*, § 2591.—*Judgment against principal in action against guarantor*, § 2592.—*Volume of city surveys*, § 2593.—*Recitals in bill of exceptions*, § 2594.—*Verdict after reversal of judgment*, § 2595.—*Copy of probate of will of lands*, § 2596.—*Letters of administration to prove death*, § 2597.—*Spanish grant; copy of petition and decree*, § 2598.—*In suit for freedom*, § 2599.—*Parol evidence to identify the subject of a judgment*, § 2600.

§ 2584. The record of a judgment in a state court, when offered in evidence in a federal court, sitting in a different state, must be authenticated as provided by section 905, United States Revised Statutes. *United States v. Biebusch*, §§ 2601-6.

§ 2585. Where the record of a suit in another state is offered in evidence, an omission of the presiding magistrate, in his certificate, to state that the attestation of the clerk is in due form, is a fatal objection to the admission of the record as evidence. *Trigg v. Conway*, § 2607.

§ 2586. Where a record of a judgment in a state court is offered in evidence in a federal court sitting in another state, the certificate of the magistrate must state that the authentication of the clerk is in due form. *Craig v. Brown*, §§ 2608-12.

§ 2587. A judgment rendered in a state court is admissible in a federal court as evidence, if authenticated by the clerk, although it has not the certificate of the presiding magistrate that the authentication of the clerk is in due form. *Mewster v. Spalding*, §§ 2613-16.

§ 2588. A record of a suit in a district court of the United States, if properly authenticated, is admissible in a court of a territory as evidence of the judgment in the district court. *Buford v. Hickman*, §§ 2617-18.

§ 2589. A record which has no writ is fatally defective. *Ibid.*

§ 2590. A sworn copy is not evidence unless the witness swears that he compared the copy with the original. *Catlin v. Underhill*, § 2619.

§ 2591. The surrogate's records must be proved in another state in conformity with the act of congress of 1790. *Ibid.*

§ 2592. In an action against a guarantor, on a guaranty, a judgment recovered on an account against the principal is evidence of the amount due from him. *Drummond v. Prestman*, § 2620.

§ 2593. A volume of city surveys, made by authority of the government, is not *per se* evidence. Any plan to be so used must be authenticated by the surveyor. *Chirac v. Reinecker*, §§ 2621-28.

§ 2594. As between parties and privies, recitals in a bill of exceptions in an ejectment suit are *prima facie* evidence of the facts recited in a suit for mesne profits of the same premises. *Ibid.*

§ 2595. When a special verdict is found which establishes a certain fact, and judgment on it is reversed, the verdict is not evidence in an action between the same parties for the same premises, when offered by the party in whose favor the verdict was, to prove the fact established by the verdict. *Smith v. McCool*, § 2629.

§ 2596. A copy and probate of a will of lands is not evidence of the contents of the will in a federal court, when the laws of the state in which the will is probated make the probate of wills of personalty only, evidence of the contents of the will. *Darby v. Mayor*, § 2630.

§ 2597. Where the right of action in a case depends upon the death of a third person, as in case of a suit upon an insurance policy, letters of administration are not competent evidence of the death of such party. *Mutual Benefit Life Ins. Co. v. Tisdale*, § 2631.

§ 2598. A copy of the petition and decree by which land was granted by the Spanish government, certified by the secretary of the Spanish government office, whose practice it is to keep the original petition and decree and only give a copy to the grantee, is good *prima facie* evidence of the grant. *United States v. Wiggins*, §§ 2632-37.

§ 2599. Where a slave has established her freedom by a suit against one who claims to be her master, this record is evidence in favor of her child in a suit by her for her freedom against the same person. *Vigel v. Naylor*, § 2638.

§ 2600. When, at the trial of a case, a former judgment is offered in evidence, and it is sought to show by parol evidence that the two causes of action are the same, parol evidence may be given to rebut this parol evidence. *Packet Co. v. Sickles*, §§ 2639-48.

[NOTES.— See §§ 2649-2804.]

UNITED STATES *v.* BIEBUSCH.

(Circuit Court for Missouri: 1 McCrary, 42-46. 1880.)

Opinion by McCRARY, J.

STATEMENT OF FACTS.— In this case and one other I have at this term heard, with the district judge, motions for new trials in cases tried before him when holding alone the circuit court. I have done so at his request, and only for the purpose of advising with and assisting him.

§ 2601. *Rulings of district judge holding circuit court are not reviewable by circuit judge or circuit justice.*

It is well settled in this circuit that the rulings of the district judge while holding the circuit court are not subject to be reviewed in the same court, either by the circuit judge or the circuit justice. I make this announcement so that it may be understood that I am not to be expected, as a rule, to entertain motions for new trials in cases tried in my absence by the district judge, and that I will only sit with the district judge in hearing such matters when he desires and requests it. It is not enough that he does not object or consents. *Appleton v. Smith*, 1 Dill., 202 (COURTS, § 14). In this case, however, I have, at the request of the district judge, considered carefully the questions raised by counsel for defendant in support of their motion for a new trial, and am prepared to announce my concurrence in his rulings.

§ 2602. *Evidence offered under a count that is withdrawn is not incompetent if relevant to any subsisting count.*

The questions involved are, I think, sufficiently important to justify me in stating the legal propositions upon which we are agreed, and which are conclusive of the motion. They are as follows:

1. Evidence offered in support of an indictment, containing several counts, goes to the jury in support of each and all the counts to which it is relevant, and so far as competent; and where one of several counts is withdrawn after evidence has been offered, it is proper for the court to direct the jury to consider such evidence, under counts not withdrawn, in so far as it is legally applicable to them.

§ 2603. *A rule of evidence. Fraudulent sale. Fraudulent possession.*

2. In an indictment, charging in one count possession of counterfeit coin, with intent to defraud, etc., and in another count charging a fraudulent sale of such coin, evidence of fraudulent possession and sale may be retained as supporting the first named count after the second has been withdrawn from the jury, though the person to whom such sale is made is not named in the indictment. A fraudulent sale to any person, whether named in the indictment or not, is competent evidence to support the charge of fraudulent possession.

§ 2604. *Rule as to incompetence of witness from infamy.*

3. At common law a person convicted of an infamous crime was rendered incompetent as a witness, but in England and in most of the states of the Union the disqualification of infamy has been removed, and a conviction may be shown only to affect credibility. Whart. on Ev., § 397. The tendency of courts and legislatures is now strongly in the direction of the doctrine that all persons of sufficient intelligence should be accepted as competent to testify, leaving to the jury, and not to the court, the question of credibility. In the courts of the United States, as well as in those of many of the states, a defendant in a criminal case may now testify in his own behalf. If, however, a conviction of an infamous crime is to be held to exclude a witness, it is clear that such conviction must be shown by the record. "The record," says Mr. Greenleaf, "is required as sole evidence of his guilt, no other proof being admitted of the crime, not only because of the great injustice of trying the guilt of a third person in a case in which he is not a party, but, also, lest in the multiplication of the issues to be tried the principal case should be lost sight of and the administration of justice should be frustrated." 1 Greenl. Ev., § 372. "It is the judgment, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify. . . . If the guilt of the party should be shown by oral evidence, and even by his own admission (though in neither of these modes can it be proved if the evidence be objected to), or by his plea of 'guilty,' which has not been followed by a judgment, the proof does not go to the competency of the witness, however it may affect his credibility." Id., § 375.

§ 2605. *When the record of a state judgment is properly attested and admissible in evidence.*

4. The record of a judgment in the state of Illinois by a court of that state, to be admitted in evidence here, must be attested in the manner provided by section 905 of the Revised Statutes, and the certificate must show that the person signing it as judge was, at the time of so signing, the judge, chief justice, or presiding magistrate of the court in which the judgment is of record.

Lothrop *v.* Blake, 3 Barr, 495; Stephenson *v.* Bannister, 3 Bibb, 369; Kirkland *v.* Smith, 2 Mart. (N. S.), 497; Stewart *v.* Gray, Hemp., 94; Catlin *v.* Underhill, 4 McLean, 199; Erb *v.* Scott, 2 Harris, 22.

Our attention has been called to the case of Bennett *v.* Bennett, 1 Deady, 307, where the opinion is expressed that the statute above cited concerning the authentication of judicial records does not apply to the authentication of a state record in the federal courts. I have carefully considered the reasoning of the learned judge in that case, and find myself unable to concur therein. In numerous reported cases where transcripts of judgments in state courts have been offered in evidence in courts of the United States, the applicability of the statute has been taken for granted. See cases cited under section 905, Revised Statutes. And in no case, so far as I am advised, except the one above cited, has the question been raised. It is said that the act was passed in pursuance of article 4, section 1, of the constitution, which declares that full faith and credit shall be given in each state to the judicial records, etc., of every other state. And it is argued that congress must be presumed to have enacted the law in question for the sole purpose of carrying into effect this constitutional provision. But it must be borne in mind that congress has the general power to regulate the mode of proof and procedure in the national courts, and that the act in question may have been intended to accomplish this end. Whether it was so intended or not must depend upon the language of the statute, and this appears to me to be entirely clear. It provides that "the records and judicial proceedings of the courts of any state or territory . . . shall be proved or admitted *in any other court within the United States* by the attestation of the clerk," etc. The language, "any other court within the United States," is very comprehensive, and must be held to include both state and national courts. Congress having full power under the constitution to regulate the mode of proof of judicial records of state courts, in all other courts, both state and federal, has seen fit to exercise it in the enactment of a single statute. It matters not that the power of congress to pass the act may have been derived from several provisions of the constitution.

§ 2606. *Rule as to evidence corroborative of the testimony of an infamous witness.*

5. Upon the question raised upon this motion as to what evidence may be received in corroboration of the testimony of a witness who is shown to be infamous, the authorities are not perfectly agreed. I am, however, prepared to accept, as applicable here, the rule laid down by Chief Baron Joy, in his work on the Evidence of Accomplices, pp. 98, 99, and which is as follows: "The confirmation ought to be in such and so many parts of the accomplice's narrative as may reasonably satisfy the jury that he is telling truth, without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observation of the judge." See 1 Greenl. Ev., § 381, note 1. This is, I think, a safe and sound rule, with perhaps a single modification. The corroborating evidence should not be extended to such facts in the witness' narrative as are generally known, but should be confined to those matters which, whether in themselves material to conviction or not, are seen to be well calculated to strengthen and confirm the truth of his story.

TRIGG v. CONWAY.

(Circuit Court for Arkansas: 1 Hempstead, 538-541. 1847.)

Opinion by the COURT.

STATEMENT OF FACTS.— On the trial of this cause, the counsel for the defendant made two objections to the admissibility of the record from the Jefferson county court of Kentucky; first, that it was not properly authenticated; and second, that it purported on its face to be a partial record.

This record is conceded on all hands to have been indispensable to a recovery on the part of the plaintiff; and, as the jury have found for her, it follows, as a necessary consequence, that a new trial must be granted on this ground alone, if that record was not admissible, irrespective of the other points urged by the defendant's counsel, and on which no opinion is intended to be expressed. The counsel of the defendant has produced a number of adjudged cases of controlling authority, and which are conclusive, to show that the first objection made by him to the admissibility of the record was tenable, and should have been sustained.

§ 2607. *Attestation of clerk to judgment of another state must be certified by judge to be in due form.*

The specific objection to it is, that the presiding magistrate has omitted the statement in his certificate, that the attestation of the clerk is in due form. This is a fatal defect, as the cases cited by him demonstrate. And other cases to the same effect will be found industriously collected, in note 771, by Cowen and Hill, in 3 Phillips on Evidence, 1120, 1132. The act of congress of 26th May, 1790 (1 Stat., 122), expressly declares that "the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form." And when so authenticated, they are entitled to the same faith and credit as in the courts of the state from whence the same are taken.

In *Smith v. Blagge*, 1 Johns. Cas., 238, it was said by the court: "We cannot officially know the forms of another state, and therefore they ought to be proved. The act of congress directs the mode of proof, and requires that the presiding judge of the court from which the copy is obtained shall certify that the attestation is in due form." Hence a mere certificate verifying the handwriting of the clerk is not enough. *Craig v. Brown*, 1 Pet. C. C., 352 (§§ 2608-12, *infra*).

The intention of the act of congress was, not that the attestation should be according to the form used in the state where offered, or to any other form generally observed, but according to the forms of the court where the proceeding was had; and the certificate of the presiding judge is the only evidence that can be received that such form has been observed. The record not being admissible, it follows that a new trial must be granted, the costs to abide the event of the suit.

Ordered accordingly.

CRAIG v. BROWN.

(Circuit Court for Pennsylvania: Peters, C. C., 352-355. 1816.)

STATEMENT OF FACTS.—Rule to show cause why defendant should not be discharged on common bail because he had been discharged from all his debts under the insolvent laws of Louisiana. The cause shown by the plaintiff will appear sufficiently in the opinion of the court.

Opinion by WASHINGTON, J.

The objections to the record being offered in evidence are, that the seal of the court is not affixed to it, nor is it certified by the judge that the record is authenticated in due form.

§ 2608. *Forms of authenticating records of one state for use in another prescribed by act of congress.*

The act of congress of the 26th of May, 1790 (Laws U. S., vol. ii, 102), declares that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, etc., that the said attestation is in due form. As to the mode of authenticating the legislative acts of the several states, the same law declares that it shall be by affixing thereto the seal of the respective states.

The record offered in evidence in this case has the signature of the clerk, with the seal of the late territory of New Orleans affixed, the clerk certifying that no seal has yet been provided for the state, and the certificate of the presiding judge of the court states that the person whose name is signed to the attestation is clerk of the said court, and that the signature is in his own proper handwriting. As to the law of the territory, it is printed in a small pamphlet, in the French and English languages, but has no seal whatever affixed.

§ 2609. *What is a sufficient seal of a state or a court. Quære.*

It is objected to this evidence, first, that it has not the seal of the court; and secondly, that it is not certified as the law directs.

First. Whenever the court whose record is certified has no seal, this fact should appear either in the certificate of the clerk or in that of the judge. In this case, the seal affixed is stated to be that of the *late territory of Orleans*, not of *the court*; and it is further stated that no seal has been provided for *the state*. But, from the impression of the seal, it would seem that it had belonged to the court before the territory was erected into a state; in which case it might well continue to be the seal of the court under the new form of government, although no new provision for that purpose had been made. There are strong reasons for believing that the circumstance which has given rise to this objection has proceeded from an inaccuracy of expression in the clerk, and I shall therefore proceed to examine the other objection without giving any decided opinion as to the sufficiency of this.

§ 2610. *A certificate that is insufficient to authenticate a record.*

Second. In answer to this objection it is contended that the attestation of the clerk appears upon the face of it to be in due form, and that the certificate of the judge, though it does not expressly state it to be so, contains what amounts to such an allegation, and is therefore a substantial compliance with law. I cannot accede to this argument. Each state has a form of its own for authenticating records, prescribed either by positive law or by practice; and

to make those records evidence in other states, congress has thought proper to declare that the attestation must be, not according to the form used in the state where it is offered, or to any other form generally observed, but to that of the state or of the court from whence the record comes; and the only evidence of this fact is the certificate of the presiding judge of that court. I infer that the form intended by the law is that which I have stated, from the circumstance that congress has prescribed none, and it is not to be supposed that the judge who gives the certificate should be acquainted with any other form than that of his own state or court.

But it is contended that, although this certificate should be too informal to entitle the record to be given in evidence upon the trial of the cause, it is nevertheless sufficient upon a question of bail. The answer to this is, that the record in question is not evidence for any purpose, because it is not so authenticated as to entitle it to credit. It is in fact no more than a paper having the signature of a person who styles himself clerk of the court, but who is not shown by the certificate to be so, inasmuch as it states a fact which the law does not authorize or require the judge to certify; and therefore it is the same thing as if the certificate had been omitted altogether.

§ 2611. *Laws of a state are not sufficiently authenticated without a seal of the state.*

As to the law of the territory of Orleans, upon which these proceedings have been founded, it is equally inadmissible, not being authenticated under the seal of the state of Louisiana, as the act of congress requires.

§ 2612. *To discharge on common bail, the evidence must be of no doubtful character.*

Evidence on which the court will discharge on common bail ought not to be of a doubtful nature, since the plaintiff may lose his debt altogether if it should turn out that he was entitled to demand special bail. A mistake made on the other side may be productive of inconvenience to the defendant, but the consequence will be less serious.

Rule discharged.

MEWSTER v. SPALDING.

(Circuit Court for Michigan: 6 McLean, 24-27. 1853.)

Opinion by the COURT.

STATEMENT OF FACTS.—This is an action against the sheriff of Washtenaw county, for an escape. A record was offered in evidence of a judgment obtained in that county, before a state court, against the defendant, who, it is alleged, was in the legal custody of the sheriff, and from whose custody he was permitted to escape, for which this action was brought.

§ 2613. *Authentication of record of state courts, when sufficient in federal courts.*

The record was objected to, because it was only certified under the seal of the court by the clerk, but had not the certificate of the presiding judge that the record, etc., “was in due form.”

By the act of congress of the 26th of May, 1790, it is provided “that the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto; that the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court of the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief

justice, or presiding magistrate, as the case may be, that the said attestation is in due form."

It is supposed that judgments of the state courts, as well as its legislative action, are required to have the above authentication, when used as evidence in another state. When used within the state the published statutes are evidence, and so, it would seem, are the judgments regularly certified by the clerk under the seal of the court. It can hardly be necessary for a state judge to certify to another state judge, when each knows officially what is "the due form" required. And if such a certificate of the presiding or chief justice be not necessary to make the record evidence in a court of the state where rendered, the same rule is applicable in this court.

§ 2614. *Judges of the United States courts are presumed to know the laws of the several states.*

It has been held by the supreme court, that, as its jurisdiction extends throughout the United States, the judges of that court are presumed to know the laws of the respective states. They require no authentication of the laws of the states, as above provided, but act on them from their own knowledge, or from the published statutes. And on the same principle they take cognizance of the courts of each state organized under its laws, and of the jurisdictions they exercise. This being the case, the necessity of the certificate of the judge, as to the "due form" of a state court record, is not very apparent. It would be objectionable to those of the profession who look more to form than substance. But, however this may be, we admit the record objected to without the certificate of the judge, as it is the record of a court of the state of Michigan.

§ 2615. *Law of Michigan concerning fraudulent debtors.*

It is also objected that the arrest in this case was made under a special statute of the state, partaking, to some extent, of a criminal procedure, of which this court cannot take jurisdiction. The procedure took place under the Revised Statutes of 1846, entitled "An act for the punishment of fraudulent debtors." The first section declares that no person shall be imprisoned for debt except as follows: The plaintiff may apply for a warrant to arrest the defendant, and the warrant may be issued on the affidavit of the plaintiff or some other person that the debt is due, and that the defendant is "about to remove to defraud his creditors, or that he has property which he refuses to apply to the payment, or that he has disposed, or is about to do so, of his property to defraud his creditors, or that defendant fraudulently incurred the obligation sued on; and upon proof to the satisfaction of the officer called on to issue the warrant, he shall issue it."

On the warrant, the defendant being arrested is brought before the officer, where the defendant may controvert the facts alleged, on which the warrant was issued. On this examination, if the officer finds the allegation true, he may commit the defendant unless he shall pay the debt, give security, or enter into bond to assign in thirty days his property for the benefit of his creditors, and if committed, the defendant remains in custody until final judgment shall be rendered in his favor, or until he has assigned his property or obtained his discharge under the insolvent laws. The commitment having been made under the above statute, it is charged the sheriff suffered him to escape.

§ 2616. *Jurisdiction of this court.*

No objection is perceived to the jurisdiction of this court. The proceeding, under the statute, is not criminal. It gives a remedy against a fraudulent

debtor, and in the action now before us, we have to inquire whether the defendant in the action before the state court was legally in custody. To prove this the warrant must be produced, or its loss must be shown, to authorize secondary proof of its contents. The warrant is not produced, and some evidence has been offered of its loss. The warrant was issued by Judge Lane, who, on examination, committed the defendant. Shortly after this Judge Lane died. A copy of the warrant appears to be contained in the recognizance entered into by the defendant to appear and answer the allegations of fraud; but to make this evidence the original must be shown to have been lost. A file of the judge's papers, found in his office, has been examined, but the original warrant was not found in it. The other papers of the judge have not been examined, and this is essential to the reception of secondary proof.

BUFORD v. HICKMAN.

(Superior Court for Arkansas Territory: Hempstead, 232-234. 1834.)

Opinion of the COURT.

STATEMENT OF FACTS.—An action of debt was brought by Paschal Buford, executor of Henry Buford, deceased, against William Hickman, founded upon a record of the United States district court of West Tennessee. The defendant filed a special demurrer to the plaintiff's declaration, but the demurrer was overruled. Issue was then taken on the plea of *nul tiel record*, upon which issue the court rendered judgment for the defendant; and the assignment of error calls in question the propriety of this judgment. The whole case, we apprehend, turns upon the question of the sufficiency of the record offered in evidence. If that was full and complete and properly authenticated, the decision of the court in refusing to receive it as evidence was erroneous. But, on the other hand, if it was not full and complete and properly authenticated, the decision of the court was correct.

§ 2617. *Records of a district court of the United States are admissible in evidence in a territorial court in a suit brought on the judgment.*

The first objection taken in argument to the admissibility of the record was, that it being a record of a district court of the United States, the act of congress of 1790, regulating the mode of authenticating records in order to make them evidence, does not apply. Admitting the act of congress of 1790 to apply alone to the records of the state courts, and this is clearly the case, still it has been decided by some of the most respectable courts in the Union that the records of the United States courts are admissible in evidence in the state courts, if authenticated by the seal of the court, attestation of the clerk and certificate of the judge; and we can perceive no substantial objection to their admission as evidence in the courts of this territory. The United States exercise jurisdiction and sovereignty over Arkansas, and we conceive that we are bound to know the officers of the respective courts of the United States, and to enforce, when called upon, their judgments, for the same reasons that the English courts enforce the judgments of one another. *Pepoon v. Jenkins*, 2 Johns. Cas., 119; *Borden v. Fitch*, 15 Johns., 121.

§ 2618. *The transcript of a judgment should show a writ, or such record of facts as would dispense with a writ.*

The second objection taken to the admission of the record in evidence is one of much more difficulty, and about which we have entertained great doubt. It has been contended that the record is incomplete and imperfect, and does not

furnish evidence that the defendant was served with process. There is no writ in the record, nor does it appear that issue was joined between the parties. In the introductory part of the declaration, the technical term "attached" is used; from which it might be inferred that there had been a writ and it had been executed. It further appears from the record that the parties appeared by their attorneys, that a jury tried the cause and gave a verdict, and that the district court rendered a judgment. But does all this furnish conclusive legal evidence of the existence of a writ and its service? If a writ be an essential component of a record, and that it is so considered is well settled by authority, can it be dispensed with, or can its legal existence be established in any other way than by its production; or can its service be shown in any other mode than by the return of the proper officer? *Duvall v. Craig*, 2 Wheat., 45, 55; *Adams v. Calhoun*, Litt. Sel. Cas., 10. It is true that the appearance of a party by attorney will cure a defective service of a writ, and even supersede the necessity of service, and the consent of the parties entered on the record might doubtless dispense with the writ itself. 2 Strange, 1072; 4 Cranch, 180; 3 id., 498. But in the record of the district court no such consent appears. The parties appeared by their attorneys, but no plea was filed, and no *venire facias* awarded, although, from the nature of the case, one was necessary. In short, no act was performed by the attorney going to show that he was representing the defendant Hickman. Can Hickman, then, be considered to have been regularly in court? We think not. The record furnished, in our opinion, no legal evidence of the service of process on Hickman, or an appearance for him; and if so, the judgment of the district court of Tennessee was not binding upon him, and was properly excluded.

Judgment affirmed.

CATLIN *v.* UNDERHILL.

(Circuit Court for Indiana: 4 McLean, 199, 200. 1847.)

Opinion by the COURT.

STATEMENT OF FACTS.—This case is brought before the court, by consent of the parties, to submit certain questions on the admissibility of evidence. Charlton Ferris, being sworn, says that the annexed exhibit A. contains the letters testamentary, the copy of the will, the certificate of the surrogate and the proofs thereon, and a certified copy of the oath taken by the witness upon taking out said letters testamentary. Witness states that he has acted as such executor ever since he was so qualified, and still continues to act.

§ 2619. *What is necessary to make a sworn copy evidence.*

This, it was contended, proved the will and other papers as sworn copies. But the witness does not swear that he compared the copies with the record; and, therefore, they cannot be received as sworn copies. The surrogate before whom the will was proved, and who granted the letters testamentary, certified under his official seal to a copy of the will, letters, etc., and proof of the will. But there was no certificate of the presiding judge that the attestation was in due form, and for this defect the copies are objected to. The surrogate acts as his own clerk, and certifies under his seal, but he also acts in the capacity of judge, and, consequently, had a right to certify. He keeps a record, and the court held that copies must be authenticated in the form required to make them evidence.

The act of congress of 1790 provides "that the records and judicial proceedings of one state shall be proved or admitted in any other court within

the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate, as the case may be, that the said attestation is in due form." The papers offered, not having the required authentication, cannot be admitted in evidence.

DRUMMOND *v.* PRESTMAN.

(12 Wheaton, 515-523. 1827.)

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This case arises on the following state of facts: Richard and Charles Drummond, being engaged in some joint mercantile adventures, which appear to have been carried on chiefly by Charles, made consignments, in the year 1803, to William Prestman, then doing business as a commission merchant in Baltimore. George Prestman, the father of William, thereupon addressed to Charles Drummond a letter of guaranty, in these terms:

"BALTIMORE, 17th November, 1803.

"CAPTAIN CHARLES DRUMMOND:

"*Dear Sir* — My son William having mentioned to me that, in consequence of your esteem and friendship for him, you have caused and placed property of yours and your brother's in his hands for sale, and that it is probable, from time to time, you may have considerable transactions together, on my part I think proper, by this, to guarantee to you the conduct of my son, and shall hold myself liable, and do hold myself liable, for the faithful discharge of all his engagements to you, both now and in future."

The connection in business was kept up between the Drummonds and William Prestman until Charles' death, after which Richard, who resided in Norfolk, came up to Baltimore to adjust the accounts of the concern with William, and then received from him an account, stated as between him and Charles Drummond, on which, after some corrections, which appear on the face of the account, the balance is struck for which this suit is instituted. This account commences with an acknowledgment of a balance due the Drummonds, in November, 1804, and brings down their transactions to December 20, 1805. Upon this account a suit was instituted against William Prestman, in 1806, in the name of Richard, survivor of Richard and Charles Drummond, and a judgment confessed. William Prestman was dead at the time of the trial of this cause.

This suit is now instituted upon the letter of guaranty; and the declaration, after setting out the letter and the subsequent transactions with William, demands the sum acknowledged due upon the account stated. Upon the trial, the plaintiff gave in evidence the letter of guaranty, the account stated by William, parol evidence of subsequent acknowledgments of its correctness, and the record of recovery upon that account, in which he confesses judgment to Richard, as survivor of Richard and Charles Drummond, also parol evidence conducing to prove the joint dealings of the Drummonds.

In the progress of the trial, the defendants took exception to the admission in evidence of the record of recovery against William. The court overruled the exception, and it went to the jury; but the court refused to grant a prayer of the plaintiff, that they would instruct the jury that, upon the whole evidence, he was entitled to a verdict; and to this refusal the bill of exceptions is taken, upon which the principal question in this cause arises.

As evidence was permitted to go to the jury conducing to prove as well the copartnership between Richard and Charles Drummond as the balance due by William Prestman, and the interest of Richard in that balance, it follows that the refusal of the court to give that instruction could only have been upon the ground that the guaranty did not cover this demand; and this, accordingly, has been the principal question made in argument. It is contended that the correct construction of this guaranty will exclude a copartnership debt; that, in its language and import, it is confined to liabilities to be incurred by William to Charles or Richard severally, or to Charles individually, and cannot be extended to a copartnership interest under a trade ostensibly carried on as between Charles solely and William.

We have considered this question attentively, and are unanimous in the opinion that the guaranty may well be construed to cover the joint trade of Charles and Richard. An interest of Richard is expressly contemplated by the guaranty, and the language of the letter seems more naturally adapted to a joint than a several interest. For, a concern being represented in the person of any one of its members, the use of the pronoun of the second person is naturally suggested and familiarly resorted to when we address ourselves to an individual of the concern. This court is not called upon to decide whether the words might not also be correctly applied to an individual interest as well as a joint concern. It is enough, for the purposes of this action, if they will cover the latter.

§ 2620. *The record of a judgment recovered against a principal is evidence of the amount of the account in an action against the guarantor.*

It is a rule, in expounding instruments of this character, "that the words of the guaranty are to be taken as strongly against him as the sense will admit." But it is not necessary to test this letter by any canon of the law of guaranty more rigid than the first and most general, to wit, "that no party shall be bound beyond the extent of the engagement which shall appear from the expression of the guaranty and the nature of the transaction." There is nothing on the face of the letter which holds out the idea of a connection between William and the Drummonds, exclusively in their individual capacity. The object is to throw business into the hands of the guarantee's son, and it could not have been inconsistent with this idea to guaranty a joint trade as well as an individual trade. The grammatical construction of the language will sanction this idea, and the nature and object of the guaranty favors it. If it be conceded that there is a latent ambiguity on the face of the instrument, that ambiguity might well be explained by the objects of the instrument and the circumstances attending its origin. We are therefore of opinion that the court erred in refusing the instruction as prayed, and for that reason the judgment must be reversed, and a *venire facias de novo* awarded.

But, as is the practice of this court, where questions present themselves on the record, and are argued, upon which the same cause may possibly be brought back here, the court has also considered the question whether the record of the judgment between this plaintiff and William was properly admitted in evidence. On this subject it is necessary to observe that it was not set up as a plea in bar, nor as a decision conclusive of the right of the party to recover in this action. There was evidence in the cause to establish the defendant's guaranty, and the balance acknowledged by William; also, evidence conducing to prove the joint trade carried on by Charles and Richard Drummond, through the hands of Charles, with William. This record was certainly

competent to prove a fact which every judgment is competent to prove between any parties, to wit, that such a judgment was obtained between certain parties in a certain cause of action. It was also evidence to prove that the cause of action was identically the same with the one on which this action was instituted; and that, in that suit, William Prestman solemnly acknowledges that the statement made by him in favor of Charles Drummond was of a debt really due on a joint trade between Charles and Richard Drummond. And why should not this be evidence against George, the guarantee, who had tendered himself as security to these individuals in these very transactions?

We are perfectly aware of the rule that he who cannot profit by a judgment between other parties should not be damnified by it. But here the application of the rule is in favor of the admission of this record. Suppose the suit against William Prestman had gone to a jury, and a verdict obtained against this plaintiff, can there be a doubt that the record would have been admissible in evidence in favor of this defendant? The material fact on this subject is, that the liability of the guarantee is dependent upon the liability of the principal; the case, therefore, is not widely different from that of accessory and principal, in which the record of the conviction of the principal is *prima facie* evidence against the accessory.

Nor is it unlike the case of *Green v. The New River Company*, 4 Term R., 590, in which it was held that a judgment against a master for damage from the negligence of his servant was good evidence against the servant, in an action against him by the master for the same negligence, the recovery in the one case being dependent upon that in the other. See, also, *Stark. Ev.*, 188, 189. There the case is presented of a master suing the servant for damage sustained by the negligence of the servant. The questions are, whether the master has been damnified by the negligence of the servant, and to what amount; and the record of a judgment against the master is admitted in evidence against the servant. The present case, however, is a much stronger one. It seems unique in its principle, since the object of introducing the record seems not so much to prove that a judgment was obtained, as that a judgment was confessed. Now, the proof of William Prestman's liability to Drummond was indispensable to Drummond's recovery against the guarantee. But this liability might have been proved by a confession in writing, or even by parol, after his death, if not before; then why not by the more solemn act of confessing it of record?

It is worthy of remark in this case, that the guaranty purports, by its terms, to be something more than a mere suretyship for a debt. The words are, I guaranty to you "the conduct of my son." It partakes, therefore, of the nature of a bond given by a surety for the faithful discharge of a duty; and it cannot be doubted that, in proving the fact of a breach of the condition of such a bond, the confessions of the principal, after his death, would be evidence. It would be difficult to assign a reason why his confessions should lose that character by increasing in their solemnity.

We are aware that there are cases which have been thought to maintain principles inconsistent with these doctrines. They are chiefly collected together in the second volume of Mr. Metcalf's edition of *Starkie's Treatise on Evidence*, title Surety. We have examined those cases, and find some of them of very little authority, others inapplicable to the circumstances of the present case, and, generally, in support of our opinion.

The case of *Dawes v. Shed*, 15 Mass., 6, has no application. It was a suit

against the surety of an executor, by a creditor of the deceased, who had obtained judgment against the executor, and received payments of interest upon the debt. The question was, whether this precluded the surety from his plea of the act of limitations of that state, made in favor of executors. The court decided that it did not preclude him. In that case, the record was pleaded in bar, and the decision given that it was not conclusive.

In the case of *Respublica v. Davis*, 3 Yeates, 128, an attempt appears to have been made to introduce a record for the purpose of proving an admission of counsel in evidence. We cannot understand on what principle it was rejected; but the suit being on a recognizance that one Cobbett should keep the peace, and the breach proposed to be established being the publication of a libel, parol evidence of the confession of Cobbett was admitted to prove, against the surety, that he had published a libel. So that this authority would seem in favor of our doctrine.

So, in *The Sheriffs of London v. Tindall*, 1 Esp. Cases, 394, which was a suit against the surety of a bailiff, a receipt indorsed on a warrant, in the handwriting of the principal, was admitted in evidence, which amounted to nothing less than a confession that the bailiff had received a sum of money, and ordered the prisoner discharged. It was objected that the bailiff himself should be sworn, but the judge refused, and admitted the evidence, declaring that the bailiff was, in fact, the defendant in the action. This would go far to prove that, even in William Prestman's life, the stated account would have been evidence against George; and the fact of a judgment being entered upon it by confession could not have been immaterial to corroborate it.

The case of *Evans v. Beatie, Executors*, 5 Esp. Cas., 26, seems *contra*; for there, in a suit against the guarantee of one Copper, for "any woolens that should be furnished him by plaintiff," evidence was offered to prove Copper's parol acknowledgment of certain goods delivered, but refused on the ground that he might be sworn, and it was not the best evidence the nature of the case would admit of.

Here, it will be observed that the principal was living; but we must not be thought to concur, without further consideration, in the doctrine that he could have been equally sworn for the one party, or compelled to give evidence for the other. With the surety he had a direct interest, and against the plaintiff it was equally direct. In the present case the principal was dead. This case is loosely reported, and attributes some observations to Lord Ellenborough which we doubt much the authenticity of.

In the case of *Higham v. Ridgway*, 10 East, 122, the doctrine on these subjects is laid down with so much good sense as to speak its own correctness. It is to this effect: that the principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his life-time. On this principle it is that entries in receivers' accounts are admitted; so, also, an acknowledgment by a witness of a debt to another, or of an acquittance of a debt to himself; because the individual who makes the acknowledgment has no interest of his own to subserve, but does it to his own prejudice. In all such cases, however, the evidence is received with due caution, and its weight must rest with the jury.

The most stubborn case on this subject that we have considered is that of *Beall v. Beck*, reported in 3 Harris & M'Henry, 242. This was debt upon a sheriff's bond, brought against a surety in Maryland. The same plaintiff had

brought suit, and recovered judgment against the sheriff for the same cause of action, and the court refused to receive the record of that judgment in evidence as against the surety. In the inferior court it was rejected on a division of opinion, but in the court of the last resort, we are told, the judgment was affirmed. On this decision we can only remark that the report of it is very brief and unsatisfactory; there is no argument of counsel, or other means of determining on what the decision turned. If the attempt was made to introduce the record as final and conclusive against the surety, it was properly rejected, and, in the absence of anything to prove the contrary, we cannot but suspect that such was the true import of that decision. In any other view we should not feel satisfied to recognize its authority. Judgment reversed, and a *venire facias de novo* awarded.

CHIRAC *v.* REINECKER.

(2 Peters, 613-626. 1829.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is a writ of error from the circuit court of the district of Maryland. The original suit was an action for mesne profits, brought by the plaintiffs in error against Reinecker, and is the same cause which came before this court, and is reported in 11 Wheat., 280. The cause now comes again before this court upon certain bills of exceptions, taken by the plaintiffs in error, at the new trial had under the mandate issued upon the former judgment of reversal.

Without going at large into the facts as they came formerly before us, it is sufficient to state that the action is for taking the mesne profits of a certain parcel of land lying in a part of Baltimore, called Howard's late addition to Baltimore town, and is designated as lot No. 802 in that addition. Before the commencement of this suit, a recovery of the same premises was had in ejectment by the same plaintiffs (the husband of one of them being now added as a party), as lessors, against one John C. F. Chirac, who was admitted upon his prayer as landlord to defend the premises. The record of that recovery was offered in evidence at the former trial against Reinecker and rejected by the court; and that rejection constituted one of the grounds of the reversal.

At the new trial, after the introduction of certain evidence, which will be hereafter stated, the plaintiffs offered the same record in evidence, including the execution of the writ of possession and other proceedings in the same cause, to the admissibility of which, as evidence of the plaintiffs' possession, the defendant's counsel did not object, but did object to it as evidence of the plaintiffs' title to the property. The court, however, admitted the record as *prima facie* evidence of the plaintiffs' title, and thereupon the defendant filed an exception, which, however, is not now before this court.

The evidence alluded to consisted of the testimony of witnesses to establish the facts that Reinecker had received, as landlord, the rents of the premises during the period sued for; that he exercised the rights of ownership over the same; that he was, at the time of the ejectment brought, the real landlord, and had notice of the suit, employed counsel to defend it, and was, in fact, the substantial litigant party; and that he derived his title to the premises under the defendant in ejectment, John C. F. Chirac, by intermediate conveyances executed before the ejectment. The evidence further established a strict deduction of title by mesne conveyances of the lot in question down to John

Baptist Chirac (the intestate), under whom the plaintiffs claimed the same as heirs.

The plaintiffs then proved by a surveyor that he had surveyed most of the lines and streets in Howard's late addition to Baltimore town, in 1782, according to the official plot and location thereon in the mayor's office (which plot was also then given in evidence by the plaintiffs to the jury); that he had run the lines of Lun's lot, according to the patent or certificate thereof, and that the premises described in the plaintiffs' declaration and in the writ of possession were in Lun's lot, and also within the said addition, and were known as lot 802, etc.

§ 2621. *A volume of city surveys is not per se evidence. Any survey so used must be authenticated by the testimony of the surveyor.*

The plaintiffs, after having given in evidence the plot aforesaid, upon which was located lot No. 802, and Walnut street, then gave in evidence, from the original book of entry and record in the mayor's office, certain proceedings, condemning Walnut street to be shut up, and ordering that each person interested by having lots in the street be entitled to one-half of such street on each side, etc. The defendant then offered in evidence another plot in the same volume of city plots, being a plot of Howard's addition to Baltimore, in 1766, in order to show that the whole of Walnut street was contained within such last-mentioned addition, already read in evidence, to the admission of which the plaintiffs objected, but the court overruled the objection and permitted the plot to go to the jury.

The admission of this evidence constitutes the first exception of the plaintiffs. It is in the first place said that it was not proper evidence against the plaintiffs, after the recovery in ejectment, even if the plot in question had been duly authenticated. But, at all events, it is contended that it is not *per se* evidence, merely from the fact that it is found in a volume of city plots, which contained the general plot already in evidence, and which had been specially authenticated by the surveyor. We are of opinion that this last objection is well founded. The book itself had not been authenticated as a book of public plots regularly made; but a single plot only in the volume had been authenticated. The whole volume, therefore, was not in evidence; and if the defendant meant to use any other plot, it was his duty to establish it as evidence by competent proofs of its particular authenticity.

The other objection assigned for rejection of it admits of more doubt. It is said that the effect of this evidence would be to establish that John B. Chirac (the intestate) had no title to a certain portion of the land recovered in the ejectment. Unless the defendant was absolutely concluded by the judgment in that suit, he was certainly at liberty to dispute any part of that title. And, if it were material for the plaintiffs to prove the actual location of the lot 802, and Walnut street, in Howard's late addition, in 1782, no reason occurs to us why the defendant was not at liberty to disprove the fact, by showing that Walnut street was in Howard's former addition, in 1766. It is merely evidence to rebut other parol evidence of the plaintiffs as to the location.

§ 2622. *The contents of lost depositions recited in a bill of exceptions in a cause are admissible to prove pedigree in another suit between the same parties or those in privity with them.*

The plaintiffs then further read in evidence the depositions of certain witnesses in France, taken under a commission to establish their pedigree. The testimony was to this effect: that J. B. Chirac, the father of the intestate, had

three wives; that by his second wife he had two sons, the intestate and one Gabriel B. R. Chirac; that the intestate died in 1799; that his brother, Gabriel, left France, and went to the islands. One of the witnesses said he died in the islands. Another witness stated that, before 1797, she resided in St. Domingo and lived on a plantation near that of J. B. Chirac (the intestate); that she heard in St. Domingo that his brother came to the intestate's residence there, and it was publicly reported in the neighborhood that the said brother had died; that she heard this at the house of a friend where the intestate visited, and heard it very often, and that it was generally stated as a fact; that she never saw the brother, and never heard that he was married, and never heard of him as being alive since the report of his death; that she is no relation of the family, and never was at the intestate's house while he was at St. Domingo, and did not know or believe that there were any ladies living there when the brother died.

The plaintiffs then offered to prove that the original commission for taking the testimony issued in the said ejectment cause, with the depositions taken under the same, were lost; and then offered to read to the jury the bill of exceptions, contained in the record aforesaid, in order to show the pedigree of the plaintiffs' family. But the court refused to allow the same to be read in evidence to the jury. This refusal constitutes the second exception of the plaintiffs. The bill of exceptions so rejected was taken by the plaintiffs, and did not refer to any depositions, but it stated that the plaintiffs gave in evidence to the jury that the intestate was a native of France; that the lessors of the plaintiffs (naming them) were the brothers and sisters, and grandniece, etc., of the intestate, etc.; "and that neither the father nor mother, nor any brother or sister of the whole blood of the said intestate, nor their issue or descendants, were living at the time of his death."

Upon consideration, we are of opinion that, under the circumstances of this case, the evidence was admissible for the purpose of establishing the pedigree of the plaintiffs' family; and this is the only view in which it was presented to the court. It is well known that, in cases of pedigree, the rules of law have been relaxed in respect to evidence, to an extent far beyond what has been applied to other cases. This relaxation is founded upon principles of public convenience and necessity. In a case between the parties to the suit, in which this bill of exceptions was taken, the evidence would have been conclusive. Although Reinecker was not the defendant in that suit, yet he was the real landlord and party in interest, and conducted the suit; and the evidence of the facts so proved, as to pedigree, ought, under such circumstances, we think, to be admitted as *prima facie* evidence against him. He had the means of contesting those facts, and if he did not avail himself of those means, it may fairly be presumed that he yielded to the sufficiency of the proofs.

This was the whole evidence in the cause; and it being closed on both sides, the plaintiffs offered the same record of the recovery in the ejectment cause, as conclusive evidence of their right and title to the premises, against J. C. F. Chirac (the defendant therein), and against the defendant, Reinecker, holding under that title, which the court refused to admit. This refusal constitutes the third exception of the plaintiffs. The plaintiffs then prayed the court to instruct the jury that, if they believe the evidence, the plaintiffs have shown a sufficient title to the premises in the declaration to entitle them, in law, to maintain their action against the defendant, which the court refused to give.

And this refusal constitutes the fourth exception of the plaintiffs. There was a fifth exception, but it is unnecessary to refer to it, because it is a mere repetition (apparently by mistake) of the fourth.

§ 2623. *A judgment in ejectment binds only parties and their privies. But it is prima facie evidence of the plaintiff's title and possession as against one who, though not nominally a party, yet actually defended the suit as landlord.*

Before proceeding to consider these exceptions, it may be proper to say a few words explanatory of that part of the former decision of this court, as it stands reported in 11 Wheat., 280 *et seq.* The record of the ejectment suit had been rejected by the court below as any evidence against Reinecker, although it was offered, in connection with other evidence, to establish that Reinecker, although not a party on the record, was the real landlord, and had received the rents and profits, and had notice of the suit, and had employed counsel to defend it, and resisted the recovery. In the opinion of the court upon this point, it was stated that, in general, a recovery in ejectment, like other judgments, binds only parties and privies. It is conclusive evidence in an action for mesne profits against the tenant in possession or other defendant on record. But in relation to third persons the judgment is not conclusive, and if they are sued in an action for mesne profits, they may controvert the plaintiff's title at large. In such a suit (that is to say, against third persons), the record of the ejectment is not evidence to establish the plaintiff's title, but is admissible to show the possession of the plaintiff. This proposition has been supposed at the bar to indicate an opinion that in the case then before the court, with reference to all the circumstances of notice, and rating of the rents, etc., by Reinecker, the record was only evidence of the possession, and not of the title of the plaintiffs. Such was not the understanding of the court. The proposition was asserted as to third persons generally, who were strangers to the suit. Even as to such persons it was asserted that the record was admissible to show the possession of the plaintiff. The particular circumstances of Reinecker's case, as connecting him with the parties, were not, in that part of the opinion, in the view of the court. In the subsequent commentary of the court on the case of *Hunter v. Britts*, 3 Camp., 455, a doubt was intimated whether a mere notice *in pais*, to the landlord, who was not a party to the record, was conclusive upon him; but not the slightest doubt was intimated that it was *prima facie* evidence of title, as well as of possession against him, under such circumstances. The point whether the record in the ejectment suit was not *prima facie* evidence of title in the plaintiffs, as against a person standing in the predicament of Reinecker, was not decided at that time and was not necessary to the decision.

Upon consideration of the question presented by the third exception above mentioned, we retain the opinion that the record in the ejectment suit was not conclusive evidence upon persons not parties to the record; but we are also of opinion that it was *prima facie* evidence of the plaintiffs' title and possession against Reinecker, under the circumstances adduced in evidence. He had full notice of the suit, and had the fullest means to defend it. The parties upon the record were his agents or tenants, and he, in effect, though not in form, took upon himself the defense of the suit. The case is stronger than that of *Hunter v. Britts*, and fairly within the reach of the principle decided by it. There was then no error in the court in refusing to give this instruction.

§ 2624. *It is the province of the jury to pass upon evidence of a presumptive nature.*

The fourth exception can be sustained only upon the ground that there was no fact in the cause upon which there was any doubtful or contradictory evidence. If there was any such evidence, it would have been improper for the court to withdraw the question of its credibility from the jury. And if the evidence was merely of a presumptive nature, it was not for the court to decide as a point of law how much it ought to weigh with the jury. It was properly their province to draw the conclusions of fact arising from such presumptions. They might have believed the evidence, but at the same time not have been satisfied that it justified them in inferring from it other facts not positively proved. The real difficulty in the case arises from the peculiar structure of the prayer of the plaintiffs, and the introduction of parol evidence at the trial by them, to fortify what had been already declared by the court to be *prima facie* evidence, record evidence of title.

§ 2625. *An instruction assuming a fact is properly refused.*

If the court had been asked to instruct the jury that the evidence of the plaintiffs, if believed by the jury, was competent in point of law, from which they might infer all the necessary facts to maintain the action, unless it was rebutted on the part of the defendant, it would have been unobjectionable. It would have left the matters of fact for the just consideration of the jury, upon the *prima facie* evidence of the plaintiffs. But the difficulty is that a matter of fact, of vital consequence to the plaintiffs, was, whether Gabriel B. R. Chirac, the brother of the whole blood of the intestate, was dead without leaving lawful issue upon the death of the intestate. The plaintiffs very unnecessarily introduced parol evidence on this subject, after the court had ruled that there the ejectment was *prima facie* evidence of their title. The parol evidence did not particularly establish the death of Gabriel (for the bill of exceptions had been rejected as evidence), although it was exceedingly strong as presumptive proof; and as such it was the province of the jury to pass upon it. The court was right, therefore, in refusing the prayer of the plaintiffs, because it trenched upon the proper province of the jury, by requiring the court to assume a fact which was not absolutely proved, but was matter of inference and presumption upon the whole testimony.

The defendant afterwards prayed the court to instruct the jury as follows:

1. That if, from the evidence, the jury believed that J. B. Chirac, who died seized of the premises in the declaration mentioned, had any brother or brothers, sister or sisters of the whole blood or their descendants, who survived the said J. B. Chirac the younger, then the plaintiffs are not entitled to recover.
2. That if the jury believe that the said John B. Chirac the elder had, by his second wife, another son besides the said son J. B. Chirac, the intestate, then it is incumbent upon the plaintiffs to show, before they can entitle themselves to recover, that such son died before the said intestate without lawful issue.
3. That if the jury believed that the said John B. Chirac, the elder, had by his first wife a daughter, who married a certain Samuel Bonfils, by whom she had a son named John Baptist Bonfils, who married Ann Coton, who had a daughter named Maria Bonfils, who married Desportes, one of the plaintiffs, it is incumbent upon the plaintiffs, before they can entitle themselves to recover, to show the death of the great-grandfather, grandmother and father, before the impetration of the original writ in this cause; and that the plaintiff-

iffs have offered no evidence of these facts. The court gave the instructions so prayed for, and the plaintiffs filed their exception thereto.

§ 2626. *An instruction should not be given concerning a point upon which there was no evidence adduced.*

The first instruction is open to two objections. It asks the court to instruct the jury that if from the evidence they believed, among other things, that the intestate had any sister or sisters of the whole blood or their descendants, who survived him, etc., the plaintiffs were not entitled to recover. Now there was not the slightest evidence from which the jury had a right to believe the existence of any such sister or sisters; and without such evidence the court ought not to have given the instruction, since it was calculated to mislead them and to raise a mere speculative question. But a still more decisive reason against it is that, by the law of descent of Maryland, a person claiming as heir must prove himself heir of the person last actually seized of the estate; and if the intestate had left a brother of the whole blood, who survived him, and died without issue and without ever having been actually seized of the estate, the plaintiffs would still have been entitled to recover as heirs of the half blood of the person last seized.

§ 2627. *To establish collateral heirship the claimant must prove not only the death of the ancestor but also his death without issue.*

The second instruction was rightly given. It was not sufficient for the plaintiffs to show that Gabriel was dead, but that he died without lawful issue; for, otherwise, such issue were entitled to recover. The *onus probandi* was upon them to establish every fact necessary to their own heirship; and it cannot admit of doubt that this was necessary. The same rule is laid down in 3 Starkie on Evidence, 1099, and is supported by the case of Richards v. Richards, there cited from Mr. Ford's MSS., and also by Doe v. Griffin, 15 East, 293.

§ 2628. *An instruction which assumes to decide a fact upon which there was evidence is erroneous.*

The third instruction assumes to decide a question of fact upon which we think there was evidence before the jury. The record of the recovery in the ejectment suit was *prima facie* evidence of the plaintiffs' title; and the depositions in the cause, and the structure of the interrogatories and answers, presupposed the death of the great-grandfather, grandmother and father of the intestate. There was error, then, in the court in giving this instruction.

Upon the whole the judgment must be reversed and the cause remanded with directions to award a *venire facias de novo*.

SMITH v. McCOOL.

(16 Wallace, 560-564. 1872.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—The action in the court below was ejectment. The plaintiff in error was the plaintiff there. A like action between the same parties for the same premises was heretofore decided by this court, and is reported in 1 Black, 459. In that case the jury found a special verdict, which is set out in the statement of the case by the reporter. This court held that the plaintiff had no title at the commencement of the suit, and upon that ground reversed the judgment, and remanded the cause with directions to the

court below to enter a judgment upon the special verdict for the defendant, which was accordingly done. Smith, the plaintiff in that action, subsequently instituted the case now before us, upon a title alleged to have been acquired since the commencement of the former suit. Upon the trial in this case, he offered in evidence the special verdict in the former case to prove the heirship of one of the parties under whom he claimed. The evidence was objected to by the counsel for the defendant, and excluded by the court. The plaintiff excepted, and has brought this ruling here for review.

§ 2629. *Verdict without judgment is not evidence between the same parties in another suit for the same premises.*

A verdict without a judgment in a case like this is of no validity, either as an estoppel or as evidence. *Reed v. The Proprietors, etc.*, 8 How., 291; *Donaldson v. Jude*, 2 Bibb, 60; 3 Bouv. Inst., 376. To give efficacy to a verdict, general or special, it must be followed by a judgment, and when offered to establish any fact, such fact must have constituted, in whole or in part, the foundation of the judgment which was rendered. Greenleaf says (§ 535): "It is only where the point in issue has been *determined* that the judgment is a bar. If the suit has been discontinued, or the plaintiff becomes nonsuit, or for any other reason there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive." The matter must have become *res judicata*. *King v. Chase*, 15 N. H., 14.

If the judgment originally rendered upon the special verdict here in question had still subsisted, the case would be a different one. But that judgment was reversed. The reversal took away all efficacy from the verdict. It is true this court ordered a judgment to be entered upon it in favor of the defendant, but that was not upon the ground that the verdict showed title in the defendant, but because it showed there was none in the plaintiff. The judgment for the defendant followed as a matter of course. It was, in effect, a judgment *verdicto non obstante*, or of nonsuit. Instead of giving the findings its sanction, and resting upon them as its foundation, the judgment denied their efficacy and repelled them as immaterial. This suit was brought upon an after-acquired title. The causes of action in the two cases are as distinct from each other as if the latter were brought to recover a different tract of land.

In the leading case of *The Duchess of Kingston* (20 State Trials (8vo.), 355; 2 Smith's Lead. Cas., 7th Am. ed., 648), Lord Chief Justice De Grey said: "From a variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter directly in question in another court; secondly, that the judgment of the court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred from argument."

The authority of this case, it is believed, has never been controverted. But what in such cases is "directly upon the point," "what came collaterally in question," and what was "incidentally cognizable," are questions upon which

the adjudications are wide asunder. *Roberts v. Heim*, 27 Ala., 678; *King v. Chase*, 15 N. H., 13. The cases maintaining the broadest, and those the narrowest, views are numerous. They are collected and ably analyzed in the American note to *Doe v. Oliver* and *The Duchess of Kingston's Case*, in 2 Smith's Leading Cases, 7th Am. ed., pp. 787-813.

As the proper determination of the case before us does not require the consideration of this subject, we forbear to enter upon its examination. Under the circumstances we think the special verdict, and the proceeding upon it in the case in which the verdict was rendered, may be regarded as not unlike a demurrer to evidence. In such cases there is an admission of record of all the facts proved, of those which the evidence tends to prove, and of those which may be fairly inferred from it. The party demurring relies upon the law arising upon the facts thus presented. The facts so spread on the record are never evidence for or against either party in another suit. Here the special verdict performed the same office as such a demurrer.

The defendant's counsel insisted upon the legal proposition — ultimately sustained by this court — that, conceding the facts to be as found, the plaintiff was not entitled to recover in that action. He may well have been, and doubtless was, less careful to introduce his full evidence, and to contest the facts found, including the one which the verdict was offered in this case to prove, than he would have been but for the confident assurance that they were all immaterial in respect to the judgment to be given, which he claimed must be in favor of his client.

As there could be no special plea, owing to the form of the action, the verdict, if admissible, must have been held to work an estoppel as to all the facts found. Its effect would have been the same as if it could have been, and had been, specially pleaded. *Dame v. Wingate*, 12 N. H., 291. This must have taken the defendant by surprise, and been very harsh in its effect. It would, doubtless, have tended to defeat rather than promote the ends of justice. The ruling of the court which required the plaintiff to prove the heirship *aliunde* subjected him to no hardship. If the fact were as found by the special verdict there could be no difficulty in his proving it, as it was proved before. If the fact were otherwise, to admit the estoppel would have involved the sacrifice of truth and justice to a technicality, and have subjected the defendant to a grievous loss, which he ought not to be required to bear. The parties were properly allowed to stand in the second action in all respects upon a footing of equality, as they stood in the first.

Upon the whole case we are of opinion that the learned judge decided correctly in rejecting the evidence. There are other grounds disclosed in the record, upon which, in the view of some members of the court, a judgment of affirmance might well be placed; but as we are unanimous in the views expressed, it has been deemed unnecessary fully to consider them.

Judgment affirmed.

DARBY v. MAYER.

(10 Wheaton, 465-472. 1825.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This was an action of ejectment, in which the present plaintiff was plaintiff in the court below. His title is derived through a patent to one John Rice, and successive conveyances down to himself, which

it is immaterial to recapitulate, since no question arises upon this part of the evidence. The defense set up was the statute of limitations, and in order to bring himself within its provisions, the defendant received the patent under which the plaintiff claims as the patent for his own land, and undertakes to connect himself with it. This gave rise to a variety of exceptions taken by the plaintiff to the evidence offered by the defendant for this purpose, to which the defendant replies that, should he have failed in establishing a connection by a chain of title, he has complied with the statute, notwithstanding, by proving his possession within the patent issued to Rice, which, he contends, is all the connection with a patent which the law requires.

One of the grounds of exception made by the plaintiff is, that the evidence of the defendant proves his possession to be upon a tract of land essentially different from that which the patent covers. And not a little difficulty has existed on this part of the case, to understand the counsel when discussing the question of identity. All this has arisen from omitting to have the *locus in quo* established by a survey; an omission to which the court takes this opportunity to express its disapprobation. It is true that the case upon this bill of exceptions can be disposed of without such a survey, but great facility would have been afforded by a survey, in understanding the discussion, which, without it, was scarcely intelligible. It is very obvious, when we refer to the patent to Rice under which the plaintiff claims, and the entry to Ramsay through which the defendant deduces title, both of which are made parts of the bill of exceptions, that they do not describe the same land. On the contrary, that to Rice, calling for the entry to Ramsay as its eastern boundary, must necessarily lie without it.

However, we are of opinion that we are not now at liberty to notice this inconsistency. The bill of exceptions states that the plaintiff proved the defendant in possession of the land granted to Rice, and the defendant proved himself in possession of the land entered to Ramsay, both concurring in the fact that the land in the defendant's possession was the land in controversy; from which it certainly results that Rice held a patent for Ramsay's entry. But the defendant having no patent, the other has, of course, the legal estate in him, which may be barred by the defendant's possession, if he brings himself within the provisions of the statute.

In order to connect himself with the patent, the defendant proved a sale of the inchoate interest of John Rice to one Solomon Kitts, and the next link in his title depended upon the will of Solomon Kitts. To prove that Kitts devised the land to the trustees through whom defendant made title, a copy and probate of the will of Kitts was produced in evidence, duly certified from the orphans' court of Baltimore county, Maryland, in which, it seems, the will had been recently proved and recorded. This evidence was excepted to, but the court overruled the exception, and it went to the jury.

The question is, whether the evidence thus offered was legal evidence of a devise of land?

§ 2630. *Under the law of Maryland the ordinary's probate of a will related only to personal estate, and a certified copy of a will and probate was not evidence of its contents as to real estate.*

The common law doctrine on this subject no one contests; the ordinary's probate was no evidence of the execution of the will in ejectment. Where the will itself was in existence, and could be produced, it was necessary to produce it; when the will was lost, or could not be procured to be produced

in evidence, secondary evidence was necessarily resorted to, according to the nature of the case. But whatever proof was made was required to be made before the court that tried the cause; the proof before the ordinary being *ex parte*, and the heir at law having had no opportunity to cross-examine the witnesses; neither were the same solemnities required to admit the will to probate as were indispensable to give it validity as a devise of real estate. At first, it was a question of controversy between the common law and ecclesiastical courts, whether a will, containing a devise of lands, should not be precluded from probate, although containing a bequest of personalty also. And the question was one of serious import, since the common law courts required the production of the original, whereas the consequence of probate was, that the original should be consigned to the archives of the court that proved it. This was at length compromised, and the practice introduced of delivering out the will, when necessary, upon security to return it.

Upon general principles, there is no question that lands in Tennessee must, in all respects, be subject to the land laws of Tennessee. Their laws affecting devises, and the rules of their courts respecting evidence in ejectment, must be the law of this case, as far as the constitution of the United States does not control the one or the other.

With regard to the modification under which the right of devising may be exercised, there is no question that the power of the state is unlimited; and wills of realty, wherever executed, must conform to the laws of Tennessee. The right of determining whether its laws have been complied with in this respect is a necessary result from the power of passing those laws. But in this respect, it has been supposed that the right of the states is in some measure controlled by that article of the constitution which declares "that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." And hence that a will of lands duly recorded in one state, so as to be evidence in the courts of that state, is rendered evidence thereby in the courts of every other state, provided the record, on the face of it, shows that it possessed the solemnities required by the laws of the state where the land lies.

As this is a question of some delicacy as it relates to devises of lands, the court passes it over at present, being induced to adopt the opinion that the rule could not be applied to this case, since the laws of Maryland do not make the probate here offered evidence in a land cause in the courts of that state.

That the law of Maryland, with regard to the evidence of a devise in ejectment, is the common law of England, is clearly recognized in the case of *Smith's Lessee v. Steele*, 1 Harris & M'Henry, 419. In that case, as in this, a copy of the will and probate were offered in evidence, and was supported by proof of the loss of the original will from the office of probates. Yet the whole argument turns, not on the admission of the copy and probate *per se*, but whether admissible at all to prove the existence and contents of the original will. And the court declare, in permitting it to be read in evidence to the jury, that they are at liberty to find for or against the original will, not holding them bound from the production of the probate to find for the plaintiffs. It is observable also, in that case, that it is yielded in argument throughout that the admission of the probate could only be sustained on the idea that the acts of 1704 and 1715, now no more in force, permitted the ordinary to take probate of wills of land. But it has been supposed that the Maryland law of probates of 1798 has, by express enactment, made such probates evi-

dence in their own courts. And had it been shown that such had been the established construction of that law, and the practice of the state courts under it, this court would not have hesitated to relinquish their own views on the correct construction to be given to that clause. As it is, we must pursue the suggestion of our own minds with regard to the legal construction of the act.

The clause alluded to is the fourth section, chapter 2, article 3, of the act in question, and is in these words: "An attested copy, under the seal of office, of any will, testament or codicil, recorded in any office authorized to record the same, shall be admitted in evidence in any court of law or equity, provided that the execution of the original will or codicil be subject to be contested until a probate hath been had according to this act." It is true, that the generality of the terms in the first lines of this clause is such as would, if unrestricted by the context, embrace wills of lands. It is also true that the previous chapter, in the same article, prescribes the formalities necessary to give validity to devises of real estate; it is further true that the previous sections of the second chapter indicate the means, and impose the duty of delivering up wills of all descriptions to the register of the court of probates, for safe-keeping, after the death of the testator, and until they shall be demanded by some person authorized to demand them for the purpose of proving them.

But it is equally true that the act does not authorize the registering of any will without probate. Nor does it, in any one of its provisions, relate to the probate of any wills, except wills of goods and chattels. The clause recited makes evidence of such wills only as are recorded in the offices of courts authorized to record them. But when the power of taking probate is expressly limited to the probate of wills of goods and chattels, we see not with what propriety the meaning of the clause in question can be extended to wills of any other description. The orphans' court may take probates of wills though they affect lands, provided they also affect goods and chattels; but the will, nevertheless, is conclusively established only as to the personalty.

Unless the words be explicit and imperative to the contrary, the construction must necessarily conform to the existing laws of the state on the subject of wills of real estate. And when the power of taking probates is confined to wills of personalty, we think the construction of the clause recited must be limited by the context. We are therefore of opinion that there was nothing in the law of Maryland which could, under the constitution, make the document offered to prove this will *per se* evidence in a land cause. Nor does there appear to exist any rule of law in Tennessee which could make such a document good evidence under the laws of that state. Since, therefore, the charge of the court was general in favor of the defendants, and the effect of each particular piece of evidence upon the minds of the jury cannot be discriminated, this opinion disposes of the whole cause.

The case presents several other and very important questions, but the court will at present decline remarking on them. Judgment reversed, and a *venire facias de novo* awarded.

MUTUAL BENEFIT LIFE INSURANCE COMPANY v. TISDALE.

(1 Otto, 238-246. 1875.)

ERROR to U. S. Circuit Court, District of Iowa.

Opinion by MR. JUSTICE HUNT.

STATEMENT OF FACTS.—In an action brought, not as administrator, but in an individual character, to recover an individual debt, where the right of

action depends upon the death of a third party,—to wit, an insurance upon his life,—do letters of administration upon the estate of such party, issued by the proper probate court, afford legal evidence of his death? This is the question we are called upon to decide. It is presented sharply, and is the only question in the case.

§ 2631. *In an action by one in his individual capacity, to recover an individual debt, where the right of action depends upon the death of a third party (such as a suit upon a policy of insurance upon his life), letters of administration, granted by the proper court upon the estate of such third party, do not afford legal evidence of his death.*

The authority in favor of the admission of the letters as evidence of the death of the party, in a suit between strangers, is a general statement to that effect in 1 Greenl. Ev., sec. 550. The cases cited by the writer in support of the proposition are *Thompson v. Donaldson*, 3 Esp., 64; *French v. French*, Dick., 268; *Hamblin's Case*, 3 Rob. (La.), 130; *Jeffers v. Radcliff*, 10 N. H., 245. In the case first cited, the authority does not support Mr. Greenleaf's statement. It was held that the letters did not afford sufficient proof of death; and, no further evidence being given, the verdict was against the claimant. In *French v. French*, the court held in terms against the theory that the letters were evidence of death, "but, under all the circumstances, admitted the probate as evidence of death." This case was that of a bill filed by an heir against one in possession of the estate; and in that case Mr. Greenleaf hardly contends that the letters are evidence of death. In *Tisdale v. Conn. Life Ins. Co.*, 26 Ia., 177, and in the same case in 28 Iowa, 12, cited by the defendant in error, the law was held as claimed by her. The other cases cited by the defendant in error are those where the administrator or executor was a party to the suit in his representative capacity, in relation to which a different rule prevails.

In the New Hampshire case above cited there was evidence to sustain the ruling, independently of the letters; and the case concedes that the law is otherwise in England, and bases itself upon the peculiar organization of the courts of that state.

On the other hand, the text-writers — *Phil. on Ev.* (2d vol., 93 m, ed. 1868); *Tamlyn* (48 Law Lib.), 154, referring to *Moons v. De Bernales*; *Hubback on Succession*, 162 (51 Law Lib.) — concur against the rule laid down by Mr. Greenleaf.

In *Moons v. De Bernales*, 1 Russ., 307, it was held that letters of administration were not *prima facie* evidence of death, and the defect was supplied by other evidence. Lord Eldon says, in *Clayton v. Gresham*, 10 Ves., 288, that it is the constant practice to require proof of death, and that probate is not sufficient. In *Leach v. Leach*, 8 Jur., 211, Sir Knight Bruce refused to order the payment of money upon letters alone, but required other evidence. In *Blackham's Case*, 1 Salk., 290, it was held that the sentence of the spiritual court in granting letters is not evidence upon any collateral matter which would have prevented the issuing of the letters.

In speaking of judgments *in rem*, and where the judgment may be evidence against one not a party or privy to it, Mr. Starkie says: "This class comprehends cases relating to marriage and bastardy where the ordinary has certified; sentences relating to marriage and testamentary matters in the spiritual court." 1 Stark. on Ev., 372 m. What is meant by this is explained at a subsequent place, where he says: "The grant of a probate in the spiritual court is conclusive evidence against all as to the title to personalty, and to all rights inci-

dent to the character of an executor or administrator." Page 374 *m*. He cites, in support of this statement, the case of *Allen v. Dundas*, 3 T. R., 125, that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor. The grant is conclusive in all business transacted as executor, and concerning the duties of the executor, that it was properly made. This accords with the principle hereafter laid down.

The chief ground of argument to admit letters testamentary as evidence of the death of the party is, that the order of the probate court issuing them is an order or judgment *in rem*. But a judgment *in rem* is not *prima facie* evidence; it is conclusive of the point adjudicated, unless impeached for fraud. 1 Stark. on Ev., 372 *m*; Freeman, *infra*. If admissible on this principle, the letters were conclusive evidence of the death of Tisdale. But this is not claimed by any argument.

Again: the probate court has never adjudicated that Tisdale was dead. Death was not the *res* presented to it. Shall Mrs. Tisdale receive letters of administration was the *res*; and upon that only has there been an adjudication. Hubback, *supra*, 162*m*.

The letters issued to an executor or an administrator by a probate court are, as a general rule, evidence only of their own existence. They prove, that is to say, that the authority incident to that office or duty has been devolved upon the person therein named, that he has been appointed, and that he is executor or administrator of the party therein assumed to have departed this life. Different states have different provisions as to who may be executor or administrator, excluding some persons and preferring others, in the order and manner in their statutes specified. Thus persons convicted of infamous crime are excluded from this office, and persons of notoriously evil lives may be passed by in the discretion of the probate court. Sons or daughters or widows are entitled to take in preference to others; unmarried women are entitled in preference to married women. Certain notices may be, and usually are, required to be given of the proceedings to obtain letters; and the letters are the evidence that the proceedings have been regularly taken, and that the person or persons therein named are those by law entitled to the office. Upon these points the court has adjudicated. No proof to the contrary can be admitted in an action brought by the executor as such. Parties wishing to contest that point must do it before the probate court at the time application is made for the letters, or upon subsequent application, as the case may require.

In an action brought by such executor or administrator touching the collection and settlement of the estate of the deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased. The letters are conclusive evidence of the probate of the will. It cannot be avoided collaterally by showing that it is a forgery or that there is a subsequent will. The determination of the probate court is upon these precise points, and is conclusive. 2 Smith's Lead. Cas. (6th Am. ed.), 669; *Vanderpoel v. Van Valkenburgh*, 6 N. Y., 190; *Colton v. Ross*, 2 Paige, 396; Freeman on Judgments, 507, citing numerous cases.

If the present suit were brought by the plaintiff as executor or administrator to collect a debt due to her deceased husband, or to establish a claim arising under a will, of which probate had been made by her, she would have been within these rules. The letters testamentary would not only have been competent evidence, but they would have been conclusive of her right to bring the suit, and unimpeachable except for fraud. Such, however, is not the case

before us. The suit is by the plaintiff as an individual to recover a debt alleged to be due to her as an individual. It is a distinct and separate proceeding, in which the question of the death of the husband has never been passed upon. That fact must be established by proof competent upon common law principles.

The books abound in cases which show that a judgment upon the precise point in controversy cannot be given in evidence in another suit against one not a party or privy to the record. This rule is applied not only to civil cases, but to criminal cases and to public judicial proceedings, which are of the nature of judgments *in rem*.

If an indictment for an assault and battery by A. upon B. is prosecuted to a trial and conviction, the record is conclusive evidence in favor of A. upon a subsequent indictment for the same offense; but if B. sues A. for the same assault and battery, it cannot be doubted that it would be incompetent to introduce that record as evidence of the offense. For this purpose it is *inter alios acta*. B. was no party to that proceeding. In theory of law he was not responsible for it, nor capable of being benefited by it. 1 Stark. Ev., 317*m*. So if B. should afterwards be indicted for an assault upon A., arising out of the same transaction, the record would not be competent evidence to show that A., and not B., was in fact the offending party.

In some states provision is made for the admeasurement and setting apart of dower to the widow of a deceased person. Officers are appointed for this purpose, who make their certificate awarding particular property to her use, and file their report in the proper office. Although this certificate is judicial in its character, and assumes that the deceased had title to the property described, and the certificate is valueless except upon that supposition, it has still been held that it is no evidence of title, and that the title must be proved as in other cases. Jackson *v.* Randall, 5 Cow., 168; Same *v.* De Witt, 6 id., 316.

It has been held that a comptroller's deed for the non-payment of a tax due the state is not even *prima facie* evidence of the facts giving him the right to sell, such as the assessment and non-payment of the tax, although they are recited in the deed, and this deed is in compliance with the statute. These facts must have existed to give a right to sell; but they are not established by the deed. They must be made out by independent proof. Tallman *v.* White, 2 N. Y., 66; Williams *v.* Peyton, 4 Wheat., 77; Beekman *v.* Bigham, 5 N. Y., 366.

A certificate of naturalization issues from a court of record when there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years, and is of good moral character. This certificate is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property. It is conclusive as such; but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant. Campbell *v.* Gordon, 6 Cr., 176; Stark *v.* Chesapeake Ins. Co., 7 Cr., 420.

The certificate of steamboat inspectors, under the act of congress of 1852, is evidence that the vessel was inspected by the proper officer; but it is held that it is not evidence of the facts therein recited, when drawn in question by a stranger, although the officer was required by law to make a return of such facts. Erickson *v.* Smith, 2 Abb. Ct. of App., N. Y., 64; 38 How. Pr., 454. So it has been held that where a sheriff sells real estate, giving to the purchaser a certificate thereof, although there can lawfully be no sale unless there

be a previous judgment, and although the sale is based upon and assumes such judgment, and although the law requires the sheriff to give such certificate, the recital by the sheriff of such judgment furnishes no evidence thereof. It must be proved independently of the certificate. *Anderson v. James*, 4 Rob. Sup. Ct., 35.

So on an application by a wife for alimony, pending a divorce suit prosecuted against her, the fact that her husband has recovered a verdict against a third person for criminal connection with her has been held not to be even presumptive evidence of her guilt. *Williams v. Williams*, 3 Barb. Ch., 628. Authorities of this nature might be greatly extended. Enough has been said to demonstrate that neither upon principle nor authority was it proper, in the individual suit of Mrs. Tisdale against a stranger, to admit letters of administration upon the estate of her husband as evidence of his death. The judgment must be reversed, and a new trial had.

UNITED STATES *v.* WIGGINS.

(14 Peters, 334-352. 1840.)

APPEAL from the Superior Court of the Territory of East Florida.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—The first question arises upon the admission in evidence of the memorial of Mrs. Wiggins, and the decree thereon by the governor, Estrada, on the certificate of the secretary, Aguilar. They are as follows:

MEMORIAL FOR GRANT.

Translation.

“HIS EXCELLENCY THE GOVERNOR:

“Isabel Wiggins, an inhabitant of the town of Fernandina, with the greatest respect appears before your excellency, and states that she has never importuned the attention of the government with petitions for lands, as she procured to support her family with the fruits of her industry, in this town; but owing to the diminution of trade, she considers that she will have to devote herself to the pursuits of the country; and wishing to establish herself on the eastern side of the Pond of St. George, she supplicates your excellency to be pleased to grant to her three hundred acres in the said place, as she has five children and five slaves, with herself; which favor she begs of the just administration of your excellency.

“Fernandina, 1st August, 1815.

ISABEL WIGGINS.”

DECREE.

“ST. AUGUSTINE, 6th August, 1815.

“The tract which the interested party solicits is granted to her, without prejudice to a third party; and for the security thereof, let a certified copy of this instance and decree be issued to her, from the secretary’s office.

“ESTRADA.”

CERTIFICATE OF AGUILAR.

“I, Don Tomas de Aguilar, sub-lieutenant of the army, and secretary of the government of the place and province of East Florida, for his majesty, do certify that the preceding copy is faithfully drawn from the original which exists in the secretary’s office, under my charge, and pursuant to the order I give the present, in St. Augustine of Florida, on the 6th of August, 1815.

“TOMAS DE AGUILAR.”

Before the memorial and concession were offered in evidence, Elizabeth Wiggins made affidavit: "That in August, 1815, she petitioned for the grant; that she received shortly after, from the secretary of the government, a certified copy of the petition and decree; that she never had had possession or control of the original; that she always understood that it was, at the date thereof, placed in the proper public office, as was usual in such cases; that she understood from her counsel the same could not be found; and that she is ignorant what has become of the same."

The affidavit was objected to, on the part of the United States, and rejected by the court, and the evidence offered received without its aid, on proof being made of the handwriting of Aguilar, the government secretary.

§ 2632. *The existence of a foreign law, especially when unwritten, may be proved by appropriate evidence, and the practices and rules of the Spanish offices in granting land titles may be proved by parol testimony.*

Much evidence was introduced to prove the practice and rules in use in the offices of the Spanish government, from which titles to lands issued. We think the evidence was admissible; the existence of a foreign law, especially when unwritten, is a fact to be proved, like any other fact, by appropriate evidence. The Spanish province of Florida was foreign to this country in 1815, when the transaction referred to purports to have taken place.

A principal witness to prove the practice in the government secretary's office was Alvarez, who had been a clerk in it from 1807 to the time of the change of government, in 1821. He, and others, establish beyond controversy that persons wishing grants of land from the Spanish government presented a memorial to the governor, and he decreed on the memorial, in the form pursued in Mrs. Wiggins' case; that the decree of the governor was filed in the secretary's office, and constantly retained there, unless, in cases where a royal title was ordered to be issued, when the decree was transferred to the escribano's office. Mrs. Wiggins' is a case of the first class; and the petition and decree could not be removed from the government secretary's office. These papers were not recorded in books there, but kept in files or bundles.

§ 2633. — *and where the original papers of such title are kept in the public offices, and only certified copies are furnished the grantees, such copies are competent evidence.*

The evidence given to the grantee was a certified copy of the decree, or of the memorial and decree, by the government secretary; and it was one of the ordinary duties of the secretary to make certified copies of memorials and decrees for the use of the parties. Generally, the decree of the governor directed the copy to be made for the use of the party; and copies made by the government secretary, and certified by him, were generally received as evidence of title in the Spanish courts of justice; the copies were made immediately after making the decree, and delivered to the party when he called for them. No seal was affixed to the secretary's certificate; which was evidence of the facts to which it certified, in a case like this. The duties incumbent on the government secretary of Florida, derived from this record, and other sources, we have no doubt, were such as are proved; that the secretary was the proper officer appointed by law to give copies; and that the law trusted him, for this particular purpose, so far as he acted under its authority. It follows, in this case, as in all others where the originals are confined to a public office, and copies are introduced, that the copy is (first) competent evidence by authority of the certificate of the proper officer; and (second) that it proves *prima facie*

the original to be of file in the office when the copy was made. And for this plain reason, the officer's certificate has accorded to it the sanctity of a deposition; he certifies "that the preceding copy is faithfully drawn from the original, which exists in the secretary's office under my charge."

The same doctrine was holden in this court in *Owings v. Hull*, 9 Pet., 624, 625. The copy of a bill of sale for slaves, made and of record in a notary's office in New Orleans, was offered in evidence, without accounting for the original; and objected to for this reason. By the laws of Louisiana, the original could not be removed from the notary's office; and he was authorized to give a copy. This was received and deemed evidence of what was contained in the original, and, of course, that it existed when the copy was made.

Again, in *Percheman's Case*, 7 Pet., 85, it was decided by this court that a copy of a Spanish grant, certified by the government secretary, could be given in evidence without accounting for the non-production of the original; and this, on general principles, which did not require the aid of legislation; much reliance in that case having been placed upon acts of congress to give effect to the certificate.

This court in *The United States v. Delespine*, 12 Pet., 655, recognized the principle that a certified copy, such as the one before us, was evidence, for there a copy of the first copy was introduced; and when speaking of the first copy, the court say: "The first copy was made from the original filed in the proper office, from which the original could not be removed for any purpose. That copy, it is admitted, would have been evidence in the cause." The original copy having been lost, and no decree being found in the government secretary's office in favor of Delespine, although there was proof that one had existed, the copy of the first copy was received, and a decree founded on it.

Delespine's case is, however, prominently distinguishable from the present on the main point in controversy; in that case there was positive proof of the existence, in the secretary's office, of the original concession; here, there is none, save the inference that arises from Aguilar's certificate, with some other circumstances; and the question is, can a decree for the land be founded upon these proofs, in the face of the facts that no decree or evidence of the claim now exists or has ever been known to exist in the proper office.

§ 2634. *Prima facie* evidence is such as, in judgment of law, is sufficient to establish the fact, and remains such, if not rebutted.

We have established that the copy of the petition and decree are made *prima facie* evidence by the certificate of the secretary. "What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." *Kelly v. Jackson*, 6 Pet., 632 (§§ 22-25, *supra*). And is it rebutted in this case? Had the papers in the government secretary's office been carefully kept, and had this claim been first brought forward at a late day, as it is insisted in argument it was (that is, eighteen years after its date), then the presumption would stand against its original existence, and it ought to be rejected if the certificate had no support. But this is far from being the fact. The survey was made by the proper surveyor for Mrs. Wiggins, March 23, 1821, in conformity to the memorial and decree, and which refers to their date. Then again she pursued this claim before the register and receiver of the land office of East Florida, whilst they acted as a board of commissioners for the examination of Spanish claims and titles; and they rejected it because there was no evidence of cultivation. Truly, the certificate and plot of the survey were

only before them; but as no exception appears to have been taken, for want of sufficient evidence of the existence of the concession, the circumstance of the non-production of it before the board has not so much in it as was supposed in the argument.

§ 2635. *A certificate of an officer cannot be impeached by evidence that he subsequently offered to or did forge other similar papers.*

The record shows why such vigorous exertions were made, either to reject or to destroy the force of Aguilar's certificate. The attorney for the government offered to prove, by William G. Davis, that Aguilar, just before the delivery of the province was made to the United States, offered to forge a grant in favor of the witness, for a tract of land; and the attorney also offered to prove by William Levington, that about the same time Aguilar offered to forge, or did actually forge, under the signature of the former governor, White, of that province, a grant of land in favor of the witness; which evidence the court rejected, and we think correctly. Aguilar was not introduced as a witness; but the proof offered sought to establish upon him forgery and fraud in other instances, so as to destroy the credit of his certificate in this. The secretary may have been honest and faithful in the discharge of his duties in 1815, and grossly the reverse in 1821; and although any number of frauds should be established upon him, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected with other frauds. 4 Pet., 297. If there had been a forgery in this instance, it is probable it would have been brought to light at the time the survey was made; the making of which is the controlling fact with this court, coming in aid of the certificate of Aguilar. For it must be admitted, that if the unsupported certificate had been brought forward, and the claim for the first time set up under it in July, 1833, eighteen years after it bears date, that it could not have furnished any foundation for a decree, or been evidence of title worthy of credit. The lapse of time, the silence of the claimant, and her failure to have presented it for confirmation, would, under the circumstances, have been conclusive objections to its credibility. But the existence of the claim in 1821 is rendered certain by the return of the surveyor-general; and before the American tribunals it has been steadily pursued.

Furthermore, the presumption that the original memorial and concession, supposed to have been on file in the government secretary's office, have been lost or destroyed, is very strong. After the papers were taken possession of, in 1821, by the authorities of the United States, they were almost abandoned in an open house, subject to the inspection and depredation of every one; many of the files were seen untied and the papers scattered about the room, the doors and windows of the house being open. There can hardly be a doubt that some of the papers were destroyed or lost. Nothing is therefore found in the condition of the office to rebut the *prima facie* presumption furnished by the secretary's certificate, as might be the case had the papers been kept with proper care, and especially had the concession been numbered and no number been missing.

The next question is, does the concession carry with it the conditions imposed by law on those having lands given to them for the purposes of settlement? The object of the applicant, Mrs. Wiggins, is distinctly set forth by her memorial, with the number of the family of which she was the head, that is, five children and five slaves, with herself. By the regulations of Governor White, published in 1803, it was declared that to each head of a family there

should be distributed fifty acres, and to the children and slaves sixteen years of age, twenty-five acres for each one, but from the age of eight to sixteen years only fifteen acres. Taking the slaves and children all to have been over sixteen, there being ten of them, would have entitled the applicant to two hundred and fifty acres on their account and fifty acres on her own, which would have made up the three hundred acres applied for.

The same ordinance provides: "That those employed in the city, if lands be granted to them for cultivation, by themselves or their slaves, it shall be with the express condition that he shall commence cultivation within one month after the concession of them, with the understanding that, if they do not do it, they will be granted to any one who will denounce him and verbally prove it." And that all concessions without time specified shall be void and held as though not made, if grantees do not appear to take possession and cultivate them within the term of six months.

In the concession to Mrs. Wiggins no time is specified for the settlement, and the government of the United States may take advantage of the non-performance of the condition prescribed by law, if the eighth article of the treaty (8 Stats. at Large, 252) with Spain does not provide for the omission. It stipulates: "That grants of land made by Spain, before the 24th of January, 1818, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of Spain."

§ 2636. *Perfect titles made by Spain before January 24, 1818, within the ceded territory, are intrinsically valid and exempt from the eighth article of the Spanish treaty, and need no legislative or judicial sanction.*

It was adjudged by this court, in the cases of Arredondo and Percheman, 6 and 7 Pet., 691, 51, that the words "shall be ratified and confirmed," in reference to perfect titles, should be construed to mean "are" ratified and confirmed, in the present tense. The object of the court in these cases was to exempt them from the operation of the eighth article, for the reason that they were perfect titles by the laws of Spain when the treaty was made; and that when the soil and sovereignty of Florida were ceded by the second article, private rights of property were by implication protected. The court, in its reasoning, most justly held that such was the rule by the laws of nations, even in cases of conquest, and undoubtedly so in a case of cession; therefore it would be an unnatural construction of the eighth article to hold that perfect and complete titles, at the date of the treaty, should be subject to investigation and confirmation by this government; and to reconcile the article with the law of nations, the Spanish side of the article was referred to in aid of the meaning of the American side, when it was ascertained that the Spanish side was in the present tense; whereupon the court held that the implication resulting from the second article, being according to the law of nations, that and the eighth article were consistent, and that perfect titles "stood confirmed" by the treaty and must be so recognized by the United States and in our courts.

The construction of the treaty being settled, a leading inquiry in the cases referred to was, were they perfect, unconditional Spanish grants? Percheman's had no condition in it; and the only difficulty involved was, whether it had been made by the proper authority. The court held it had been so made. The grant to Arredondo and son was for four leagues square and made as a present grant from its date; with the subsequent condition that the grantees

should settle and improve the land in three years, and on failure, the grant should become void; further that they should settle on it two hundred Spanish families, but no time was fixed for the performance of this condition. Possession was taken and improvements made within the three years, but the families were not settled when the country was ceded. This court declared that, after the cession of Florida to the United States, the condition of settling Spanish families had become probably impossible, by the acts of the grantor, the government of Spain, and certainly immaterial to the United States; therefore the grant was discharged from the unperformed condition, and single.

That the perfect titles made by Spain before the 24th of January, 1818, within the ceded territory, are intrinsically valid and exempt from the provisions of the eighth article, is the established doctrine of this court, and that they need no sanction from the legislative or judicial departments of this country.

§ 2637. — *but Spanish titles to lands granted upon conditions of cultivation or settlement, which were unperformed, and without excuse for the non-performance, would have been void as against Spain and are so as against the United States.*

But that there were, at the date of the treaty, very many claims whose validity depended upon the performance of conditions in consideration of which the concessions had been made, and which must have been performed before Spain was bound to perfect the titles, is a fact rendered prominently notorious by the legislation of congress, and the litigation in the courts of this country for now nearly twenty years. To this class of cases the eighth article was intended to apply; and the United States were bound, after the cession of the country, to the same extent that Spain had been bound before the ratification of the treaty to perfect them by legislation and adjudication; and to this end, the government has provided that it may be sued by the claimants in its own courts, where the claims shall be adjudged, and the equities of the claimants determined and settled according to the law of nations, the stipulations of the treaty and the proceedings under the same, and the laws and ordinances of the government from which the claims are alleged to have been derived.

These are the rules of decision prescribed to the courts by congress in the act of 1824, ch. 173, § 2 (4 Stat. at Large, 52), passed to settle the titles of Missouri and Arkansas, and made applicable to Florida by the act of 1828, ch. 70, § 6 (4 Stats. at Large, 285). By the sixth section of the act of 1824, the claimant who has a decree in his favor is entitled to a patent from the United States, by which means his equitable claim draws to it the estate in fee. These are the imperfect claims to which the eighth article of the treaty with Spain refers.

That a Spanish concession carrying on its face a condition, the performance of which is the consideration for the ultimate perfect title, is void unless the condition has been performed in the time prescribed by the ordinances of Spain, was decided by this court, after the most mature consideration, in the cause of *The United States v. Kingsley*, 12 Pet., 476, which is the leading decision upon the imperfect titles known as Mill grants, and which has been followed by all others coming within the principles then, with so much care and accuracy, laid down. The concession to Mrs. Wiggins, carrying with it the conditions incident to settlement rights by the ordinances and usages of Spain, a brief notice in addition to what has already been said, will be taken of the

regulations and ordinances governing the case. As, on the first point, the practice of the government, in disposing of the public domain, may be proved by those familiar with the customs, and there is in the record very satisfactory proof by witnesses of the laws and customs governing the provincial authorities in this respect; but as the proof is in exact accordance with the published ordinances on the subject, of course the written law will be relied upon.

After the passage of the act of 1828, it was the opinion of the attorney-general of the United States, that it was indispensable to the correct decision of the Florida claims by this court, that a correct translation into the English language should be made of the Spanish and French ordinances, affecting the land titles in that country. The task of translating and compiling them was assigned to Joseph M. White, Esq., then of Florida. The collection was accordingly made and translated, and the manuscript deposited in the state department; and congress was informed of the fact, by a special message from the president of the United States, of February 11, 1829. 2 White's *Recopilacion*, 9, 10. It was afterwards published by Mr. White; and latterly, he has published a second and enlarged edition, which is the one referred to in this case.

The treaty with Spain for the cession of Florida was signed 2d February, 1819; on the 25th of November preceding, the political and military governor, Coppinger, caused to be published an ordinance setting forth the conditions on which concessions for settlement claims had been issued; obviously with a view to the future cession. 2 White's *Recopilacion*, 282-285. From the ordinance it appears, "That concessions made to foreigners or natives, of large or small portions of land, carrying their documents with them (which shall be certificates issued by the secretary), without having cultivated or even seen the lands granted to them, such concessions are of no value or effect; and should be considered as not made, because the abandonment has been voluntary, and that they have failed in complying with the conditions prescribed for the encouragement of population;" "and, therefore, there is no reason why they should not revert to the class of public lands, making null the titles of cession which were made to them."

Ten years had been the time required for cultivation and occupation; this rule was not rigidly adhered to, but the titles were perfected in some instances, where valuable improvements had been made and the occupation had been short of ten years; the governors taking in consideration the disturbed state of the country. These exceptions were abatements of the general rule requiring ten years' cultivation and occupation; as Mrs. Wiggins, however, never cultivated or occupied the land claimed, she took no interest under the rule, or any exception made to it; and it is free from doubt, had Spain continued to govern the country, no title could have been made to her; nor can any be claimed from the United States, as successors to the rights and obligations of Spain.

It is therefore adjudged that the decree below be reversed, and the petition dismissed.

VIGEL *v.* NAYLOR.

(24 Howard, 208-214. 1860.)

ERROR to the Circuit Court for the District of Columbia.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—Susan Vigel sued Henry Naylor, administrator of George Naylor, by a petition for freedom in the circuit court of this District.

He pleaded that she was his slave. On the trial of this issue she offered in evidence the will of John B. Kirby, by which all his slaves over thirty-five years of age were emancipated; and all those under that age were to be emancipated — the males at thirty-five, and the females at thirty years of age. This was allowed by an act of the legislature of Maryland of 1796, ch. 67, sec. 13.

A witness testified, on the petitioner's behalf, "that a few days after the death of Kirby, which took place in 1828, George Naylor brought to his house, where witness was then at work, the petitioner, her mother, and her sister; and said George Naylor stated to the witnesses at the time, that he had brought said negroes from the residence of said Kirby; and that the petitioner was then between six and eight years of age."

The petitioner then offered to prove that her brother Richard, and her mother Sarah, and her sister Eliza, had obtained their freedom under the will of Kirby; that Sarah, the mother, and Eliza, had recovered their freedom by suits brought against George Naylor, which were defended by him. In the one instituted by Sarah judgment was rendered in 1838; and that brought by Eliza was decided in her favor in 1842. The petitioner also offered to prove that it is very unusual for children of the age of the petitioner at the time of Kirby's death to be separated from their parents; but the court excluded the testimony offered from the jury; to which exception was taken.

The defendant then proved by two witnesses, that they had known the petitioner from her birth, and that she was born the property of George Naylor; and that she never was out of his possession, or that of his successor and administrator. It is objected that no records of the verdicts and judgments were offered to prove the recoveries. The bill of exceptions states, generally, that she offered to prove the facts, but the court refused to hear the evidence.

Transcripts of the records being the best evidence, and their production necessary, it is manifest that the offer to prove the recoveries was not refused for the reason that the record evidence was absent, but because the recoveries were deemed irrelevant, or that they were *inter alios acta*, and therefore incompetent as proof in the cause for any purpose. And the first question is, was the evidence offered relevant, when taken in connection with the parol evidence?

§ 2638. *In a suit for freedom, record evidence that the plaintiff's mother established her freedom by law is competent, and is not res inter alios acta.*

The girl was six or eight years old when George Naylor brought her home in 1828, with her mother and sister, from the late residence of Kirby, the testator. It was offered to be proved, and we must take it to be true that it could have been proved, that it was unusual to separate the mother from the slave-child as young as the petitioner was at the time Kirby's will took effect.

If Sarah the mother, Richard the brother, and Eliza the sister, were the slaves of Kirby at his death, and acquired their freedom under his will, does this circumstance furnish evidence from which a jury might infer, in connection with other evidence, that the petitioner was also the slave of Kirby when he died, and entitled to her freedom on arriving at thirty years of age? It is immaterial whether the evidence offered and rejected was weak or strong to prove the fact. The question is, was it competent to go to the jury? *Castle v. Bullard*, 23 How., 187 (§§ 26-32, *supra*). If so, it was for them to judge of its force and effect. If this child had been only one year old or under when Naylor got possession of her and of her mother, and other children in company with her, the presumption would be stronger that her condition and that

of her mother was the same, and both the slaves of Kirby, and were manumitted by his will.

By the rejection of the evidence the case was stripped of all proof that Susan, the petitioner, ever belonged to Kirby, the testator; whereas, had it been admitted, it would have proved that Susan's mother, and her other children, belonged to the estate of Kirby after his death, and were emancipated by his will; and having emancipated *all* his slaves, a presumption could have been founded on this proof, by the jury, that an infant child of the same family was the slave of Kirby also, especially as Naylor brought the slaves as a family from Kirby's late residence.

2. Was the record of the judgment *inter alios acta*, and therefore incompetent? In the case of *Davis v. Wood*, 1 Wheat., 6, it was held by this court that a judgment in favor of the mother establishing her freedom against Swan, a third person, could not be given in evidence in a suit by the child of that mother as tending to prove his freedom. On the trial below, the petitioner offered to prove by witnesses that they had heard old persons, now dead, declare that a certain Mary Davis, now also dead, was a white woman, born in England, and such was the general report in the neighborhood where she lived; and further offered to prove, by the same kind of testimony, that Susan Davis, the mother of the petitioner, was lineally descended in the female line from the said Mary; which evidence, by hearsay and general reputation, the court refused to admit, except so far as it was applicable to the fact of the petitioner's pedigree. And the ruling below this court affirmed.

There is no question arising in the cause before us involving the consideration to what extent hearsay evidence to prove the *status* of freedom is admissible, and therefore we refrain from discussing the first point decided in *Davis v. Wood*. In that case, Susan, the mother of John, was sold by Wood, the defendant, to Caleb Swan; and she and her daughter, Ary, who had likewise been sold, sued Swan for their freedom, and recovered it. This record of recovery was offered in evidence on behalf of John, but was rejected on the trial.

This court held that, "as to the second exception, the record was not between the same parties. The rule is that verdicts are evidence between parties and privies. The court does not feel inclined to enlarge the exceptions to this general rule, and therefore the judgment of the court below is affirmed."

This is the judgment with which we have to deal. The difference in the case under consideration and the one found in 1 Wheat. is, that here Susan's mother and sister recovered their freedom from Naylor, he being the defendant in both actions. There the mother and daughter recovered their freedom from Swan, who had purchased them of Wood. This court having cut off all evidence by hearsay and general reputation — first, that the female ancestor of the petitioners was a white English woman, and free; and second, that the record of the recovery of freedom by John's mother and sister from Swan was incompetent,—of course the petitioner had to go out of court, having proved no case.

There the verdict was not between the same parties. Here the suit was between George Naylor and the mother of Susan; as between the mother and Naylor, the verdict was conclusive of her right to freedom; and Susan, the child, was a privy in blood to the mother (being her heir, if free), and, as such heir, comes within the rule laid down in *Davis v. Wood*, and could avail herself of that verdict as equally conclusive, if she could further prove that she

was born after the impetration of the mother's writ. *Alexander v. Stokely*, 7 Serg. & R., 300; *Pegram v. Isabell*, 2 Hen. & M.; *Chancellor v. Milton*, 2 B. Mon., 25. Or, if she could prove that she was born after Kirby's death, and that her mother recovered her freedom under his will,—and which facts might have been established by further proof,—these circumstances could be let in as additional evidence. 2 Henning & M., 211.

Owing to the lapse of time since Mr. Kirby died, the petitioner sought to establish her case by circumstantial evidence. It was rejected; for what particular reason does not appear. As already stated, we think the evidence offered had weight enough in it to be pertinent, and ought therefore to have been submitted to the jury. 23 How., 187. How it was proposed to be proved that Richard was a free man, and acquired his freedom under the will, does not appear; but as to Eliza, the sister, a record of recovery by her of her freedom against Naylor was offered as evidence, and rejected. The record could have proved the existence of the verdict and judgment as a *fact*, and the legal consequences flowing from the fact, namely, that the petitioner Eliza was a free person. As to George Naylor and his representative, her *status* of freedom is a conclusive fact. And what is the effect of the record as respects other persons? Eliza sued George Naylor, declaring that she was free. He replied that she was his slave. She had a verdict that she was free. By the verdict and judgment, she took to herself all Naylor's title; it was *vested* in her as Naylor had it. *Harris v. Clarissa*, 6 Yerg., 243. He had had her in possession twelve years, and had title by the act of limitations of six years, as to other contestants who might set up claim to her as a slave. She can rely on his title as if he had manumitted her; the record has this effect. It stands on the footing that a recorded deed of manumission to her from Naylor would stand, or that a recorded bill of sale from him to a purchaser would stand. In either case, the title-paper could be given in evidence to prove the title, and the title thus acquired must be deemed valid until some one else legally establishes a better. This record evidence may be used in any suit by a third person, where the evidence is pertinent, of which the court must judge from facts and circumstances appearing on the trial; and to this effect are the adjudications of the state courts generally. *Pegram v. Isabell*, in Virginia, 2 Hen. & M., 210; *Alexander v. Stokely*, 7 Serg. & R., 290, in Pennsylvania; *Vaughan v. Phebe*, Mart. & Y., 6, in Tennessee; *Chancellor v. Milton*, 2 B. Mon., 25, in Kentucky. In Maryland, no decision is found on the subject.

In the next place, the record operates on the *status* of the person; it sets him free or pronounces him a slave, and binds him by the verdict either way. *Shelton v. Barbour*, 2 Wash. (Va.), 82. In some of the states, the suit may be in equity, and the *status* of freedom be established by a decree. *Fishers' Negroes v. Dobbs*, 6 Yerg., 119; *Reuben v. Paraish*, 6 Humph., 122.

It is ordered that the judgment of the circuit court be reversed, and the cause remanded for another trial.

PACKET COMPANY v. SICKLES.

(5 Wallace, 580-599. 1866.)

STATEMENT OF FACTS.—Sickles & Cook were the owners of a patent for a contrivance for saving fuel in the use of steam-engines. The Packet Company entered into a contract with them for the use of the contrivance on their boat during the life of the patent, if the boat should last so long, agreeing to make

compensation at a rate agreed upon. On the trial of this case certain evidence was offered, the nature of which, and the rulings of the court, will appear from the opinion.

Opinion by MR. JUSTICE NELSON.

When this case, or one of the class, was formerly before this court [24 How., 333], in which the record of the former recovery was in evidence, it was claimed that, without any extrinsic evidence, it concluded the defendants from again denying the existence of the contract, or from disproving any other of the averments in the first count of the declaration, and it had been so ruled by the court below. This court, when the case came up on error, agreed that the record was properly admitted as evidence of the former trial between the parties, but held the pleadings, verdict and judgment did not furnish the necessary proof to show that the contract in controversy in the suit then on trial had been before agitated, and conclusively adjudicated in the former trial in behalf of the plaintiffs; and that the verdict had been rendered upon the entire declaration, and without special reference to the first count.

The record, with the pleadings and verdict, furnished evidence that the same matters might have been litigated on that trial, and afforded ground for the introduction of extrinsic evidence to show that the same contract had been in contest before the court, and had been referred to the decision of the jury, but nothing more. For this reason the judgment was reversed, and a new trial ordered.

§ 2639. *Where a former judgment is put in evidence, and supported by parol evidence, this evidence may be rebutted.*

Taking this view of the application and effect of the record of the former trial, the plaintiffs introduced in this case extrinsic evidence, and have endeavored to prove the necessary facts which, in connection with the record, would lead to the conclusion that the same contract was in controversy in the former suit, and had been conclusively adjudged in their favor. But this extrinsic evidence was open to be controverted on the part of the defendants. As the record itself did not furnish evidence of the finding of the existence or validity of the contract in the former suit, and hence extrinsic proof was required to this effect, it was of course competent for the defendants to deny and disprove both, as in so doing they did not impeach the record, but only sought to disprove the evidence introduced by the plaintiffs.

The rejection of this evidence, therefore, offered by the defendants on the trial, was error. Whether or not the contract, as proved on the former trial, rested in parol or was in writing, was material. If in writing, there could be no controversy in fact in respect to its terms or stipulations; and its construction and legal effect belonged to the court to determine. If it rested in parol, its terms and conditions depended upon the extrinsic proof, and hence the materiality of the first question put to the witness, as preliminary to further proof. It was important to settle the terms of the contract in evidence on the former trial, in order to determine whether it was the same as the one then in controversy, and, resting in parol, these terms depended very much upon the testimony in the case.

§ 2640. *Unless the record as supported by parol evidence shows that the point must have been decided in the former suit, the record is not conclusive.*

There is another view in this branch of the case that must be noticed. As we have seen, the declaration in the former suit contained four counts, to which the general issue was pleaded, and a general verdict for the plaintiffs.

The first and fourth counts set up two different special contracts relating to the same subject-matters, and which constituted the cause of action between the parties. Now, the extrinsic evidence furnished on the part of the plaintiffs as to the former trial, and the grounds of proceeding therein, tended to prove either count, and was sufficient to have justified the jury in finding either contract. These contracts, as thus set forth, were identical, with the exception of the agreement to settle the proportion of fuel saved by an experiment which had been made, and resulted in the saving, by the use of the cut-off, of three-fourths of the fuel as used by the old throttle valve. The jury, therefore, might have found in favor of the plaintiffs on the contract as set forth in the fourth count, even if they disbelieved the proof of the agreement as to the mode of settling the proportion of fuel saved. Many of the jurors called and examined speak of a contract between the parties in respect to the use of the Sickles cut-off, but so indefinitely it is impossible to determine whether the testimony related to the one set out in first or fourth counts, and no attempt was made to distinguish between the one or the other on the trial.

As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined — that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded. *Wood v. Jackson*, 8 Wend., 10, 16, 31, 36; *Washington, etc., Packet Co. v. Sickles*, 24 How., 333, 343, 345; *Lawrence v. Hunt*, 10 Wend., 80; *Cowen & Hill's Notes to Phillips' Evidence*, part 2, n. 121.

In view of this doctrine, it is quite clear that the record of the former trial, together with the extrinsic proofs, failed to show that the contract in controversy in the present suit was necessarily determined in the former in behalf of the plaintiffs. We agree, if the declaration had contained but the first count, which had set out the contract in controversy in the present suit, the effect of the judgment would have been different. The verdict of the jury, then, could not have taken place without finding the existence and validity of the contract. But, as we have already shown, the record and evidence on the former trial are different, and tend to a different conclusion.

§ 2641. *The secret deliberations of the jury, or grounds of their proceedings, while engaged in making up their verdict, are not admissible evidence of the issues or finding.*

Some of the jurors in the former trial were permitted to testify as to the particular ground upon which they found the verdict. This testimony was not objected to, and therefore is not available as error here. But it is proper to say that the secret deliberations of the jury, or grounds of their proceedings, while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding. The jurors oftentimes, though they may

concur in the result, differ as to the grounds or reasons upon which they arrive at it. The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict. *Wood v. Jackson*, 8 Wend., 36; *Lawrence v. Hunt*, 10 id., 85; *Hitchin v. Campbell*, 2 Blackstone, 827; *Saunders on Pl. & Ev.*, pt. I, 260.

§ 2642. *When a judgment, supported by parol evidence, is submitted to a jury, the merits of the case should also be tried.*

There is another suggestion, also, it may be proper to make, growing out of the rule, now very general both in the federal and state courts, to admit the record of a former trial as evidence to conclude a party from agitating the same matters in a second suit, and that is where the extrinsic proof of the identity of the cause of action is such that the court must submit the question to the jury as a matter of fact; any other matters in defense or support of the action, as the case may be, should be admitted on the trial, under proper instructions. For, if the jury should find against the conclusiveness of the former trial, then this additional evidence would not only be material, but constitute the whole of the proof on which the cause of action or defense must rest. If the extrinsic evidence should be so conclusive that the court could properly hold the record to be conclusive, the trial would of course be at an end, so far as the matters embraced therein were identical with those in controversy. But, if not so conclusive, and the question must be submitted to the jury, then the record and evidence in respect to the former trial would constitute but one of the grounds relied on before the jury in support of the cause of action, or in defense, and be entirely consistent with any other grounds for the maintenance or defense of the suit in the possession of the parties. This must be so, for the reason that if the trial should, in the case contemplated, be confined to the issue growing out of the former trial, and the jury should find against its conclusiveness, nothing would be determined. The former trial, therefore, when its conclusiveness must be submitted to the jury, can be regarded only as a preliminary question, and the merits, independently of this question, should be heard and tried.

§ 2643. *Contracts not to be performed in a year are invalid by the statute of frauds.*

As the case must go down for another trial, and as the validity of the contract set out in the declaration may be involved in that trial, it is proper that we should express our opinion upon it, if, as it was offered to be proved, the contract was not in writing, but rested in parol. We have referred particularly to the contract in the fore part of this opinion. The question raised is whether or not it is within the statute of frauds, and therefore void? The law in this district, it is admitted, is a copy of the English statute on the subject. The patent had some twelve years to run after the date of this contract, which was in June, 1844.

The words of the statute are: "That no suit shall be brought to charge any person upon any agreement that was not to be performed in one year, unless there was some memorandum or note in writing of the agreement," etc. Now, the substance of the contract is that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long.

The statute applies to contracts not wholly to be performed within the year. *Boydell v. Drummond*, 11 East, 142; *Broadwell v. Getman*, 2 Denio, 87. It is insisted, however, that this contract is not within it, because it may, by the happening of a certain event,—the loss or destruction of the boat,—terminate within the year. The answer is that the possibility of defeasance does not make it the less a contract not to be performed within the year. In *Birch v. The Earl of Liverpool*, 9 Barn. & Cress., 392, a contract for hire of a coach for five years, for a stipulated price per year, was held to be within the statute, although determinable by either party at any time within that period.

The same principle was again held in *Dobson and another v. Collis*, 2 Hurlst. & N., 81. That case was the hiring of a traveler for more than a year, subject to a determination by three months' notice. Pollock, C. B., in delivering his opinion, stated that the object of the enactment was to prevent contracts not to be performed within the year from being vouched by parol evidence, when at a future period any question might arise as to their terms. No doubt, he further observes, formerly it was the practice to construe not only penal statutes, but statutes which interfered with the common law, as strictly as possible; but, in my opinion, that is not the proper course of proceeding. Alderson, B., observed: "The very circumstance that the contract exceeds the year brings it within the statute. If it were not so, contracts for any number of years might be made by parol, provided they contained a defeasance, which might come into operation before the end of the first year."

We might refer to many other cases arising upon this statute. They are numerous and not always consistent, for the reason, probably, given by Pollock, C. B., that the courts at first construed the enactment as strictly as possible, as it interfered with the common law. We think the construction given in the cases referred to is sound and adopt it. The result is that the contract in question is void, not being in writing. It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time. All the mischiefs which the statute was intended to remedy apply with full force to it. Judgment reversed, the cause remitted and *venire de novo*.

Dissenting opinion by MR. JUSTICE MILLER.

I dissent from the opinion of the court just delivered.

The points in the case before us for review are whether there was such a contract made as that set forth in the first count of the declaration, and if so, whether it was valid.

§ 2644. *Evidence to contradict a record is inadmissible.*

The only evidence of both these propositions offered by plaintiffs was the record of the former trial, and the testimony of certain jurors on that trial, tending to show that their verdict was based on the same contract which is described in the first count of the declaration in the present suit. If that testimony did not establish both those propositions, then plaintiffs failed in their action, for they offered no other evidence on that issue. If that testimony did show that the contract on which the verdict in the former suit was rendered was the one set up in the first count of the present declaration, then the record established both the making of that contract and its valid character, for a judgment was rendered on that verdict which is still in full force and unreversed. If the testimony of the witnesses tended to show this fact, then

it should go to the jury, for its sufficiency to establish the fact was for them and not for the court. No charge on this subject was asked by defendants, and none given by the court to which defendants excepted.

The main exception sustained by this court is to the offer of defendants to prove, by a competent witness, that the contract, proved in the former trial, was a parol contract. Did this testimony have any tendency to disprove that of the witnesses of plaintiffs, who testified as to the contract on which the former verdict was founded? I am not able to see it.

The witness did not propose to swear that the *terms* of the contract proved on the former trial differed from the terms of the contract counted on in this suit. He was expected to state that the only contract proved in the former suit was a parol contract. None of the witnesses of the plaintiffs said it was other than a parol contract. It was not pretended that the contract relied on in the first suit was a written contract.

§ 2645. *Validity of contract under statute of frauds; conclusiveness of former judgment.*

It is said that if the contract was in parol, it is void as against the statute of frauds, and that question could not be concluded by the former judgment. I think the law is otherwise. In the case of *Smith v. Whiting*, 11 Mass., 445, the supreme court of Massachusetts says: "It is apparent from the pleadings that this very demand has been once tried and determined; and although the court may have decided wrong in rejecting the evidence in the former suit, yet this is not the way to remedy the misfortune. Exceptions might have been filed to the opinions of the judge, or a new trial had upon petition. We must presume that this very matter has been tried, and it is never permitted to overrule the judgment of a court having jurisdiction by another action." To the same effect is the case of *Grant v. Button*, in the supreme court of New York. 14 Johns., 377.

§ 2646. *Estoppel as to matter of law.*

If the law be, as claimed, that there can be no estoppel as to matter of law, but only as to matter of fact, what becomes of the estoppels by judgments rendered on demurrer? The authorities in favor of estoppels in this class of cases are numerous. The case of *Goodrich v. The City*, decided at this term [5 Wall., 566], is directly in point. There the judgment of the state court of Illinois on demurrer, in a former suit between the same parties, was held a bar, although it was intimated that if it had been an open question, this court might have differed with the Illinois court in the construction of the law. All decisions on demurrer must necessarily be on questions of law, for the demurrer admits the facts pleaded and only raises the questions of law which grow out of those facts. If the principle contended for were true, there could be no estoppel by demurrer.

If, then, the jury were satisfied from the record in the former case, and from the testimony of the witnesses, that the terms of the contract on which that verdict was founded were the same as the special contract set out in the present suit, then the verdict and judgment in that case established the existence and validity of that contract for the purposes of this suit, and whenever it may be called in question between the same parties in relation to the same transaction. And the testimony, if admitted, would have had no tendency to disprove either of those propositions, but only to show that the court erred in its judgment in the first suit.

§ 2647. *To render a former judgment conclusive as between the same parties, it is only necessary to show that the same matter might have been and was actually decided.*

Again, if I understand the opinion aright, it is said that it must be made to appear from the record of the former suit, and the testimony of the witnesses, that the former verdict was *necessarily* founded on the contract set out in this suit. It seems to me that when this case was last here before [24 How., 333], the court then stated the proposition much short of this. For the opinion, after alluding to the indefinite character of the pleadings in many actions, says: "It was consequently decided that it was not necessary as between parties and privies that the record should show the question upon which the right of the plaintiff to recover, or the validity of the defense, depended, for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury." The rule, as I understand it, is that to render such former judgment conclusive it is only necessary to show that the same matter might have been decided, and actually was decided.

§ 2648. *While a juror cannot be permitted to impeach his verdict, he is never refused to sustain it.*

Again, it is said in the opinion that the testimony of the jurors in the former trial was incompetent to disclose the grounds of their decision in the former case. I think the rule in those courts where it is adopted at all, and it is rejected wholly in many, is that a juror cannot be permitted to impeach his verdict, but that he is never refused to sustain it. And this only applies to proceedings to set aside that verdict, and not to cases where the question of what was actually decided may arise in another proceeding.

On the whole, I am of opinion that there was but one question in the case, and that was whether the former verdict and judgment were based on the same contract counted on in the present suit, and that the evidence which went to the jury had a tendency to establish that fact, and the evidence rejected by the court had no tendency to disprove it.

§ 2649. **Judicial records, generally.**—The record of a court of competent jurisdiction is conclusive as to all facts which appear to have been passed upon in a case between the same parties, involving the same property, and where the second suit is brought for the same object or purpose. But in a proceeding for the forfeiture of a distillery and the property connected with it, for alleged violation of the revenue laws, the record of a prior forfeiture of a certain amount of whisky belonging to the same distillery, in a proceeding in another court, is not conclusive proof that the distillery and all the other property mentioned in the information are subject to forfeiture for the frauds charged. But such a record may be taken into consideration as a fact bearing on the question of the frauds charged, and as corroborating witnesses for the government. *United States v. One Distillery*, 2 Bond, 399. See §§ 258, 362, 914, 990, 2276.

§ 2650. A paper filed in the cause, which does not constitute a part of the record of the cause, cannot be used to explain or qualify the statements of the record itself. *Sargeant v. State Bank of Indiana*, 12 How., 371.

§ 2651. What has been done in a court of record must be proved by its record, and cannot be proved by parol; and therefore parol evidence is inadmissible in aid of the record in order to establish an estoppel. *Putnam v. New Albany*, 4 Biss., 365.

§ 2652. When a record of proceedings is used in evidence, the presumption is in favor of the proceedings and not against them. *Nelson v. Moon*, 3 McL., 319.

§ 2653. The record of judicial proceedings of a court of competent jurisdiction, properly certified, is not rendered incompetent as evidence on account of errors and irregularities in the proceedings after they were instituted. *Barton v. Forsyth*, 20 How., 532.

§ 2654. If the record of proceedings in equity has not been made out in full by the clerk,

the original papers, docket entries, and minutes of the proceedings, and the decree, may be read in evidence. *Bank of United States v. Benning*, 4 Cr. C. C., 81.

§ 2655. The dismissal of a suit, or a part of a cause of action, or the withdrawal of a pleading, does not authorize the removal of the pleading itself, unless the court for good reason shall order that to be done. It remains a part of the record, and may be relied on as evidence in the case, if competent and material. *Lyster v. Stickney*, 12 Fed. R., 609.

§ 2656. Under the act of March 3, 1797, chapter 67, the judge who transmits the petition for remission to the secretary of the treasury must state the facts which appeared on the summary inquiry before him, and not the evidence of the facts; and these facts must be proved by competent evidence. Where there was no statement of facts, and the only evidence to support the petition was the oath of the party, the proceeding before the judge was held a mere nullity. *The Margareta*, 2 Gall., 515.

§ 2657. On the trial of an indictment for perjury, alleged to have been committed in the court in which the trial is had, the record of the case need not be produced. *United States v. Erskine*,* 4 Cr. C. C., 299.

§ 2658. The proper evidence of the pendency of a suit is the record of the court. *United States v. Coons*, 1 Bond, 1.

§ 2659. The docket entry of an action, proved to have been made by the proper officer, is admissible as evidence of the pendency of the action. *Philadelphia, Wilmington, etc., R. Co. v. Howard*, 13 How., 307.

§ 2660. The records of a court are admissible in evidence to show that a suit is pending therein, although a term of court has intervened between the certification of the record and the time of using it in evidence, since the jury may infer that it is still pending. *Hagan v. Lucas*, 10 Pet., 400.

§ 2661. When a formal record is not required by law to be kept, docket entries which are permitted to stand in place of it are admissible evidence. *Philadelphia, Wilmington, etc., R. Co. v. Howard*, 13 How., 307.

§ 2662. Where docket entries stand in place of the record, or are themselves the record, they are admissible in evidence as the record. *Washington, etc., Steam Packet Co. v. Sickles*, 24 How., 333.

§ 2663. Where docket entries stand in the place of any other record, and are regarded by the court that makes them as the record, they receive from other courts the same consideration, as a record, as is accorded to them by the court that permits them to stand in the place of any other record, provided that there is no express provision of law prescribing any other record. *In re Coleman*, 15 Blatch., 406.

§ 2664. The record of the appointment of a guardian by a court of general jurisdiction, when offered in evidence, is conclusive as to the residence of the minors. *Sprague v. Litherberry*, 4 McL., 442.

§ 2665. A marshal's return, when made part of the record, cannot be impeached by a party to that record, in a subsequent suit. *Vogler v. Spough*,* 4 Biss., 288.

§ 2666. The allegations of a libel cannot be contradicted by a party to the record in a subsequent suit. *Ibid.*

§ 2667. If a note as described, in proceedings for confiscation by the United States, differs from a note on which a civil suit is brought, parol evidence is not admissible in the civil suit to prove that they are the same. *Ibid.*

§ 2668. Upon an indictment under the postoffice law of 1825 for receiving a land warrant, knowing it to have been stolen from the mail by the person from whom defendant received it, the record of the conviction of the latter for stealing "a letter containing land warrants" is admissible in evidence to show the guilt of the thief in stealing the letter containing land warrants, but not the particular warrant charged to have been received by the defendant. *United States v. Keene*, 5 McL., 509.

§ 2669. On the strength of the act of 1795, making it the duty of the grand jury to indorse on the presentment the name of the person on whose information it was found, it was held allowable to show the time when a witness testified to the grand jury by the record of the presentment. *Virginia v. Gorden*, 1 Cr. C. C., 48.

§ 2670. If the parties to a suit have agreed to extend the time for bringing it until the decision of the questions involved in another suit then pending, the record of the latter is admissible to show its termination. *Home Insurance Co. v. Baltimore Warehouse Co.*, 3 Otto, 527.

§ 2671. The vendor of a chattel agreed with the purchaser that if the latter would defend a suit brought by a third person for the chattel, he, the vendor, would make good the damages. The third person having recovered in his suit, it was held that the record of such suit was admissible in an action by the purchaser against the vendor, not to prove the title of the third person, but to prove a recovery and the amount of damages. *Sanders v. Hamilton*,* 2 Hayw. (N. C.), 282.

§ 2672. When a record is offered in evidence to support a sheriff's deed, the transcript cannot be impeached by evidence that the record is imperfect, if it shows a proper judgment and execution. *Lanning v. Dolph*,* 4 Wash., 625.

§ 2673. In an action against a surety on a marshal's bond for failure of the marshal to account for moneys received by him, the dockets and records of the court of which he was an officer, showing judgments and executions, the receipt of money upon them by the marshal, and his admissions of the receipt thereof by himself and his deputies, are competent evidence, and conclusive until reversed by a competent power. *Williams v. United States*, 1 How., 290.

§ 2674. Where the question in a real action is whether the land is included in a survey and deed made to the plaintiff, the record of a suit between the defendant and plaintiff's grantor is evidence on this point if the plaintiff was at that time the real owner of the land. *Jones v. Miller*,* 1 McC., 535.

§ 2675. The plaintiff in an ejectment suit, who claims under a sale under a decree of foreclosure of a mortgage, may introduce as evidence in chief the record of the foreclosure suit, whether the defendant in that suit was served with a subpoena or not, and although the defendant claims under a deed from the mortgagor made prior to the mortgage. *Dirst v. Morris*, 14 Wall., 484.

§ 2676. The record of a recovery in ejectment against the grantee of land is admissible in evidence in an action of covenant on a warranty of title, brought by the grantee against the grantor, although the grantee was a witness for the plaintiff in the ejectment suit. *Griffin v. Reynolds*, 17 How., 609.

§ 2677. In an ejectment suit the record of an ejectment suit for the same land brought against the defendant by a person under whom the plaintiff claimed, in which judgment was rendered for the defendant, was received in evidence, not as conclusive, but to have such effect as the jury might think it entitled to. *Fellows v. Pedrick*, 4 Wash., 477.

§ 2678. In an action of ejectment in which the plaintiff claimed under a sale by the marshal upon a *fieri facias* against one O., under whom the defendant also claimed, the plaintiff was permitted to give in evidence the record and proceedings in three cases and three writs of *fieri facias* against O., which had not then been returned to the clerk's office, with the indorsement thereon, and the schedule of property upon which they were levied, which were produced by the marshal; also the private book of entries kept by the marshal of his official sales, in which was an entry of the sale of the property for which the suit was brought, made on a certain day by the marshal's clerk, who was not a deputy, together with proof that this entry was a true copy from an original memorandum made by the deputy at the time of the sale, which original paper had been lost, and that the entry was made according to the usage and practice of the marshal's office. He was further permitted to offer a written return of the said writs of *fieri facias*, stating a sale of the property to the plaintiff, which return was made after the impaneling of the jury in the cause. *Linthicum v. Remington*, 5 Cr. C. C., 546.

§ 2679. In an action of ejectment, the plaintiff introduced in evidence the record of a partition suit which had resulted in a decree of sale of the interests of a number of the parties, under which sale plaintiff derived his title as purchaser. The defendants, being strangers to these proceedings, were not allowed to object to the admission of the record and deed of sale, that the sale had not been conducted regularly, and the decree of sale had been rendered against infants by default, and did not prescribe the manner of sale. *Gregg v. Forsyth*, 24 How., 179.

§ 2680. In an action of trover by an assignee in bankruptcy against the bankrupt and another for the conversion of goods belonging to the estate, the whole record of the proceedings in bankruptcy, including the schedules annexed to the petition, are admissible in evidence. But the schedules are not evidence for the bankrupt, being his own declarations as to the title of the property in question. *Carr v. Gale*, 3 Woodb. & M., 38.

§ 2681. In an action of trover for a slave, if the plaintiff has, in a former action against the defendant, claimed and recovered for the hire of the slave up to a time subsequent to the institution of the action of trover, such claim and judgment are conclusive evidence of a waiver of any unlawful conversion. But if, in making the claim for the hire of the slave, he did not mean to extend it to a time subsequent to the commencement of the action of trover, then such mistaken claim is not so conclusive. *Semmes v. Sherburne*, 2 Cr. C. C., 367.

§ 2682. In a suit for freedom, where the petitioners, having belonged to the defendant at the time of her marriage, claimed under a deed of manumission by the deceased husband freeing them at his death, the record of a suit for alimony by the defendant against her husband, pending at the date of the manumission, and in which an injunction had been issued against him preventing him from conveying away his property, was admitted in evidence. *Negro Clagett v. Gibson*, 3 Cr. C. C., 359.

§ 2683. In an action upon an open account, proceedings in a suit in equity to which the plaintiff and defendant were parties may be given in evidence to show that one of the items

claimed against the plaintiff in this action was in that proceeding charged against the estate of which the plaintiff is executor. *Barry v. Barry*, 3 Cr. C. C., 120.

§ 2684. In an action against a surety on an administration bond, where the issue is waste by the administratrix, the settlement by the orphans' court of the administration account is not conclusive evidence for the defendant. *Beatty v. State of Maryland*, 7 Cr., 281.

§ 2685. Where an officer of the government charged with the keeping, disbursement and transfer of the public moneys is indicted, under the act of August 6, 1846, for the loaning of such moneys, and those to whom he loaned it are jointly indicted with him for advising and participating in the unlawful act, and the principal defendant, before the impaneling of the jury, enters a plea of *nolo contendere*, the record of his conviction is *prima facie* evidence of his guilt in the trial of the other defendants, and is admissible. *United States v. Hartwell*, 3 Cliff., 221.

§ 2686. Evidence is not admissible to show that an allegation in a record, that one of the defendants appeared in the suit by attorney, is false, where the record is used in another suit between the same parties. *Dilworth v. Johnson*,* 6 Fed. R., 460.

§ 2687. In order to prove the condemnation of a vessel it is only necessary to produce the libel and the sentence. It is useless to read the proceedings at length. In an action on a policy of insurance upon the vessel, a deposition appearing among such proceedings is not admissible to prove that the vessel was not in the due course of her voyage when she was captured, and the condition she was in at the time of the capture, these proceedings having been read by the plaintiff merely for the purpose of proving the libel and condemnation, and the defendants having reserved to themselves every objection to their contents. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cr., 206.

§ 2688. If part of a record be produced to prove a fact, and is deficient, it cannot be aided by evidence *dehors*, but the whole record must be produced. *James v. Stookey*,* 1 Wash., 332.

§ 2689. The records of the Cathedral church of the diocese to which New Orleans belonged at the time the canon law, as sanctioned by the church of Rome, was in force in Louisiana, showing an ecclesiastical proceeding against a man for bigamy, were held to be inadmissible evidence of the validity of a marriage, in a civil suit. *Gaines v. Hennen*, 24 How., 553.

§ 2690. The record of a trial for bigamy, whether it resulted in conviction or acquittal, is not admissible in a suit by the daughter of the accused, against a defendant who does not claim title to the property in controversy under the father of the plaintiff. *Patterson v. Gaines*, 6 How., 550.

§ 2691. In a suit on a policy of insurance, where the burning of the building insured by the plaintiff himself is alleged in defense, the indictment, trial and acquittal of the plaintiff in a criminal court for arson for the same burning is entitled to no weight. *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Biss., 31.

§ 2692. A. shipped a cargo to B. to be sold for his account. After the cargo was received by B., A. assigned it to C., advising B. of the assignment by letter, and desiring him, in case he had already made a remittance on account of the shipment, or otherwise disposed of the funds arising from it, to make good to C., out of any funds in his hands, the full net proceeds of the shipment. B. replied that he had already remitted to A., and that whatever balance should be found due to A. would be paid to any one authorized to receive it. A. wrote a second letter to B., telling him to pay to the order of any one holding the aforementioned assignment any balance of his property to an amount not exceeding the value of the cargo. A. and C. brought a bill in equity against B., praying an account of the proceeds of the cargo, and of the payments and remittances on account of the same, and of the balance on hand; and that the defendant might admit funds in his hands belonging to A. to the amount of the value of the cargo, or render an account of the effects of A. in his hands, at the time he was notified of the assignment, and of the disposition thereof. It was held that the record of former proceedings in a court of equity between A. and B. alone, in which the balance in favor of A. as against B. was found to be a certain amount, was not admissible in evidence. *Baring v. Fanning*, 1 Paine, 549.

§ 2693. The record of a court-martial of two soldiers for stealing a package of money from an officer is not admissible evidence of the amount of money, in a suit by that officer in the court of claims, brought by that officer under statutory provisions allowing him to establish the loss by decree of that court, as a defense to a suit in a federal court by the United States, for the amount lost. *United States v. Clark*, 6 Otto, 37 (§§ 3636-40).

§ 2694. The record of a suit against the maker of a sealed note is not evidence of the assignment of the note in a suit against the assignor, so as to dispense with the production of the original. *Sebree v. Dorr*,* 9 Wheat., 558.

§ 2695. In an action to establish the title of the plaintiff to certain certificates for a portion of the public debt of Texas, alleged to have been unlawfully sold to the defendant by plaintiff's agent, the record of a former suit between the agent and the defendant with respect to the certificates, in which the pleadings were signed by the counsel and not by the parties, can-

not be resorted to to prove admissions of the respective parties. *Combs v. Hodge*, 21 How., 397.

§ 2696. In an action for a vexatious suit and malicious holding to bail, in one action only, the records of other actions brought by the defendant against the plaintiff cannot be given in evidence. *Ray v. Law*, Pet. C. C., 207.

§ 2697. Where the purchaser of property of a deceased from executors sues the executors to recover back the purchase money, on a recovery of the property from him at the suit of the heirs, the proceedings and judgment in the latter suit are not evidence except to show a recovery of the property by a paramount title. *Owings v. Hull*, 9 Pet., 607.

§ 2698. In an action for libel, the alleged libel consisted in a charge that the plaintiff had been sued, that his wife was about to sue for a divorce, and that he had in consequence put his property out of his hands. The defendant, among other defenses, pleaded the truth as a justification. The plaintiff offered in evidence the record of a divorce suit brought by his wife against him for adultery, some time after the libel suit was instituted, the answer in which charged that the suit was instigated by the defendant in the libel suit, together with depositions taken in the divorce suit, and the record of its dismissal, which evidence was received. *Held*, that the evidence was improperly received, because (1) the plaintiff's answer in the divorce case was made when it could neither be contradicted nor denied by the defendant; (2) the depositions were taken in a suit to which the defendant was not a party, and when he had no right to contradict or cross-examine. *Tappan v. Beardsley*,* 10 Wall., 427.

§ 2699. Though it is true that when one party introduces and reads from the record of a suit that which suits his purpose, the other party may read for his own benefit all that relates to that subject, or require the party introducing the record to do so, yet, the fact that a party uses a record or part of it to establish a fact that can only be established by record, does not authorize him to use anything else that may be found in the record, if irrelevant to the issue, or in violation of established rules of evidence. *Ibid*.

§ 2700. In order to constitute a record evidence of the facts in it, the parties must be the same in both cases. A record of a court-martial of two soldiers is not admissible to prove the facts it states, in a suit by an officer in the court of claims. *United States v. Clark*, 6 Otto, 40 (§§ 3636-40).

§ 2701. The validity of a will, in relation to real estate, being open for decision upon an issue of *devisavit vel non* directed out of chancery, the proceedings in the orphans' court, upon the offer of the will for probate, as a testament of personal estate, and the decree of the prerogative court refusing probate, are inadmissible, where the state law considers the jurisdiction of the ordinary as similar to that of the ecclesiastical court in England, and confined to testaments of personal estate. *Harrison v. Rowan*, 3 Wash., 580.

§ 2702. The record of a former suit between the same parties, with reference to the same property, is admissible in evidence if it conduces to prove any fact material to the issue. Thus, in an action of *indebitatus assumpsit* for work and labor of certain slaves of the plaintiff, the record of a former suit between the same parties, which showed that the defendant had, by an order of the court, caused the same slaves to be taken from the plaintiff and delivered to him, and that, at a subsequent term of the court, the slaves were again ordered to be restored to the plaintiff, was held admissible in evidence, as conducing to prove the length of time the defendant had possession of the negroes. *Janes v. Buzzard*, Hemp., 240.

§ 2703. The production in evidence of the record of a chancery suit will not affect those not parties to such record. *Dick v. Balch*, 8 Pet., 30.

§ 2704. The record of a suit between others is not competent evidence. *Townsley v. Sumrall*, 2 Pet., 170.

§ 2705. The record of bankruptcy proceedings under the act of 1841, if not conclusive against the creditors, is at least *prima facie* evidence that all the facts necessary to sustain the decree were proved before the court. *Shawhan v. Wherrit*, 7 How., 627.

§ 2706. When a suit by an assignee in bankruptcy in the same court in which the adjudication was had is taken to the circuit court on a writ of error, it cannot be objected that there was no evidence of the adjudication and the appointment of the plaintiff, when the records showing these facts were produced and recognized in evidence, no objection having been made below that they were not formally read or offered in evidence. *Andrews v. Graves*, 1 Dill., 108.

§ 2707. When a discharge in bankruptcy is given in evidence in bar of a debt, the record cannot be impeached by showing that the bankruptcy court had no jurisdiction because of the citizenship of the bankrupt. *Lathrop v. Stewart*,* 6 McL., 631.

§ 2708. On an application to the bankruptcy court for a discharge of the bankrupt from arrest, and for satisfaction of a judgment obtained in a state court, where the record of the proceedings and judgment of the state court, produced before the bankruptcy court, imported on their face, according to the practice and course of proceedings in the state court under the

state law, that the suit was one to recover a debt created by the fraud of the debtor, the bankruptcy court decided that it would not go behind that record to question its verity, though the fact that the suit was for fraud did not appear from the declaration alone. *In re Robinson*, 6 Blatch., 253.

§ 2709. If A. sell a chattel to B. and agree that he will make good the damages if B. will defend a suit against him for the property, and a recovery is had against B. in the suit, the record of such recovery may, in a suit by B. against A. on his promise, be read to prove that there was a recovery, but not to prove title in the third person, since A. was not a party or privy. *Sanders v. Hamilton*,* 2 Hayw. (N. C.), 282.

§ 2710. Papers from the probate records, which show that a certain person was treated by the probate court as guardian of a *non compos*, afford strong *prima facie* evidence, after a long lapse of time, to supply the direct proof of a probate appointment. *Thomas v. Hatch*, 3 Sumn., 170.

§ 2711. As between an administrator or executor and one indebted to the estate of the deceased, a settlement in the probate court is not conclusive evidence of the payment of the debt and the discharge of the debtor. *Butterfield v. Smith*, 11 Otto, 570.

§ 2712. In an action of debt upon a guardian's bond, the court refused to permit the defendant, in order to show that the orphans' court had no jurisdiction or authority to require and take the bond, to give evidence to prove that no land descended nor was devised to the orphan in that county; and that he was not entitled to a distributive share of the personal estate of the intestate, or to a legacy of bequest under a last will and testament of any person on whose estate any administration had been granted in the county; and that no friend of the orphan had applied to the orphans' court to require the guardian to give bond for the performance of his trust. *United States v. Bender*, 5 Cr. C. C., 620.

§ 2713. A defendant's being beyond the jurisdiction of the court is not conclusive evidence that the judgment rendered against him was void. He may have left behind counsel to defend suits brought against him in his absence. *Landes v. Brant*, 10 How., 348.

§ 2714. The report of a master in chancery, on a question of fact referred to him, and confirmed by the court, is proper evidence of that fact between the same parties in any subsequent litigation. *Hopkins v. Lee*, 6 Wheat., 109.

§ 2715. When in an action for an escape the declaration stated the judgment on which the seizure had been made to be for \$5,590, and the record showed the judgment to be for \$5,522.83 and costs, the record is not admissible in evidence. *Suydam v. Aldrich*,* 3 McL., 383.

§ 2716. File marks made by the clerk on papers filed in court, or on execution papers filed with the sheriff, are not conclusive evidence of the time of filing such papers, unless made so by statute. So held where a petition in bankruptcy, and an execution against the bankrupt's property, were each marked as filed at the same hour of the same day. *In re Roberts*, 8 Biss., 426.

§ 2717. **Verdict and judgment.**—A verdict cannot be given in evidence in a suit by one of the parties to the suit in which it was rendered against a stranger. It is immaterial that the party against whom it was offered had an opportunity of cross-examining, if the verdict could not be admitted in his favor. *Hurst v. McNeil*, 1 Wash., 70. See § 258. See, also, JUDGMENTS.

§ 2718. If a judgment record in a former action, pleaded as an estoppel, does not upon its face show that the verdict was rendered upon the same issue, evidence *aliunde* is necessary to prove that the precise point in controversy was submitted to the jury. But this may be supplied by the admission of counsel. *Merchants' International Steamboat Line v. Lyon*, 12 Fed. R., 63.

§ 2719. Verdicts are evidence between parties and privies only. In a petition for freedom, the record of a suit in which the ancestor of the petitioner recovered her freedom against one to whom she had been sold by the present defendant is not admissible to prove the freedom of the petitioner. *Davis v. Wood*, 1 Wheat., 6.

§ 2720. Evidence cannot be given of a judgment rendered in a case between different parties, for a different piece of land, and a different title. *Delancy v. McKeen*, 1 Wash., 354.

§ 2721. A verdict and judgment between different parties, and upon a different question, are not admissible in evidence. *James v. Stookey*,* 1 Wash., 330.

§ 2722. A former judgment is evidence only where it is between the same parties or their privies. *Taber v. Perrot*, 2 Gall., 565.

§ 2723. In an action for damages for a nuisance, a former verdict and judgment in an action for the continuance of the same nuisance are admissible in evidence; but should have but little weight when founded on erroneous instructions on the law. *Richardson v. City of Boston*, 24 How., 188.

§ 2724. In *assumpsit* upon a promissory note the defendant is not estopped from pleading a judgment which this plaintiff has previously recovered against him on the note, by the record of an action between the parties upon that judgment to which he had pleaded *nul tiel record*.

and the plaintiff had taken a nonsuit. The second record is not admissible in evidence. *Michigan Ins. Bank v. Eldred*, 6 Biss., 370.

§ 2725. A decree fixing a valuation, taken in connection with parol testimony, is evidence in a subsequent suit with regard to the property between the same parties. *Nations v. Johnson*, 24 How., 195.

§ 2726. When a judgment in a former action is offered in evidence, what was in issue and determined in the original action may be shown by extrinsic evidence, if not disclosed by the pleadings. *Davis v. Brown*, 4 Otto, 423.

§ 2727. Whenever the same question has been in issue, tried, and judgment rendered, it is conclusive of the issue so decided in any subsequent suit between the same parties; and where, from the nature of the pleadings, it is left in doubt on what precise issue the verdict or judgment was rendered, it is competent to ascertain this by parol evidence on the second trial. *Campbell v. Rankin*, 9 Otto, 261.

§ 2728. By a judgment put in evidence is understood the exemplification of the judgment, embracing all the pleadings and proceedings on which the judgment is founded. *Owings v. Hull*, 9 Pet., 607.

§ 2729. A record, when received in evidence, must be held conclusive between the parties as to all matters decided by the court. And if the court has stated in its judgment that legal notice had been served on the defendant, that fact can no more be controverted than any other part of the record. *Sargeant v. State Bank of Indiana*, 4 McL., 339.

§ 2730. In an action of trespass by a marine in an exploring expedition against the commander for causing him to be whipped, the proceedings of a court-martial acquitting the commander of the charge are not admissible in evidence. *Wilkes v. Dinsman*, 7 How., 89.

§ 2731. The admission in evidence of a copy of a record of the district court of the United States, authenticated according to the act of congress, cannot be objected to as being a copy of a copy, because, originally, it was a record of a state court, the person against whom it is offered having procured it to be placed on record in the federal court. *Urtetiqui v. D'Arbel*, 9 Pet., 692.

§ 2732. Where a libel was dismissed by the court, because the libelant did not appear to prosecute it, this is not such a judgment on the merits of the case as to be binding on the court of another state. *Sarchet v. Sloop Davis*, 1 Crabbe, 185.

§ 2733. Where a judgment was recovered in the court below against a corporation by a wrong name, the judgment binds it; and to make such record evidence against the corporation in this court, it is admissible to show that this was an erroneous name of the same corporation sued in this court. *The Lafayette Ins. Co. v. French*, 18 How., 404.

§ 2734. In a suit on a special contract, the plaintiff introduced in evidence the record of a former suit between the same parties, in which the plaintiff declared on the same special contract, and also on common counts, and in which he recovered judgment. The verdict in this suit was rendered on the special counts and the common counts, but the verdict in the subsequent stage of the proceedings was applied by the court to the first of the special counts. It was held that this record was admissible, but that it was competent for the defendants to show, by parol, the state of facts which existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. *Washington, etc., Steam Packet Co. v. Sickles*, 24 How., 333.

§ 2735. In debt upon a judgment of a justice of the peace in Pennsylvania, entered of record in the court of common pleas of a certain named county in Pennsylvania, a record of the court of common pleas, certified by the prothonotary and the presiding judge, according to the act of congress, and stating a transcript of a judgment rendered by a justice of the peace, certified to the court by the justice, was held to be such a record as was described in the declaration, although it consisted of short docket entries only, stating a summons, and judgment by default, upon a note and an open account. *Hade v. Brotherton*, 3 Cr. C. C., 594.

§ 2736. A judgment against *James B.*, administrator of *C.*, is admissible in evidence against *Joseph B.*, administrator of *C.*, upon parol proof that they are one and the same person, and that said Joseph B. appeared and went to issue under the name of James B. *Stevellie v. Read*, 2 Wash., 274.

§ 2737. A decree in chancery, under the authority of which a deed has been executed, is admissible in evidence to prove the validity of the deed, when such deed forms a link in the title under which a party claims, although the decree was rendered in a proceeding between others. *Barr v. Gratz*, 4 Wheat., 213.

§ 2738. It is a general rule that a person cannot be affected, much less concluded, by any evidence, decree or judgment, to which he is not actually, or in consideration of law, privy. But this rule has been departed from so far as that wherever reputation would be admissible evidence, there a verdict between strangers, in a former action, is evidence also; such as in cases of pedigree. *Patterson v. Gaines*, 6 How., 550.

§ 2739. A decree in partition proceedings in Illinois which finds that due notice had been given to all the defendants is *prima facie* evidence of the fact. *Secrist v. Green*, 3 Wall., 744.

§ 2740. In an action on a replevin bond, the judgment in the replevin suit, given for the return of the property, may be given in evidence to show the amount of damages which the plaintiff sustained. *Gorman v. Lenox*, 15 Pet., 115.

§ 2741. A judgment recovered on an account against the principal debtor by confession is evidence of the amount due on the account in an action against a guarantor. *Drummond v. Prestman*, 12 Wheat., 515.

§ 2742. The judgment against the debtor is conclusive evidence of the debt in a *scire facias* against the bail. *Morsell v. Hall*, 13 How., 212.

§ 2743. A judgment against the principal is *prima facie* evidence against the surety, but the latter may show collusion and fraud, that the demand has been paid, or that there is a clerical mistake in entering up the judgment. *Berger v. Williams*, 4 McL., 577.

§ 2744. A judgment at law against the administrator of an indorser is evidence of the existence of the debt against the surety of the administrator and the fraudulent grantee of the intestate. *McLaughlin v. Bank of Potomac*, 7 How., 220.

§ 2745. A judgment against one of several executors is not conclusive as to the demand against another executor qualified in a different state from that in which the judgment was rendered. But such a judgment may be admissible in evidence in a suit against an executor in another jurisdiction, for the purpose of showing that the demand has been carried into judgment in another jurisdiction, against one of the testator's executors, and that the others are precluded by it from pleading prescription or the statute of limitations upon the original cause of action. *Hill v. Tucker*, 13 How., 458.

§ 2746. Certain slaves being seized in execution of a judgment against a debtor and his surety, a delivery bond was given by the defendants, which, being forfeited, operated as a judgment against both. The surety seized the slaves, took them from the possession of the principal, and sold them, and applied the proceeds in discharge of the judgment. In an action by the principal against the surety for this trespass, the latter was permitted to give in evidence the original judgment and the receipt for its payment, for the purpose of explaining the motive of the surety in committing the trespass, and to reduce or abate from the damages the amount paid in discharge of the judgment. The surety having agreed with the principal, before the trespass, to make an arrangement with the judgment creditor for the payment of the judgment by instalments, and to credit on said judgment two judgments held by the principal against the surety, these two judgments were held admissible in evidence, as conducing to show that the principal was less blamable than charged by the surety, in removing the slaves, which were afterwards seized by the surety, into another state. Evidence that the original judgment creditor was enjoined from collecting debts was held admissible for the same purpose. *McAfee v. Crofford*, 13 How., 447.

§ 2747. In an action on a judgment rendered in a court having jurisdiction of the case, the evidence on which the judgment was rendered cannot be gone into, unless it may be to show fraud. *Warburton v. Aken*, 1 McL., 460.

§ 2748. An execution cannot be used in evidence in place of a copy of the judgment. *Smallwood v. Violet*,* 1 Cr. C. C., 516.

§ 2749. A verdict can never be given in evidence in favor of a party, if it could not be given in evidence against him. *Alston v. Munford*, 1 Marsh., 266.

§ 2750. A verdict not received by the court, nor in any way made a part of the record, the judgment being entered upon another verdict rendered by the jury upon further consideration, is not evidence for any purpose. *United States v. Addison*, 6 Wall., 291.

§ 2751. The record of a judgment that a woman was born free is not conclusive evidence of the freedom of her children in a suit by them against one not a party nor privy to the defense in the mother's action. *Wood v. Davis*, 7 Cr., 271.

§ 2752. A special verdict in an action of ejectment, the judgment upon which (for plaintiff) has been reversed on error with directions to enter a judgment for the defendant, is not admissible in evidence, in a second suit by the plaintiff founded upon an alleged newly acquired title, to show the heirship of one of the parties under whom the plaintiff claims. *Smith v. McCoal*, 16 Wall., 560.

§ 2753. A personal judgment rendered without service of process upon the defendant or his appearance in the action is not evidence of any liability, outside of the state in which the judgment is rendered. That the judgment is a joint one against partners makes no difference in respect to those not served. *Public Works v. Columbia College*, 17 Wall., 521.

§ 2754. Upon a petition for freedom, it appeared that in a former petition against another a judgment was rendered for the petitioner upon the default of that person to rejoin. He had in that case disclaimed to hold the petitioner as a slave, to which the petitioner replied certain

facts showing that he had purchased the petitioner and did claim and hold him. Upon being ruled to rejoin to this replication, and failing to comply, judgment by default was rendered against him. *Held*, that the record of this judgment was not *prima facie* evidence of freedom in this suit, although the defendant had, after the judgment in that suit, filed a paper in court praying that the petitioner might be delivered to him. *Negro William v. Van Zandt*, 3 Cr. C. C., 55.

§ 2755. Extrinsic evidence is admissible to prove that the real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; and whenever this is made to appear, the real party is concluded by the judgment, as effectually as if he had been a party to the record. *Clafin v. Fletcher*, 7 Fed. R., 851.

§ 2756. It cannot be objected to the admission of a judgment in evidence that there was no declaration filed in the action in which it was rendered, where a note was filed in that suit as the cause of action, and the judgment was confessed for the amount. *Guttschlick v. Bank of the Metropolis*, 5 Cr. C. C., 435.

§ 2757. An execution is incompetent and cannot be put in evidence unless the judgment upon which it was issued is also produced. *Tindall v. Murphy*,* *Hemp.*, 21; *Campbell v. Strong*, *Hemp.*, 265. See §§ 258, 2717.

§ 2758. The return of an execution by the marshal is conclusive and cannot be contradicted. *Corning v. Burdick*, 4 McL., 133.

§ 2759. On motion to quash an execution it was held unnecessary that the exemplification of a record from Maryland should be authenticated by a certificate of the presiding magistrate, the exemplification being one such as was contemplated by the thirteenth section of the act of 27th February, 1801. *Parrot v. Habersham*, 1 Cr. C. C., 14.

§ 2760. In debt on a sheriff's bond for not paying to the plaintiff money received on executions, the sheriff's return upon the executions that he has satisfied the plaintiff is not evidence for the defendants. The plaintiff was required to prove that the sheriff received the money before the return day of the execution. If the return is produced as evidence of the receipt of the money by the sheriff, it must also be admitted as evidence of the payment over to the plaintiff. *Governor of Virginia v. Wise*, 1 Cr. C. C., 142.

§ 2761. **Judgments of sister states.**—It was the intention of the first section of the fourth article of the constitution to invest congress with power to declare the judgments of the courts of one state conclusive in every other. And the act of congress "to prescribe the mode in which the public acts, records and judicial proceedings, in each state, shall be authenticated so as to take effect in every other state," declaring that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence they shall be taken," makes a judgment as conclusive in the courts in other states as in the state where it was rendered. *Green v. Sarmiento*, 3 Wash., 17. See JUDGMENTS.

§ 2762. The judgment of a court in any state is conclusive in every other state; and if it appears on the record of judgment that the defendant has been served with process, such fact cannot be controverted. *Westerwelt v. Lewis*, 2 McL., 511.

§ 2763. The record of a judgment in a court of another state, authenticated pursuant to the act of congress of 1790, if conclusive evidence in that court is conclusive in every court in the United States. The proof in such a case is in the manner prescribed by the act, and is of as high a nature as an inspection by the court of its own record. *Mills v. Duryee*, 7 Cr., 481.

§ 2764. Where the record of a judgment of a court of another state is introduced in evidence, it is presumed that it conforms to the law and usage of that state, so far as it purports to go. But the contrary may be shown, under a pleading of *nul tiel record*. *Whitaker v. Bramson*, 2 Paine, 209.

§ 2765. The judgments of the state courts import upon their face absolute verity in the courts of the United States. *Earl v. Raymond*, 4 McL., 233.

§ 2766. When a judgment of a court of a neighboring state is offered in evidence in a federal court, the inquiry must be made whether the court had jurisdiction over the parties and the subject. But the facts material to the case, which appear in the record, cannot be contradicted. *Lincoln v. Tower*, 2 McL., 473.

§ 2767. A record of proceedings in a district court of the United States, containing a petition presented to a state court for the purpose of removing the cause to the federal court, accompanied by an oath of the petitioner that he is an alien, is evidence against him to prove his alienage in another suit. *Urtetiqui v. D'Arbel*, 9 Pet., 692.

§ 2768. The decision of the district court in another state, upon a proceeding against a vessel for violation of the law in relation to the slave trade, cannot be evidence in a suit between different parties, brought to recover a penalty inflicted by a different act of congress, for misconduct of the master in not delivering up her certificate of registry, as required by law. *Allen v. United States*, Taney, 112.

§ 2769. In an action on the judgment of another state, the defendant, when offered as a witness, cannot contradict the judgment record, which states that the summons was personally served on him, and contains a copy of the summons and the return. *Logansport Gas Co. v. Knowles*, 2 Dill., 421.

§ 2770. The act of the legislature of Mississippi of March 5, 1846, declaring that "no record of any judgment, recovered in any court of record without the limits of this state, against any person who was, at the time of the commencement of the suit on which the judgment is founded, or at the time of the rendition of such judgment, a citizen of this state, shall be received in any court of this state as evidence to charge such citizen with liability, after the expiration of three years from the time of the rendition of such judgment, without the limits of this state," does not apply to judgments recovered before its passage; and if the action is brought within the three years the judgment is admissible, though not offered in evidence until the period has expired. *Murray v. Gibson*, 15 How., 421.

§ 2771. Proceedings in a state court under which property was sold, being duly certified, and said court appearing to have had competent jurisdiction, are properly received as evidence in the circuit court — at least when coming in collaterally as evidence of title. *Barton v. Forsyth*, 20 How., 532.

§ 2772. The record of a judgment against an administrator in one state is not evidence of the judgment against an administrator of the same estate in another state. *McLean v. Meek*, 18 How., 16.

§ 2773. In an action upon a judgment rendered in another state it may be shown that the judgment was obtained by fraud, or, by proper evidence, that the court had no jurisdiction. *Warren Manufacturing Co. v. Aetna Ins. Co.*, 2 Paine, 501.

§ 2774. **Foreign judgments.**—The libellant, the owner of goods shipped on board of a vessel which was wrecked, alleged that the vessel was stranded by fraudulent concert between the master and wreckers for the purpose of sharing the sum which might be awarded as salvage compensation; that this was unknown to the libellant until he had paid his contributory share of the salvage claim in order to get his property; that the respondents, the owners of the vessel, likewise ignorant of the facts, had also contributed to the salvage claim; but that the latter had, by suit in admiralty at Key West, recovered back the money which they had paid for salvage compensation. It was held that an exemplification of the record of the admiralty suit at Key West, although not admissible as evidence of the confessions of the respondents, was admissible for the purpose of showing the libellant to be the equitable owner of at least a part of the amount thus recovered. *Church v. Shelton*, 2 Curt., 271. See JUDGMENTS.

§ 2775. Under a clause in a policy of insurance that if the American character of the vessel should be questioned it should be sufficient for the assured to prove it so in any court of the United States, the sentence of a foreign court of admiralty condemning the vessel as enemies' property, or as a lawful prize, though admissible, is not conclusive evidence of the character of the vessel. *Calbreath v. Gracy*, 1 Wash., 219.

§ 2776. The sentence of a foreign court of admiralty being full, and showing the ground of condemnation and the property condemned, no other part of the proceedings need be produced. *Hourquebie v. Girard*, 2 Wash., 212.

§ 2777. The record of a foreign court of admiralty is admissible in evidence to prove a condemnation; but between the insurer and the insured, it is only evidence to prove the cause of condemnation. *Russell v. Union Insurance Co.*, 4 Dall., 421.

§ 2778. A sworn copy of the records of a prosecution for bigamy in the ecclesiastical court in Louisiana in 1802 is admissible in evidence when proved to have been taken at the proper office, and produced by the lawful keeper of the records. *Gaines v. Relf*,* 12 How., 472.

§ 2779. An adjudication made by a Spanish tribunal after the cession of Louisiana to the United States, but before possession was surrendered, is held to be *prima facie* evidence of a valid judicial proceeding. *Keene v. M'Donough*, 8 Pet., 308.

§ 2780. In a suit upon a note, the defendant gave in evidence the record of a former judgment between the same parties, rendered in a foreign country, in a proceeding in which the note, among others, was declared on, but in which verdict and judgment for the plaintiff were rendered on the others only, and as to this one no verdict was returned. As to this one the record or judgment contained an entry that the defendant go without day. It was held that the foreign judgment was only *prima facie* evidence, and that the plaintiff might offer evidence to show that the note was withdrawn before the case was submitted to the jury, and by agreement not submitted to the court or the jury, and the counts on it regarded as stricken out, and that the record entry concerning it was a mistake. *Burnham v. Webster*, 1 Woodb. & M., 172.

§ 2781. If the record of a foreign court of admiralty be read in evidence without objection, the documents exhibited in it are also evidence if they would be evidence in the cause if produced. *Russell v. Union Ins. Co.*, 4 Dall., 421.

§ 2782. In an action to recover the insurance on a vessel, the sentence of a foreign court of admiralty condemning the vessel for breach of blockade is conclusive evidence of that fact. *Croudson v. Leonard*, 4 Cr., 434.

§ 2783. Authentication.—It was held in this case that the act of congress as to the authentication of the records of state courts does not apply to the records of United States courts. *Mason v. Lawrason*,* 1 Cr. C. C., 190. See § 979.

§ 2784. The act of congress prescribing the manner in which the records of a state court shall be authenticated in order that they may be admitted in evidence in the courts of other states does not apply to the courts of the United States. And the record of bankruptcy proceedings in the district court of another district, certified by the clerk under the seal of the court, are admissible in evidence in the circuit court of the United States. *Turnbull v. Payson*, 5 Otto, 418.

§ 2785. The act of May 26, 1790, prescribing the mode of proving the judicial records of a state, when used in another state, need not be complied with in order to make such records evidence in a national court in another state. The courts of the United States do not require the certificate of the judge of the state court, that the attestation of the clerk thereof is in due form of law. They determine that matter from their judicial knowledge of the laws of the state where it is made. *Bennett v. Bennett*, Deady, 299.

§ 2786. The act of congress prescribing the mode in which public acts, records and judicial proceedings in each state shall be authenticated so as to take effect in every other state, merely provides a mode of proving public records, leaving them, when proved, invested with the same force and effect which they have at home. It has no bearing on the effect of such public acts and records in the courts of the United States. *Town of South Ottawa v. Perkins*, 4 Otto, 260.

§ 2787. Where any matter or judicial proceeding is certified from the record, the certificate of the presiding judge is required that the authentication is in due form, and this is true in case of the federal as well as of the state courts. *Tooker v. Thompson*,* 3 McL., 92.

§ 2788. A consular certificate cannot authenticate judicial proceedings. *Catlett v. Pacific Insurance Co.*, 1 Paine, 594.

§ 2789. The record of a discharge under insolvent laws of Virginia must be authenticated by the certificate of the presiding magistrate. *Gardner v. Lindo*,* 1 Cr. C. C., 78.

§ 2790. Records of state courts, certified so as to be admissible in evidence in the courts of the state from whence they come, will be admitted pursuant to agreements of the bar. *Smallwood v. Violet*,* 1 Cr. C. C., 516.

§ 2791. To the admission in evidence of a judgment of another state, the seal of the court must be annexed to the record; that it is attached to the certificate of the judge is not sufficient. *Turner v. Waddington*, 3 Wash., 126.

§ 2792. The certificate of the clerk of a court is not evidence that there is or is not a judgment roll on file in his office. It is only evidence that the paper to which it is appended is a true copy of the original on file. Whether the paper is a judgment roll or not must be determined by the paper itself. *Alexander v. Knox*, 6 Saw., 54.

§ 2793. The record of a federal court, attested by the clerk, without any certificate of the presiding judge, is good evidence; the act of congress does not apply to records from federal courts. *Murray v. Marsh*,* 2 Hayw. (N. C.), 290.

§ 2794. In the authentication of a judicial record under the act of congress of 1790, the certificate of the judge to the attestation, in which he states himself to be judge of the fourth judicial circuit of Missouri, does not show that he is "the judge, chief justice or presiding magistrate" of the "circuit court of Knox county," from which the record purports to come, and is therefore insufficient. *Pratt v. King*, 1 Or., 49.

§ 2795. Where the admission in evidence of a judicial record of another state was objected to in a national court, for insufficiency of the certificate of the judge that the attestation of the clerk was in due form, in that it did not appear from the certificate that the person who made it was either the *sole* judge, *chief* justice, or *presiding* magistrate of the court that made the decree, the person having styled himself in the certificate as judge of a certain district in the state, and it appeared from the constitution and laws of the state organizing its courts, that the judge of the district was the judge of the district court which rendered the decree, and the *sole* judge thereof, the certificate was held sufficient under the act of May 26, 1790. *Bennett v. Bennett*, Deady, 299.

§ 2796. The record of a state court having the attestation of the clerk and the seal of the court annexed, together with the certificate of the sole judge of the court that the attestation is in due form of law, is authenticated in the manner required by the act of congress of May 26, 1790, and is admissible in evidence in a federal court. *Owings v. Hull*, 9 Pet., 607.

§ 2797. In a suit upon a judgment of a sister state, the certificate of the clerk of the court in which it was rendered, that the record by which it is attempted to be proved is "a true and

faithful copy of the proceedings had in the said court in the said cause," is sufficient evidence of the correctness of such record. *Maxwell v. Stewart*, 21 Wall., 71.

§ 2798. Copies of the proceedings in the vice-admiralty court of Jamaica are admissible in evidence when certified under the seal of the court by the deputy register, who is certified by the judge of the court, who is certified by a notary public. *Yeaton v. Fry*, 5 Cr., 335.

§ 2799. Foreign judgments are authenticated, (1) by an exemplification under the great seal, (2) by a copy proved to be a true copy, (3) by the certificate of an officer authorized by law, which certificate must itself be properly authenticated. A copy certified under the seal of his arms by a person who states himself to be the secretary of state for foreign affairs, the translation being certified by the consul, is not a substitute for either of these methods, and cannot be admitted when it does not appear that there is any insuperable impediment to the use of either of these three modes. *Church v. Hubbard*, 2 Cr., 187.

§ 2800. Admiralty proceedings on the survey and condemnation of a vessel at a foreign port, under the seal of the court, certified by the register, and accompanied by a certificate of the American consul, under his seal of office, to the official character of the register, are not sufficiently authenticated to render them evidence. The seal of the court does not prove itself. And there should be proof *aliunde*, either that it is the seal of the court, by a witness who knows the fact, or by proof of the handwriting of the judge or clerk, or by an examined copy, compared with the original in the proper office, or some other evidence of similar character. *Catlett v. Pacific Insurance Co.*, 1 Paine, 594.

§ 2801. The certificate of a person who styles himself clerk of Baltimore county court, that the paper to which his certificate is annexed is a copy of a deed taken from the records of the court of that county, if not accompanied by the certificate required by the act of congress that the attestation is in due form is insufficient to entitle the copy thus certified to be received in evidence in a federal court in another state. *Drummond v. Magruder*, * 9 Cr., 122.

§ 2802. The public laws of a state are not admissible in evidence in a federal court unless authenticated as the act of congress requires (act of 26th May, 1790). *Craig v. Brown*, Pet. C. C., 354 (§§ 2608-12).

§ 2803. Where an exhibit in a suit is a transcript of the record of another court, but the decree, although purporting to be made by the court, is defective in not having the signature of the judge to it, it being formal in other respects, having been accepted by the parties and acted on by them, the signature is not indispensable, and other evidence to establish the decree as a record of the court may be considered. *Secombe v. Steele*, 20 How., 94.

§ 2804. Under the act of congress of May, 1790, declaring the mode of authenticating records and judicial proceedings so as to make them evidence in the courts of other states, and requiring the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation of the clerk is in due form, a certificate to the attestation of a record of the supreme court of another state, in which the judge states himself to be "one of the judges of the supreme court" of the state, is not sufficient. *Stewart v. Gray*, Hemp., 94.

XX. FOREIGN LAWS.

§ 2805. **How proved.**—Foreign laws must be proved by appropriate evidence. The court will not take judicial notice of them. The rules of the Spanish land office may be proved by oral testimony. *United States v. Wiggins*, 14 Pet., 347 (§§ 2632-37). See §§ 491, 920, 1006, 2281, 2306.

§ 2806. The statute or written law of foreign countries should be proved by the law itself as written. The common customary or unwritten law may be proved by witnesses acquainted with the law. *Robinson v. Clifford*, * 2 Wash., 2.

§ 2807. The printed acts of the parliament of Great Britain, purchased of the queen's printer, may be read in the courts of the United States as *prima facie* evidence of the laws contained in them. *United States v. Certain Casks of Glass Ware*, * 4 Law Rep., 36.

§ 2808. A foreign law may be proved by a witness who has practiced before the courts of the country, although for a long period since then he has resided in the United States. *Brown's Case*, * 5 Ct. Cl., 571.

§ 2809. A foreign law may be received in evidence when it is found in a statute book, with proof that the book has been officially published by the government which made the law. A book purporting on its title-page to be the statutes of England, printed by the printers to the queen, and identified by a witness, formerly queen's counsel, as an authorized copy of the statutes, and evidence in all the English courts, is sufficiently proven. *O'Keefe's Case*, * 5 Ct. Cl., 674.

§ 2810. In the proof of foreign law the best evidence must be produced. An unwritten law of Spain is sufficiently proved by the sworn testimony of a witness who is a legal practitioner

in Cuba, which is governed by the Spanish law, although he has never resided in Spain. *Molina's Case*,* 6 Ct. Cl., 269.

§ 2811. A volume of the laws of the French government, sent by that government to the supreme court of the United States, is admissible, without further authentication, to prove the foreign law. Where it appeared that a witness, although not a member of the French bar, had studied the French law as a profession, had graduated at the University of Paris, had subsequently engaged in legal pursuits, and was then employed by the French government as legal adviser, he was held competent to prove the French law. *Dauphin's Case*,* 6 Ct. Cl., 221.

§ 2812. A volume of foreign statutes is sufficiently authenticated if it has been received under the authorized reciprocal interchange of statutes between this government and France. If citations from such volume are equivocal, parol testimony of witnesses instructed in the foreign law is admissible. *Rothschild's Case*,* 6 Ct. Cl., 204.

§ 2813. A foreign law, certified by a consul of the United States, under his seal, is not admissible in evidence. A certificate of the proceedings of a court, under the seal of one who states himself to be the secretary of foreign affairs of Portugal, is not evidence. It is error to admit the translation of a foreign law, certified by the American consul, to be read in evidence. *Church v. Hubbard*, 2 Cr., 186.

§ 2814. Laws of a foreign government by which trade is regulated, not proved to have been in writing as public edicts, may be proved by parol. *Livingston v. Maryland Ins. Co.*, 6 Cr., 274.

§ 2815. The written or statute laws of a foreign country are to be proved by the laws themselves, if they can be procured; if not, inferior evidence of them may be received. The unwritten laws or usages may be proved by parol evidence. *Consequa v. Willings*, Pet. C. C., 225.

§ 2816. Although the unwritten law of a foreign country may be proved by witnesses, written laws must be proved by themselves. Thus a decree of the king of Spain cannot be proved by parol. *United States v. Ortega*, 4 Wash., 531.

§ 2817. Foreign laws, like other facts, must be proved to exist before they can be received; and the principle requiring the best testimony is applicable to their admission. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual. *Church v. Hubbard*, 2 Cr., 187.

§ 2818. A foreign written law may be received in evidence in our courts, when it is found in a statute book, with proof that the book has been officially published by the government which made the law. Thus, a volume of the Civil Code of France, sent to the supreme court in the course of our national exchanges of laws with France, being one of the volumes of the *Bulletin des Lois à Paris L'imprimerie royale*, with the indorsement, "Les Garde des Sceaux de France à la court supreme Des États Unis," and acknowledged by congress in the act making an appropriation for the reciprocation of the donation, was held admissible in evidence. *Ennis v. Smith*, 14 How., 400.

§ 2819. Foreign consuls not being intrusted with the power of authenticating the laws of foreign nations, this is not one of those consular functions to which the laws of this country attach full faith and credit; and the mere certificate of a consul to a copy of a foreign law does not render it admissible. *Church v. Hubbard*, 2 Cr., 187.

§ 2820. Courts of admiralty may exercise greater liberality as to the proof of foreign laws than other courts. *The Pawashick*, 2 Low., 142.

§ 2821. The prohibition of a trade by a foreign country, being a subject of municipal arrangement, the law is presumed to be written, and it cannot therefore be proved by parol, unless it is first shown that a certified copy cannot be obtained. *Seton v. Delaware Ins. Co.*, 2 Wash., 175.

§ 2822. The deposition of a lawyer of Norway as to the law of that country governing the presentation of bills of exchange may be received under the statute of Minnesota, which provides that "the existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence, but if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law that is not accompanied by a copy thereof." *Pierce v. Indseth*, 16 Otto, 546.

§ 2823. China being an isolated and peculiar nation, to whose records no way of access is known, it may be proved by the parol evidence of a ship-master trading to that country, that the opium trade is prohibited by its laws. But an answer of the witness that the trade is illegal as far as he knows cannot be received as evidence of the fact. *Wilcocks v. Phillips*, 1 Wall. Jr., 47.

§ 2824. The unwritten law of England may be proved in a court of admiralty, not only by experts but also by text-writers of authority, and by the printed reports of adjudged cases; and the written law may be proved by the printed copies, and be construed with the aid of text-books as well as experts. *The Pawashick*, 2 Low., 142.

XXI. TREASURY TRANSCRIPTS.

SUMMARY — *Authentication of transcripts must follow the statute, § 2825. — Must include whole account, § 2826.*

§ 2825. When a statute, in derogation of the common law, authorizes copies of public documents, authenticated in a certain way, to be used as evidence, the authentication must follow precisely the form prescribed by the statute. By act of congress, 17th March, 1797, § 2, transcripts of treasury books and accounts of officials with the United States are made evidence, if signed by certain officers and authenticated by the seal of the department. *Smith v. United States*, §§ 2827-30.

§ 2826. The transcripts of the treasury books, authorized to be used as evidence, must have the certificate of the proper officer that the transcripts include the whole account, both debits and credits, between the government and the individual. *United States v. Pinson*, § 2831.

[NOTES.— See §§ 2832-2875.]

SMITH *v.* UNITED STATES.

(5 Peters, 292-303. 1831.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.— A writ of error is prosecuted in this case to reverse the judgment of the district court of Missouri, which exercises the powers of a circuit court. In December, 1824, the United States brought an action of debt against the plaintiff in error, to recover \$10,000. The claim arises on a bond signed by the plaintiff, as one of the sureties of Alpha Kingsley, who is alleged to have been appointed a pay-master in the army.

The bond was executed on the 7th day of February, 1810, in which the plaintiff and one Wilson P. Hunt bind themselves jointly and severally to pay to the United States the above sum. The condition of the obligation states "that the said Alpha Kingsley is about to be appointed a district pay-master," etc., "who will from time to time be charged with funds to execute and perform the duties attached to that station, for which he will be held accountable," etc.; and if he shall "well and truly execute the duties of district pay-master, and regularly account for all moneys placed in his hands, to carry into effect the object of his appointment," etc., "then the obligation to be void."

Several pleas were filed and relied on in the defense. In the first plea it is asserted that, from the time of executing the writing obligatory, the said Kingsley did well and truly observe and fulfill the conditions of said bond, according to their tenor and effect. The second plea contains similar allegations except as to accounting for all moneys in the hands of said Kingsley; and, by way of excuse, the plea states that he was removed from office on the 1st day of April, 1815, for various causes assigned; and that, on the 15th of September following, he reported himself to the treasurer of the United States as ready for settlement, but his accounts were not adjusted by the government; that at this time, and long afterwards, Kingsley was solvent, and able to pay the full amount of his defalcation; that no notice was given to him by the treasury department to account for moneys in his hands, nor was any notice given to the defendant below until about the commencement of the suit. And it is alleged that, before the commencement of the suit, Kingsley became insolvent.

In the third plea it is averred that Kingsley, neither at the time the bond was executed nor at any subsequent period, was appointed district pay-master.

The fourth plea denies that any money came into his hands as district pay-master.

To the second plea a demurrer was filed, and issues were joined on the third and fourth. In their replication to the fourth and first pleas, the plaintiffs allege that a large sum of money came into the hands of Kingsley, as district pay-master; and that on a final adjustment of his accounts, in April, 1823, there remained in his hands a balance unaccounted for of \$48,492.53. The rejoinders stated that Kingsley did regularly account for and pay to the plaintiffs all sums of money which came into his hands as district pay-master.

The jury found the issues of fact for the plaintiffs, and that the defendant, as pay-master, was indebted to the plaintiffs in the sum of \$31,197.14. On this verdict, a judgment for \$10,000 and costs of suit was entered. At the trial exceptions were taken to the evidence offered, which, being overruled, the following bill was tendered and signed:

"The plaintiffs, to maintain the issue on their part, read to the jury a duly certified copy of the bond sued on, and offered to read, as evidence, a paper purporting to be a transcript from the books and proceedings of the treasury department, containing an account headed Alpha Kingsley, late district pay-master, in account with the United States. In which account he was charged, as late district pay-master, with moneys advanced to him, for pay, subsistence, forage, bounties and premiums, and contingent expenses of the army; and credited with disbursements made under the same heads of expenditures, and showing a large amount of items suspended and disallowed. By this account it appeared that the same had been settled by the third auditor of the treasury, and it showed a balance due to the United States of \$48,492.53."

"The account was duly certified to the second comptroller of the treasury, who admitted and certified the above balance, on the 23d day of April, 1823."

There were also the following certificates annexed: "Treasury department, third auditor's office, 1st September, 1824. Pursuant to an act to provide for the prompt settlement of public accounts, approved 3d March, 1817, I, Peter Hagner, third auditor of the treasury of the United States, do hereby certify that the foregoing transcripts are true copies of the originals on file in this office. Signed, Peter Hagner, auditor."

"Be it remembered that Peter Hagner, Esq., who certified the foregoing transcripts, is now, and was at the time of doing so, third auditor of the treasury of the United States, and that faith and credit are due to his official attestations. In testimony whereof, I, William H. Crawford, secretary of the treasury, have hereunto subscribed my name, and caused to be affixed the seal of this department, at the city of Washington, this 1st September, 1824. Signed, Edward Jones, chief clerk, for William H. Crawford, secretary of the treasury." To this certificate the seal of the treasury department was affixed.

There being no other evidence given to the jury than this transcript, the court instructed them "that as by the account it appears there are in it items of debit and credit to Kingsley, as district pay-master, it furnished evidence of his having acted as district pay-master, and of his appointment as such. On the facts stated, a reversal of the judgment entered in the district court is insisted on. 1. Because the United States neglected to enforce their claim against Kingsley; and 2. Because the court erred in admitting the transcript as evidence, and by instructing the jury that it conduced to prove that the defendant was a district pay-master.

§ 2827. *Laches is not attributable to the United States, and delay in collecting a debt to the government does not release the sureties of the debtor.*

That the government has been negligent in settling the account of Kingsley, and collecting the balance of moneys in his hands, it is contended, is shown by the facts stated in the second plea to which the plaintiffs demurred. From the removal of Kingsley from office to the final adjustment of his accounts in the treasury department, there was a lapse of about eight years, during which period, it seems, he became insolvent. That he was able to pay the amount of his defalcation, when he was dismissed, is admitted by the pleadings; and also that no steps were taken by the government to recover the claim from him or his sureties, until a short time before the commencement of the present action.

Sound policy requires that the accounts of disbursing officers should be adjusted at the proper department with as much dispatch as is practicable. This is alike due to the public and to persons who are held responsible as sureties. To the individual who has received advances of money, no lapse of time nor change of circumstances can weaken the claim of the government for reimbursement. But there may be some cases of hardship, where, after a great lapse of time and the insolvency of the principal, the amount of the defalcation is sought to be recovered from the sureties. The law on this subject is founded upon considerations of public policy. While various acts of limitation apply to the concerns of individuals, none of them operates against the government. On this point there is no difference of opinion among the federal or state courts.

The fiscal operations of the government are extensive and often complicated. It is extremely difficult at all times, and sometimes impracticable, to settle the accounts of public officers with as little delay as attends the private transactions of a mercantile establishment. But it is always in the power of an individual who may be held responsible for the faithful conduct of a public agent, to see that his accounts are settled and the payment of any balance enforced. A notice to the government, by the surety, that he is unwilling to continue his responsibility, would induce it, in most instances, to take the necessary steps for his release.

By the act of congress of the 3d March, 1795, the comptroller of the treasury was authorized to issue a notification to any person who had received moneys for which he is accountable to the United States, fixing a reasonable time within which vouchers for the expenditures of such moneys shall be returned; and if default be made, costs are to be charged against the delinquent, whether in a suit judgment be given for or against him. In the same act, a revision by the comptroller of the settlement made by the auditor is authorized; and after having caused notices to be served, of items disallowed, etc., the decision is declared to be final and conclusive.

This act, it is contended, has never been repealed, and that, until the notice authorized by it shall have been served, a writ cannot be brought against a defaulter. If there had been no subsequent acts of congress on this subject, it might be important to inquire whether the notice authorized by this act was not merely directory to the officer, and essential only to subject the delinquent to the penalties provided. By the acts of the 3d of March, 1797, and the 3d March, 1817, material changes were made in the accounting department of the government; and although the act of 1795 may not be expressly repealed, yet it is abrogated by new and substantive provisions. Under the present

mode of proceeding against defaulters the notice authorized by the act of 1795 is unnecessary.

§ 2828. *Congress can, in derogation of common law, make treasury transcripts evidence, but they must be authenticated in the manner prescribed by law.*

The objection made to the authentication of the transcript given in evidence presents a question of some difficulty. As the transcript has not been made a part of the record, the bill of exceptions must be looked to, as containing the ground of objection. By the second section of the act of the 3d March, 1797, it is provided "that in every case of delinquency, where suit has been or shall be instituted, a transcript from the books and proceedings of the treasury, certified by the register (or under the act of the 3d March, 1817, by the auditor), and authenticated under the seal of the department, shall be admitted as evidence." "And all copies of bonds, contracts, or other papers, relating to or connected with the settlement of any account between the United States and an individual, when certified, as aforesaid, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court."

The auditor certifies that the foregoing "transcripts are true copies of the originals on file in his office." It is the certificate of the auditor and the seal of the department which make the transcript evidence. If either be omitted, whatever the transcript may purport upon its face, it is not evidence. Where copies are made evidence by statute the mode of authentication required must be strictly pursued. The legislature may establish new rules of evidence, in derogation of the common law, but the judicial power is limited to the rule laid down.

§ 2829. — *the statute authorizes two kinds of transcripts — one from the books, the other copies of bonds.*

There are two kinds of transcripts which the statute authorizes the proper officer to certify. First, a transcript from the "books and proceedings of the treasury;" and second, "copies of bonds, contracts, and other papers, etc., which remain on file and relate to the settlement." Under the first head are included charges of moneys advanced or paid by the department to the agent, and an entry of items suspended, rejected or placed to his credit. These all appear upon the books of the department. The decision made on the vouchers exhibited, and the statement of the amount, constitute, in part, the proceedings of the treasury. Under the second head, copies of papers which remain on file, and which have a relation to the settlement, may be certified. In this case it is essential that the officer certify that the transcripts "are true copies of the originals which remain on file."

This certificate has literally been made in the case under consideration; and the question arises whether it is a sufficient authentication of the transcript from the "books and proceedings of the treasury." A majority of the members of the court think that the certificate is a substantial compliance with the requisitions of the statute. They connect the certificate of the auditor with the statement in the bill of exceptions that a "paper, purporting to be a copy from the books and proceedings of the treasury," was offered in evidence; and consider that, although the auditor states that "the foregoing transcripts are true copies of the originals on file in his office," the certificate can only relate to the transcript offered in evidence, and that it sufficiently authenticates it.

This construction is strengthened, in their opinion, by another statement in the bill of exceptions: "that a duly certified copy of the bond sued on was offered to be read as evidence."

Three of the judges think that the certificate, from the language used, can only relate to the transcript which contained a copy of the bond. That it can only authenticate copies of papers, the originals of which remain on file. They consider that the books of the department cannot be said to be on file, nor are copies from the books copies from the originals.

All moneys advanced or paid by the government are charged in the books of the treasury, and a transcript from these charges may be said to be copies from the original, but the credits entered are copied into the books from the vouchers rendered, and these vouchers remain on file. A transcript from the books, therefore, it is believed, cannot be said to be copies from the originals on file. That it is a copy from the books which is made evidence, and not a copy of the paper, though it be on file, on which the rough draft of the settlement may have been entered.

They consider that the statement in the bill of exceptions, that the transcript offered in evidence purported to be a "copy from the books and proceedings of the treasury," is merely descriptive of the paper, and cannot cure the defect in the certificate. That it is not the body of the transcript which is to give it validity, but the authentication required by the statute. The copy may be strictly accurate in all its parts, and come within the provisions of the law; yet, if the seal be not affixed, or the certificate be defective, the paper cannot be received as evidence. They consider this certificate to be defective, as every word of it may be true, and yet the copies from the "books and proceedings" may be inaccurate. The auditor certifies nothing from the "books" or the "proceedings of the treasury;" and his language is so explicit in referring to "copies of originals on file in his office," that the three judges think that the certificate cannot by reference or any correct rule of construction be made to authenticate copies from "the books of the treasury."

§ 2830. — *the signature of the secretary of the treasury is not material. The seal of the department authenticates the transcript.*

The objection that the signature of the secretary of the treasury was signed by his chief clerk seems not to be important. It is the seal which authenticates the transcript, and not the signature of the secretary. He is not required to sign the paper. If the seal be affixed by the auditor, it would be deemed sufficient under the statute. The question, therefore, is not necessarily involved in deciding this point, whether the secretary of the treasury can delegate to another the power to do an official act, which the law devolves on him personally.

A majority of the court think that the transcript from the "books and proceedings of the treasury," being admitted as evidence, did conduce to prove not only that Kingsley acted as district pay-master, but his right so to act. In the account, he is charged as "late district pay-master," with moneys advanced to him for pay, subsistence, forage, bounties, and premiums, and contingent expenses of the army; and credited with disbursements made under the same heads of expenditures of the army. These transactions not only establish, *prima facie*, the correctness of the items charged, but show the capacity in which the defendant acted.

As district pay-master he receives money and disburses it in discharge of the duties required of pay-masters. His vouchers for moneys expended prove this, and every item stated in the account goes to establish the fact that the gov-

ernment recognized the official capacity which he assumed. These facts appearing upon the face of the transcript might well be considered by the jury as at least conducing to prove the official character of Kingsley. Although on each of the principal objections relied on as showing error in the proceedings of the district court, a majority of the members of this court think there is no error, yet the judgment of the district court must be reversed, as on the question of reversal the minorities unite, and constitute a majority of the court.

UNITED STATES *v.* PINSON.

(12 Otto, 548-556. 1880.)

ERROR to U. S. Circuit Court, Western District of Tennessee.

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.— This is an action against the executrix of one of several sureties on the official bond, executed April 9, 1858, of Miles H. Morris, formerly a purser in the navy. The government claims that the deceased failed to account for certain clothing received by him as purser on board the ship "Vandalia," and for a large amount of public money received by him as purser and disbursing officer on board the ship "Seminole."

The bill of exceptions states that the district attorney, after reading in evidence a certified copy of the bond of Morris, as purser in the navy, offered to read to the jury, as evidence in behalf of the United States, "the account of Miles H. Morris, as purser in the United States navy, as certified by the treasury department." The account, thus offered, is made up of several distinct papers, as follows: Brief to accompany the account of Miles H. Morris, late pay-master United States navy; abstract of expenditures of Miles H. Morris, pay-master United States ship "Vandalia;" abstract of clothing and small stores; abstract of expenditures of Miles H. Morris, pay-master United States ship "Seminole;" statement of the account of Miles H. Morris, a purser United States ship "Vandalia," from May 19, 1858, to January 6, 1860; statement of the account of Miles H. Morris, pay-master United States ship "Seminole," from May 1, 1860, to March 12, 1861, report 4,805; statement of the account of M. H. Morris, late pay-master United States navy, supplementary to report 4,805; statement of the account of M. H. Morris, late pay-master United States navy, supplementary to report 161 A.

To these abstracts and statements is appended a certificate or communication by the fourth auditor in the treasury department, under date of January 19, 1874, addressed to the second comptroller of the treasury, stating that he had examined and adjusted the account of Morris, late pay-master United States navy, supplementary to his account of "Seminole" report 161 A, and found that there was due from him to the United States the sum of \$5,922.60 under certain heads of appropriations which are specified, and also that the statements and accounts showing such balance were therewith transmitted to the second comptroller for his decision thereon. There is also appended a statement by the second comptroller, under date of January 20, 1874, to the effect that he admitted and certified the balance reported by the fourth auditor.

Prefixed to the foregoing papers is the certificate of the secretary of the treasury, under the seal of that department, to the effect that William B. Moore, who certified the "annexed transcript," was then, and at the time of doing so was, deputy fourth auditor of the treasury, and that full faith and credit were due to his official attestations.

Following that of the secretary was a certificate in these words:

“TREASURY DEPARTMENT, FOURTH AUDITOR'S OFFICE, July 23, 1875.

“Pursuant to an act of congress to provide for the prompt settlement of public accounts, approved 3d of March, 1817, I, William B. Moore, deputy fourth auditor of the treasury department, do hereby certify that the annexed transcripts are true copies of the originals on file in this office.

“W^M. B. MOORE.”

To the reading of the foregoing “account” or “transcript” the defendant objected, and the objection was sustained, to which ruling an exception was taken by the government. Under instructions from the court, a verdict was then returned for the defendant. Whether the papers offered in evidence by the government are competent evidence in support of its claim is the general question presented for our determination.

By the law, as it has long existed, it is the duty of the fourth auditor of the treasury department to receive and examine all accounts accruing in the navy department, or relating thereto, and after such examination to certify the balances, transmitting such accounts, with the vouchers and certificates, to the second comptroller for his decision thereon. R. S., sec. 277. Upon their examination by the latter officer it becomes his duty to certify the balance arising thereon to the secretary of the navy. Id., sec. 273. The statute also provides that “the auditors charged with the examination of the accounts of the departments of war and of the navy shall keep all accounts of the receipts and expenditures of the public money in regard to those departments, and of all debts due to the United States or moneys advanced relative to those departments; shall receive from the second comptroller the accounts which shall have been finally adjusted, and shall preserve such accounts, with their vouchers and certificates; and record all requisitions drawn by the secretaries of those departments, the examination of the accounts of which has been assigned to them.” Id., sec. 283.

When an account has thus been examined, passed upon, and the balance certified, it is *adjusted*, as well within the meaning of the section last quoted as of section 957 of the Revised Statutes. The latter section, in part, provides that “when suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant in open court (the United States attorney being present) makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the treasury and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted.” This section is referred to for the purpose of showing as well the importance attached to the final adjustment of accounts by the proper officers of the treasury, as the difficulty in going behind or disputing the correctness of such adjustment when made the basis of a suit instituted to recover the balance reported to be due the government.

§ 2831. *How the accounts of a disbursing officer must be authenticated to be received in evidence. Revised Statutes, section 886.*

We come now to section 886 of the Revised Statutes, upon the construction

of which depends the solution of the question to which we have already referred. That section declares that "when suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the treasury department, certified by the register, and authenticated under the seal of the department, or, when the suit involves the accounts of the war and navy departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the treasury department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts or other papers relating to or connected with the settlement of any account between the United States and an individual, when certified by the register, or by such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court: *Provided*, that where suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract or other paper specified in such affidavit."

This section embodies the provisions found in the second section of the act of March 3, 1797 (1 Stat., 512), providing more effectually for the settlement of accounts between the United States and receivers of public money, and the eleventh section of the act of March 3, 1817, relating to the prompt settlement of public accounts. 3 *id.*, 367.

It will be observed that section 886 refers to "transcripts from the books and proceedings of the treasury department," as well as to "copies of bonds, contracts, or other papers relating to or connected with the settlement of any account between the United States and an individual." The former, certified and authenticated as required by the statute, "shall be admitted as evidence," while the latter, certified and authenticated in like manner, "may be annexed to such transcript," and have "equal validity, and be entitled to the same degree of credit which would be due to the original papers, if produced and authenticated in court." Commenting upon similar language in the act of March 3, 1817, this court, in *Smith v. United States*, 5 Pet., 300 (§§ 2827-30, *supra*), which was a suit against a pay-master in the army for a balance alleged to be due to the government, said that under the head of "a transcript from the books and proceedings of the treasury department" were included "charges of money advanced or paid by the department to the agent, and claims suspended, rejected or placed to his credit." These all appear, said the court, upon the "books" of the department; and the decision on the vouchers exhibited, and the statement of the amount due, constitute, in part, the "proceedings" of the treasury. The court, in that case, recognizes the transcript from the books and proceedings of the department as a document which shows the account of the government debtor, as finally adjusted by the proper officers, as it appears upon the records of the department. Such adjusted accounts, says Mr. Chief Justice Taney, necessarily show the charges against as well as the credits of the disbursing officer. They "could not," said he, "be adjusted on the books in any other manner, and the transcript, or, in other

words, the copy of the entire account, as it stands on the books (which must include debits as well as credits), are made evidence by the law. Nor do we see any reason for restricting the words of the act of congress within narrower limits than the words plainly imply. The accounts are adjusted by public sworn officers, bound to do equal justice to the government and the individual. They are records of the proper departments, and are always open to inspection of the party interested." *Bruce v. United States*, 17 How., 437 (BONDS, §§ 579-83).

Unless, therefore, the transcript offered, as evidence, upon the trial below is certified by the proper officer, and authenticated under the department seal, to be "a transcript from the books and proceedings of the treasury department," it is not such a transcript as the statute makes evidence.

We are of opinion that the transcript offered is not certified and authenticated to be of that character which the statute declares shall be admitted as, in itself, evidence. The certificate of the deputy fourth auditor is that the "transcript" thereto annexed, that is, the statement and abstracts heretofore described, are "true copies of the originals on file" in his office. That is precisely such a certificate as the officer would make in reference to mere copies of bonds, contracts or other papers relating to or connected with the final adjustment of the account, for the purpose of giving to such copies the same effect as would be accorded to the originals if produced and authenticated in court. If the papers offered and excluded by the court below constitute, in fact, the final adjustment of Morris' accounts, the certificates should not have described them as copies of originals on file, but as transcripts of the books and proceedings of the department. The statute, for the convenience of the government in a certain class of suits against delinquent public officers, makes an alteration of the established laws of evidence. The government, by a statutory rule which the courts must enforce, denies to defendants in such suits the benefit of the recognized principles which, at common law, govern the proof of essential facts in issue, and it should not be permitted to claim an exemption from the fair and legitimate operation of that rule. It may be true, as the certificate of the deputy fourth auditor states, that the papers offered are true copies of some originals on the files of his office; for instance, of the original drafts of settlement. But it does not necessarily follow that they present an accurate or correct statement of the final settlement or adjustment of the accounts as shown on the books and in the record of the proceedings of the department. Such originals may never have become a part of the books and proceedings of the department, in the sense of the law, or within the meaning of our former decisions. *United States v. Buford*, 3 Pet., 12; *Smith v. United States*, 5 id., 292 (§§ 2827-30, *supra*); *Cox v. United States*, 6 id., 172 (BONDS, §§ 401-404); *United States v. Jones*, 8 id., 375; *Gratiot v. United States*, 15 id., 336; *Hoyt v. United States*, 10 How., 109; *Bruce v. United States*, 17 id., 437 (BONDS, §§ 579-83). That the abstracts or statements offered and excluded may, upon their examination, seem to the court to be the final adjustment of Morris' accounts is not sufficient. Upon that question the court might be mistaken in any conclusion it should reach, or it may err in the inferences drawn from the items of the accounts. What the statute meant was, that the official certificate of the officer, charged with the examination of the accounts, should be of such character as to give the court, as well as the parties, an assurance that the transcript offered as evidence to support the claim of the government exhibits, in fact, the final adjustment of the

accounts of the delinquent officer, as shown, not by mere copies of original papers on the files, but upon the books and records of the department.

This question, in a somewhat different form, arose in *Smith v. United States*, *supra*. There, as here, the auditor certified that the transcripts offered in evidence were "true copies of the originals on file" in his office, and, in that form, the certificate narrowly escaped condemnation. The majority of the court, evidently with some hesitation, held the transcripts admissible in evidence upon the ground that the bill of exceptions stated that the documents, offered as evidence and excluded, purported to be transcripts "from the books and proceedings of the treasury department." Upon that point three of the judges dissented. The grounds of the dissent are stated in the opinion of the court. The minority held that the certificate could be regarded as referring only to papers, the originals of which were on file; that the books of the department could not be said to be on file, nor were copies from them copies from originals within the meaning of the statute; that it was a copy from the books and proceedings in the treasury department which was made evidence, and not mere copies of papers, though on the files, on which the rough draft of settlement may have been entered.

The bill of exceptions does not bring the present case, upon this particular point, within the ruling in *Smith v. United States*. There is no statement in the bill here that the papers offered and excluded were transcripts from the books and proceedings in the treasury, but only that they constituted the "account of Miles H. Morris, as purser of the United States navy, as certified by the treasury department." This language is not equivalent to that which the statute requires in order to make the transcript evidence, and we are not disposed to extend the rule announced in *Smith v. United States*. The statute is founded in justice as well as in the necessities of the government when compelled to institute suits against delinquent public officers. Its provisions are easily understood, and it is not at all difficult to meet the manifest object congress had in enacting them. When the government desires, in suits against a delinquent officer accountable for public money, to use the final adjustment of his accounts as evidence, the certificate of the officer should show, not necessarily in the very words of the statute, but plainly, and not by mere inference, that the transcript offered is from the books and proceedings of the department; in other words, that such transcript presents the account of the delinquent as finally adjusted by the proper officers of the government, and spread upon the records of the department.

Without stopping to consider other points raised by counsel in support of the ruling below, it is sufficient to say that, for the reasons given, the court below did not err in excluding from the jury the transcripts offered by the government.

Judgment affirmed.

JUSTICES SWAYNE and BRADLEY dissented.

§ 2832. **In general.**—The acts of congress making transcripts from the government departments evidence against public debtors establishes a new rule of evidence in derogation of the common law. Such legislation is valid. The statutory method of authentication must be strictly followed. *United States v. Harrill*,* 1 McAl., 243.

§ 2833. By section 886 of the Revised Statutes, a transcript from the books and proceedings of the treasury department, when introduced in an action by the United States against one of its officers for a debt due in his official capacity, is *prima facie* evidence of the facts stated therein, so far as the same are authorized by law. *United States v. Eggleston*, 4 Saw., 199.

§ 2834. Under the act of March 3, 1797, the statement of an officer's account as adjusted on

the books of the department is *prima facie* evidence only. *United States v. Gaussen*,*19 Wall., 198.

§ 2835. Every treasury transcript which contains items of payments made to others, on the authority of the person charged, should have annexed to it a duly certified copy of the instrument which authorized such payments. And so in every case where the government endeavors by suit to hold an individual liable for the acts of his agent, the agency on which the act of the government was founded should be made to appear by a duly certified copy of the power. *United States v. Jones*,* 8 Pet., 375.

§ 2836. Admissible against whom.—A certified transcript of the settlement of the account of a collector with the accounting officers of the treasury department is evidence against the sureties on the collector's bond, in a separate action against them on the same. *Chadwick v. United States*, 3 Fed. R., 750.

§ 2837. A copy of the quarterly return of a collector, certified by the assistant secretary of the treasury, under the seal of the department, is admissible in an action on the collector's bond. *Ibid.*

§ 2838. By the act of March 3, 1797, a transcript from the books of the treasury department of the account of an Indian agent, adjusted by the proper officers and properly certified, is evidence of the items charged against him, which came into his hands in the regular and ordinary operations of the government. Authenticated copies of his original receipts need not be produced. *Bruce v. United States*, 17 How., 437.

§ 2839. A commissioner of claims who receives money in advance for the contingencies of his office is a receiver of public moneys within the meaning of the act of March 3, 1797, and his accounts settled and certified by the proper officers of the treasury department are admissible in evidence against him. *United States v. Lee*, 2 Cr. C. C., 462.

§ 2840. The account of a contractor for the supply of rations to the troops, settled at the treasury, and properly authenticated, is evidence not only of the money advanced to him by the United States, but also of the money paid by the officers for the purchase of provisions in consequence of the contractor's failure to make the necessary supplies according to his contract. *United States v. Griffith*, 2 Cr. C. C., 366.

§ 2841. As to time liability accrued.—In a suit on the bond of a collector, given for the faithful discharge of his duties during his second term, the admission in evidence of a duly certified transcript of his account from the treasury department was objected to because the balance stated therein was the result of transactions of both terms of the defendant's service, and also of transactions occurring after his removal and the appointment of his successor. The transcript was held admissible, it being entirely consistent with the description of the assessment lists in the transcript as lists for specified months prior to the beginning of his second term; that the collector actually received the taxes paid upon them after the beginning of his second term; and as, on the other hand, it was also consistent with the nature of the charges for money received on lists dated after the expiration of his second term, that the money was received by him before the expiration of the term. *United States v. Hunt*, 15 Otto, 183.

§ 2842. In an action upon the official bond of a revenue collector certain treasury transcripts were offered in evidence, to the reception of which the defendant sureties objected on the ground that the transcripts showed that a large part of the deficiency chargeable to the collector accrued prior to the giving of the bond in suit; but it was held that as such objection did not arise upon the face of the transcripts, but only from comparison between them and accounts offered by the defendants, the objection did not go to the competency, but to the effect of the evidence, and was properly overruled. *United States v. Stone*,* 16 Otto, 525.

§ 2843. Evidence for defendant.—A treasury account which contains credits as well as debits is evidence for the defendant as well as the government; and, unless there be an abandonment of the suit by the counsel for the government, it has no right to withdraw from the jury any part of the credits relied on by the defendant. *United States v. Jones*, 8 Pet., 387.

§ 2844. A treasury transcript is evidence of only the items of debit in the account stated therein as one for moneys disbursed through the ordinary channels of the treasury department, where the transactions are shown by its books, and where the officers of the treasury must have had official knowledge of the facts stated. But the transcript is evidence for the defendant of the full amount of the credits stated therein; and by relying on the transcript as evidence of such credits, the defendant does not admit the correctness of any of the debits in the account of which the transcript is not *per se* evidence. *Ibid.*

§ 2845. Statement of account.—The act of congress making a transcript from the books and proceedings of the treasury evidence does not mean the statement of an account in gross, but a statement of the items, both of the debits and credits, as they were acted upon by the accounting officers of the department. *United States v. Jones*,* 8 Pet., 375.

§ 2846. Under the act of March 3, 1797, an extract from the books of an auditor, when authenticated, may be given in evidence, if not garbled or mutilated, and all proper debits and

credits are stated, and it is complete in itself. Items may be made up from statements and details of daily business furnished by the officer himself, and there may be such condensation as is proper in case of matters carried into ledger account. *United States v. Gaussen*,* 19 Wall., 198.

§ 2847. A defendant in an action by the government is entitled to the evidence of the decision of the treasury officers upon his vouchers, and may claim all credits allowed him in the treasury transcript without waiving his right to object to any items improperly charged against him therein. The credits are evidence for the defendant. *United States v. Jones*,* 8 Pet., 375.

§ 2848. A treasury transcript is admissible in evidence under the act of congress, although it does not contain all of the items. *United States v. Martin*, 2 Paine, 68.

§ 2849. A treasury transcript is not to be rejected as merely stating balances charged in gross, if, taking the whole transcript together, and examining its details as a mere matter of account, it is plain that all the items on which the balances are struck are to be found regularly entered and brought forward. *Gratiot v. United States*, 15 Pet., 336.

§ 2850. In a suit by the United States against a collector to recover a balance claimed in the settlement of his accounts, transcripts from the books and proceedings of the treasury, the several items of account in which arise out of the official transactions of the defendant, as collector, with the treasury department, and are founded upon his quarterly and other accounts rendered in pursuance of law and the instructions of the secretary, being substantial copies of these quarterly returns, revised and corrected by the accounting officers as they were received, and with the copies of which the defendant has been furnished in the usual course of the department, present a mutual account of debit and credit arising out of his official dealings with the government, in the collection of the public revenue, and are admissible in evidence under the second section of the act of March 3, 1797. It is no objection to the competency of these transcripts that some of the items included contain charges in gross, reference being made to the abstracts for the particular items composing each amount, the copies of such abstracts not having been called for at the trial. *Hoyt v. United States*, 10 How., 109.

§ 2851. The omission of allowed credits from a transcript of an account against a former postmaster does not render such transcript incompetent as evidence in an action against him. *United States v. Harrill*,* 1 McAl., 243.

§ 2852. A duly certified treasury transcript of a collector's account is not to be rejected in a suit upon his bond because it contains items which are not chargeable against him. It is evidence of those items which are chargeable against him, if they can be separated from the objectionable items by an inspection of the account. *United States v. Hunt*, 15 Otto, 183.

§ 2853. The settlement of the accounts of an internal revenue collector by the officers of the treasury, as contained in a duly certified and authenticated transcript from the books and proceedings of the treasury department, is *prima facie* evidence of the correctness of the balance certified in an action on his bond against him and his sureties. But it is competent for the accounting officers to correct mistakes in such settlement and restate the balance. *Soule v. United States*, 10 Otto, 8.

§ 2854. **Disallowed credits.**—Under section 15 of the postoffice act of July 2, 1836, certified transcripts of the accounts of a postmaster, taken from his quarterly reports as corrected, and certified copies of such quarterly reports showing the corrections and allowances of the auditor, are each admissible in evidence in an action on the bond of a postmaster, though the transcript does not contain a statement of the credits disallowed by the auditor. *United States v. Hodge*,* 13 How., 478.

§ 2855. In an action brought by the United States upon the bond of a postmaster, a transcript of the accounts of such postmaster, made up by the auditor of the treasury of the postoffice department from the quarterly returns of such postmaster, is admissible in evidence though not containing a statement of disallowed credits. So also certified copies of his quarterly returns, showing the corrections and disallowances made by the auditor, are admissible in such an action. *Ibid.*

§ 2856. A duly authenticated transcript from the books of the treasury department is admissible to show that certain credits were given after the death of the debtor, and that the payments standing in his name could not therefore have been made by him; and to let in evidence that they were in fact made by the surety on his bond. It is not necessary that the credit thus claimed should have been presented to the treasury and disallowed. *Cox v. United States*, 6 Pet., 172.

§ 2857. **Notice of adjustment.**—In an action on the official bond of a marshal for a balance due, duly certified transcripts of the adjustment of his accounts by the accounting officers of the treasury, showing the balance to be due, is sufficient for the government to rest its case upon, without notice to the marshal of such adjustment and of the balance found against him. *Watkins v. United States*, 9 Wall., 759.

§ 2858. In an action against a receiver of public money, a treasury transcript of his accounts is admissible in evidence against him under the second and fourth sections of the act of March 3, 1797, although there have been no proceedings against him under the act of March 3, 1795, by notification from the treasury department requiring him to render to the auditor of the treasury his accounts and vouchers, in order to a settlement as directed by that act. *Walton v. United States*, 9 Wheat., 651.

§ 2859. **Designation of defendant.**—A treasury transcript is admissible in evidence in an action by the United States against a receiver of public money, although the declaration is against him in his individual capacity. *Ibid.*

§ 2860. In an action upon the official bond of a public officer the official designation of such officer in the treasury transcript offered in evidence must correspond with the official designation of the bond or the transcript is inadmissible in evidence. *United States v. Stafford*,* 3 Paine, 525.

§ 2861. **What may be shown against.**—In an action upon the official bond of a revenue collector, the defendants may show by certified treasury transcripts that the balance charged against the collector upon the adjustment of his accounts during the period covered by their bond accrued prior to the time for which they were liable, and may show that credits had been given him on a prior account, which belonged to a subsequent one, and that he had been debited in the latter with items transferred from a previous one. *United States v. Stone*,* 16 Otto, 525.

§ 2862. In an action against the sureties of a collector, a restatement of the collector's accounts by the treasury, showing the liabilities incurred by him during the term for which the sureties are bound, is competent evidence on the part of the United States. The amount charged to the collector in this treasury transcript is only *prima facie* evidence against the sureties. They may show circumstances which will modify it. *United States v. Eckford*, 1 How., 250.

§ 2863. Treasury transcripts, though made legal evidence for the government in an action on the official bond of a sub-Indian agent, are not conclusive as to the amount due, and the defendants may show that there are credits which do not appear in the account, and which ought to be allowed. Any items of credit which do not appear in the treasury statement, and which have been presented and disallowed by the accounting officer, may be proved by the party charged. *United States v. Corwin*, 1 Bond, 149.

§ 2864. In an action by the United States against a disbursing agent for defalcation, unofficial letters of subordinate officers are not admissible in evidence to contradict, nor even explain, the official adjustment of the accounts as shown in the duly certified transcripts from the treasury department. *Strong v. United States*, 6 Wall., 788.

§ 2865. In a suit by the United States upon an official bond, no evidence can be admitted at the trial to show a claim for credits, unless such claim is shown to have been legally presented to the accounting officers of the treasury for examination and, except under certain circumstances mentioned in the statute, disallowed. And to be presented legally, it must be by items and with vouchers. *Watkins v. United States*, 9 Wall., 759.

§ 2866. **Not admissible, when.**—A report made by the auditor to the comptroller of the treasury, stating a balance to be due from an officer accountable for public money, is only a guide to the comptroller as to the amount he is to sue for, and not evidence in the suit when it is brought. And when certified by the register and authenticated under the seal of the department, this document is not such a transcript from the books and proceedings of the treasury as is authorized to be received in evidence by the second section of the act of March 3, 1797. *United States v. Patterson*, Gilp., 44.

§ 2867. A treasury transcript is not *per se* evidence against a person as to charges made against him for acts of persons alleged to be his agents, without papers being annexed showing the agency, or any proof of the agency offered. *United States v. Jones*, 8 Pet., 387.

§ 2868. A treasury transcript is not *per se* evidence against a disbursing officer as to a balance due on a former settlement. *United States v. Laub*,* 4 Cr. C. C., 703.

§ 2869. A treasury statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by the books. An account stated at the department, which does not arise in the ordinary mode of doing business there, can derive no additional validity from being certified under the act of congress. *United States v. Buford*, 3 Pet., 12.

§ 2870. The third auditor of the treasury cannot authenticate a copy of a contractor's bond. His power of authentication, under the act of March 3, 1817, extends only to transcripts from the books and proceedings of the treasury in regard to the accounts of the war department. Copies of bonds must still be certified by the register and authenticated under the seal of the department, according to the act of March 3, 1797. *United States v. Griffith*, 2 Cr. C. C., 366.

§ 2871. Although a duly certified treasury transcript is made evidence in an action against a collector for embezzlement, items in such transcript which were not ascertained and established by the ordinary official action of the department are not evidence. *United States v. Forsythe*, 6 McL., 584.

§ 2872. In treasury transcripts, balances struck by the treasury department and charged as such are not evidence. The items of the account on which the balance was ascertained should be stated in the transcript. But balances charged by an officer are admissible against him, for this is an admission. *United States v. Hilliard*,* 3 McL., 324.

§ 2873. In an action on a receiver's bond, a treasury transcript charging balances, not as reported by the receiver, but as found to be due at different periods on the adjustment of his accounts at the treasury, is not admissible in evidence. *United States v. Edwards*, 1 McL., 467.

§ 2874. In an action by the United States against a pay-master for a balance due, an account stated in the treasury department, consisting only of a balance from a former account and two items transferred from the account of another person, is not, *per se*, admissible evidence to charge the defendant. *United States v. Kuhn*, 4 Cr. C. C., 401.

§ 2875. In order to charge a postmaster with moneys received from other postmasters, but not stated in his returns, his receipts for such moneys must be produced, or copies of them duly certified, or some legal evidence must be exhibited to charge him, beyond a simple statement of the amount in a treasury transcript. *United States v. Hilliard*,* 3 McL., 324.

XXII. BURDEN OF PROOF.

§ 2876. In general.—The burden of proof never shifts either in a civil or criminal case, but remains on the party on whom it rested in the beginning. *Hall v. Little*, 2 Flip., 153.

§ 2877. There are many cases in which the burden of proof is on the party within whose peculiar knowledge and means of information the fact lies. But the rule is far from universal, and has many qualifications upon its application. Thus a plaintiff in ejectment who shows, *prima facie*, a good title to recover, has a right to stand upon such title, and is not bound to furnish any evidence to assist the defense. The plaintiff is not bound to show that the land in question is within an exception in a deed of the whole tract made by his lessor to a third person. *Greenleaf v. Birth*, 6 Pet., 302.

§ 2878. In respect to negative allegations, the rule is that the burden of proof is upon the party holding the affirmative, and especially where the facts are within his privity and cognizance. This rule applies more strongly where the party seeks to shelter himself under an exception which was not incorporated into the original prohibition of the statute creating the offense. *United States v. Hayward*, 2 Gall., 485.

§ 2879. In a suit by a municipal corporation to recover taxes assessed upon the property of a bank, the burden is upon the latter to show that the tax sued for is unlawful. *Canal and Banking Co. v. New Orleans*, 9 Otto, 97.

§ 2880. In an action upon a replevin bond, the value of the goods stated in the bond is *prima facie* evidence of the amount of the plaintiff's damages, if the jury find the issues for the plaintiff. If the defendant contends for a less sum, the burden is upon him to show it. *Wood v. May*, 3 Cr. C. C., 172.

§ 2881. If a party alleges that a deed, by which his land has been conveyed, by an agent under an apparent power of attorney, is invalid for want of authority in the agent, this being a cause not appearing on the face of the deed, the burden of proof is upon the party making the allegation. *Clements v. Macheboeuf*, 2 Otto, 418.

§ 2882. Where a rule has been obtained by the defendant upon the plaintiff to give security for costs, it will be presumed, at a subsequent term, that the non-residence of the plaintiff was sufficiently proved, and it is upon the plaintiff to show his residence within the county. *Furlong v. Coleman*, 3 Cr. C. C., 178.

§ 2883. Where a statute giving to a city certain state lands excepted such as had already been sold, and declared that the deeds to those which had been sold should be *prima facie* evidence of title, it was held that the recitals in such a deed, if justifying the inference that the terms of the sale under which it was made had been complied with, cast the burden of disproving the presumption upon the person alleging the contrary. *Mumford v. Wardwell*, 6 Wall., 423.

§ 2884. *Ex parte* settlements of accounts in the orphans' court of Alexandria are *prima facie* evidence of their own verity and correctness, and the *onus probandi* is upon those who seek to impeach them. *Lupton v. Janney*, 13 Pet., 381.

§ 2885. The return and acceptance of a survey is *prima facie* evidence of its legality, and the burden of proof is upon him who questions the fact. *Griffith v. Bradshaw*, 4 Wash., 171.

§ 2886. Where an instrument affecting real property, offered in evidence, has been proved and admitted to record, the burden of proof is on the party denying its execution. And it may be inferred from the fact that the subscribing witness, who is still alive, is not called, that it cannot be successfully impeached. *Gay v. Parpart*, 16 Otto, 679.

§ 2887. A manumission of slaves by will being invalid under the Maryland law of 1796, if in prejudice of creditors, the burden is upon the creditors to show that the manumission is in their prejudice. *Chapman v. Fenwick*, 4 Cr. C. C., 431; *Negro Gilbert v. Ward*, 4 Cr. C. C., 171.

§ 2888. If a misrepresentation is relied on in defense to an action on an insurance policy, the burden of proof on this point is upon the defendant. *Catlin v. Springfield Ins. Co.*, 1 Sumn., 434.

§ 2889. In an action on a bond conditioned that the defendant shall carry on the business of distilling for a certain time, and keep an exact account during that time, and deliver to the plaintiff one-tenth of the liquor distilled, when demanded; and the demand is a stale one, it is incumbent on the plaintiff to prove the amount of liquor distilled. *Cottle v. Payne*,* 3 Day (Conn.), 289.

§ 2890. Under the act of congress requiring certain vessels to carry a medicine chest, the burden is on the owner who seeks to exonerate himself from the charge of sickness imposed by the maritime law, to show the sufficiency of the chest in all respects. *Harden v. Gordon*, 2 Mason, 541.

§ 2891. In a suit between the United States and an individual, if the latter claims any credits, it is for him to show that they have been presented to the treasury department and disallowed, as required by the act of congress. And if any objection is made to any charge against the defendant, he must produce the necessary evidence to raise the inquiry. *United States v. Martin*, 2 Paine, 68.

§ 2892. In a suit in admiralty against the commander of a vessel for wrongful assault, maltreatment and imprisonment, the burden is upon the respondent to prove a justification set up by him. *Treadwell v. Joseph*, 1 Sumn., 390.

§ 2893. A pilot who claims that he offered his services to a vessel and that they were refused, he being at the time on another vessel which was passing the one first mentioned, must prove this tender and refusal by a clear preponderance of evidence. *Brig Thomas Turrall*, 6 Ben., 404.

§ 2894. **Insanity — Life insurance — Suicide.**— The burden of proof lies on him who asserts insanity. But when habitual insanity is established, the burden is on him who maintains that a lucid interval has occurred. *Hall v. Unger*, 2 Abb., 522. See §§ 672, 1502, 2149.

§ 2895. The presumption of law is in favor of the sanity of the testator, and the burden of proof lies upon the party who asserts his insanity, unless a state of insanity previous to the execution of the will is established, in which case the burden is shifted to him who claims under the will. *Stevens v. Vancleve*, 4 Wash., 262.

§ 2896. A party who claims under a life insurance policy, with an exception in case of suicide, having admitted the fact of self-killing, is charged with the burden of showing that the person's condition was such that the act did not constitute suicide. *Gay v. Union Mutual L. Ins. Co.*, 9 Blatch., 142.

§ 2897. The law presumes an accused to be sane until the contrary is shown. The burden of proving insanity as a defense is therefore upon the defendant. But if the government asserts that the insanity arose from such a cause as to render the defendant responsible notwithstanding, the burden of proving the allegation is upon the government. *United States v. McGlue*, 1 Curt., 1.

§ 2898. In an action on a life insurance policy containing the condition that if the insured should die by suicide the policy should be null and void and the company should not be liable, where the fact of self-killing is conceded, it is for the plaintiff to show that the insured, when he committed the act, was in such a condition as to render the company liable. *Gay v. Union Mutual L. Ins. Co.*, 9 Blatch., 143; *Moore v. Conn. Mut. L. Ins. Co.*, 1 Flip., 363.

§ 2899. The presumption is in favor of mental capacity; and he who alleges the contrary for the purpose of invalidating a will or deed must prove it. But if insanity be proved to have existed at any time prior to the deed or will, the burden of proof is shifted and the other party must prove the mental capacity of the grantor or testator. *Hoge v. Fisher*, Pet. C. C., 163.

§ 2900. **Validity of marriage.**— Where a marriage is proved, a subsequent marriage of the wife is *prima facie* void; and where the validity of the former marriage is attacked on the ground that the husband had another wife living at the time, the burden of proof is on the party asserting such invalidity. *Gaines v. Relf*,* 12 How., 472. See §§ 936, 1505, 1844.

§ 2901. **Trusts.**— The burden of proving a trust lies on the party asserting it. But when the trust is once established, the burden is shifted upon the other party to show its extinguishment. *Prevost v. Gratz*, 6 Wheat., 481; Pet. C. C., 364.

• § 2902. **Proof of death.**—Where an individual is proved to have been living within seven years, the burden of proving his death rests upon the party who asserts it. *Gilleland v. Martin*, 3 McL., 490. See § 1492.

§ 2903. In an action of ejectment, where it was moved to dismiss the suit on account of the alleged death of the lessor of the plaintiff, the affidavit of the niece of his wife, to the effect that she had heard of him through the relatives of the family, though she had not seen him for several years, and that he was still living, was held to raise a sufficient presumption of his life to throw upon the defendant the *onus* of proving his death. *Ibid.*

§ 2904. Where the plaintiff's title to real estate which he seeks to recover depends on the fact that a certain one of two persons who perished at sea in the same event survived the other, the burden is upon him to prove the survivorship, where there are no presumptions in the case. But the fact requires no higher degree of proof than any other facts in a civil case. *Robinson v. Gallier*,* 2 Woods, 178.

• § 2905. **Fraud.**—The burden of proving a fraud is upon the party alleging it. *Jordan v. Dobson*, 2 Abb., 398; *Lawrence v. Dana*, 4 Cliff., 1. See §§ 244, 606, 1531, 1856.

§ 2906. Actual fraud, when charged, is issuable, and as in all other cases where it is directly imputed, the burden of proof lies on the party charging it, as it is not to be presumed in any case without proof. *Clark v. Hackett*, 1 Cliff., 269.

§ 2907. The burden of proving a contract to be fraudulent is on the party alleging it. *McLean v. Lafayette Bank*, 3 McL., 587.

§ 2908. Fraud and official misconduct are not to be presumed, but must be proved by the party alleging them. *Cooper v. Galbraith*, 3 Wash., 546.

§ 2909. Upon the trial of an issue upon allegations filed by creditors against a petitioning debtor, under the act of congress "for the relief of insolvent debtors within the District of Columbia," the burden of showing the fraudulent intent is upon the creditors. *Ex parte Knowles*, 2 Cr. C. C., 576.

§ 2910. In an action by a vendee to recover back the purchase money which he has paid upon a contract, upon the ground of fraud, where the plaintiff's knowledge of the facts constituting the alleged fraud, and his failure to rescind the contract promptly, is relied on as a defense, the burden of proving such knowledge on the part of the plaintiff, and the time of his discovery of the facts, is upon the defendant. *Pence v. Langdon*, 9 Otto, 578.

§ 2911. A. accepted a bill for B.'s accommodation. B., the drawer, indorsed to C. In a suit by C. against A., where, there being some evidence of fraud, the burden was on C. to show his good faith, C. cannot offer in evidence, to show that he is a holder for value, a receipt to himself signed by B. *Platt v. Jerome*, 2 Blatch., 186.

§ 2912. Where a suit was brought in equity to set aside as fraudulent a sale made under the direction of the probate court more than eighty years before the bringing of the suit, and the papers were not to be found in the probate court, it was decided that the parties claiming under the sale need not show the regularity of the proceedings, and that the burden of proof was on the party assailing the title. *Moore v. Greene*, 19 How., 69.

§ 2913. In an action on an insurance policy, where it is urged in defense that the fire in question was caused by the criminal and wilful act of the plaintiff with intent to defraud the insurance company, and fraud on the part of the plaintiff in the exhibition of his proofs of loss by presenting an intentionally exaggerated statement as to the extent of his loss, the defendant has the burden of proof as to both of these points. *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Biss., 31.

§ 2914. **Mistake.**—The burden of proof to show grounds for the rescission of a contract rests on the plaintiff. *Veazie v. Williams*, 8 How., 134.

§ 2915. To reform a written agreement on the ground of mistake, the burden of overcoming the strong presumption arising from the terms of the written contract is upon the party asking relief; and the testimony must be plain and convincing beyond a reasonable controversy. *Howland v. Blake*, 7 Otto, 624.

§ 2916. The burden is on one who has given a general release of all claims to show that she did not rightly understand the transaction. *Crossley v. Steam-tug Louis*, 4 Ben., 510.

§ 2917. In *assumpsit* by a bank for money had and received by an overdraft paid by the bank by mistake, payment of the check is *prima facie* evidence of funds, and that the apparent state of the funds upon the books justified the payment, and it is incumbent on the plaintiff to prove error in the account upon the apparent balance of which the check was paid. *Bank of United States v. Washington*, 3 Cr. C. C., 295.

§ 2918. **Official bonds.**—In a suit by the United States against a surety on an official bond, the burden of proving the forfeiture of the bond rests upon the United States. *United States v. Bell*, Gilp., 41. See §§ 955, 1343, 1574, 2552.

§ 2919. If, upon the re-appointment of a public officer, and at the date of the execution of his new bond, there is a balance due by him to the government, which he is directed to turn

over to himself as his own successor, to be accounted for under his new bond, it will not be presumed that he had illegally appropriated these moneys before that time, and the burden is upon the government to prove this. *United States v. Earhart*, 4 Saw., 245.

§ 2920. In a criminal case it is incumbent upon the government to prove, beyond a reasonable doubt, the truth of every allegation in the indictment, necessary in point of law to constitute the offense. *United States v. McGlue*, 1 Curt., 1. See §§ 1475, 1972, 2162.

§ 2921. In all cases where a party stands charged with an offense, the burden of proof is on the government, unless a different provision is made by statute. *United States v. Gooding*, 12 Wheat., 460.

§ 2922. Upon the trial of an indictment for conspiring to commit a crime against the United States, the burden of proof throughout is upon the prosecution to prove the guilt of the defendants. Until guilt is proven there is an absolute presumption of innocence. *United States v. Goldberg*, 7 Biss., 175.

§ 2923. The intent, when it forms a part of the charge in a statutory offense, must be proved. *United States v. The William Arthur*, 3 Ware, 276.

§ 2924. Upon an indictment for murder it is upon the government to prove a felonious killing. *United States v. Mingo*, 2 Curt., 1.

§ 2925. Under an indictment of a master of a vessel, under the third section of the act of March 3, 1835, for beating one of his crew, it is incumbent on the government to prove that the act was without justifiable cause and that it was malicious. *United States v. Cutler*, 1 Curt., 501.

§ 2926. The burden of proving a malicious killing is upon the government, and proof of the mere fact of killing does not change this burden nor support it by raising a presumption of malice. But circumstances may attend a homicide which in point of law stamp it as malicious without other evidence of malice. *United States v. Armstrong*, 2 Curt., 446.

§ 2927. In an indictment for assault with a dangerous weapon, the burden of proof is upon the government throughout and does not shift. *United States v. Lunt*, 1 Spr., 311.

§ 2928. When any act is done which, unexplained, is a violation of law, and is sought to be excused by necessity or distress, the burden of proof is upon the accused to make out the excuse, and by the most convincing and conclusive testimony, where the temptation to infringe the law is great. *The Josefa Segunda*, 5 Wheat., 338.

§ 2929. Where an officer of a ship is charged with manslaughter in allowing a sailor falling overboard while at work upon the ship to perish, without any effort to save him, when, by proper efforts, promptly made, he could have saved him, the burden is upon the defendant of showing that the fall was fatal, or of showing such attending circumstances as to create a reasonable doubt whether such was not the fact. *United States v. Knowles*, 4 Saw., 517.

§ 2930. The act of congress of 1831, punishing the act of cutting and removing timber from the public lands, fixes the rule of proof. The government must prove the cutting and removing, and that the premises were lands of the United States. The defendant may rebut the presumption of unlawful intention arising from such facts by showing a mistake in regard to the lines of survey. *United States v. Darton*, 6 McL., 46.

§ 2931. **Priority of United States.**—Where the United States claim a priority of payment out of the estate of their debtor on the ground that he has made an assignment of all his property, and the deed contains only the property in a schedule annexed, which schedule does not purport to contain all the property, the presumption is that the deed does not convey all the debtor's property, and the burden of proving the contrary is upon the United States. *United States v. Howland*, 4 Wheat., 108.

§ 2932. In an action brought by the United States under the trustee process, where the principal debtor has made an assignment to the trustees, in order that the priority provided for by the act of 1799, chapter 128, section 65, may attach in favor of the United States, it should appear that the assignment was of all the debtor's property; and where a contrary presumption arises upon the face of the assignment, the burden is on the United States to make this out. *United States v. Langton*, 5 Mason, 280.

§ 2933. The United States not being entitled to priority as a creditor unless the assignment by the debtor is a general one, the burden is upon them to show it to be general, where it does not so appear upon its face. *United States v. Clark*, 1 Paine, 629.

§ 2934. **Penalties and forfeitures.**—In a proceeding under the passenger acts for the forfeiture of a vessel for taking on board more passengers than her space, under these acts, allowed her to transport, where the question turns upon the contents of certain boxes and chests, whether luggage belonging to the passengers, or other goods which could not be legally placed in that portion of the ship allotted to passengers, the burden of proving that they were the latter is upon the government. *United States v. The Anna*, Taney, 549. See §§ 763, 1876.

§ 2935. In this case, which was a proceeding for the forfeiture of a vessel for violation of section 27 of the act of December 31, 1792, sufficient circumstances being proved to call for an

explanation by the claimant, by evidence which he had in his power to produce, the vessel was condemned, on his failure to produce the evidence. *The Luminary*, 8 Wheat., 407.

§ 2936. In a libel of information against the master of a vessel to enforce the payment of a penalty for not making the report required by the act of 1790, chapter 35, section 16, the burden of proof is upon the government. *United States v. Galacar*, 1 Spr., 545.

§ 2937. In an action brought under the internal revenue act, as amended July 13, 1866, to recover a penalty, the burden is upon the government to establish the fact stated in the complaint. But it is a civil action, and is to be determined on a preponderance of testimony. *United States v. Brown, Deady*, 566.

§ 2938. In a suit by the United States, under section 48 of the act of June 30, 1864, to recover penalties for alleged frauds upon the revenue, it is error for the court to instruct the jury in effect that if the government makes out a *prima facie* case, not one free from all doubt, but one disclosing circumstances requiring explanation on the part of the defendants, which they do not give, their silence supplies, in the presumptions of law, that full proof which should exclude all reasonable doubt. *Chaffee v. United States*, 18 Wall., 516.

§ 2939. The act of May 15, 1820, chapter 122, by its reference to a previous act which refers again to the revenue laws of the United States for the manner of suing for, recovering, etc., penalties under said act of 1820, does not adopt by implication the seventy-first section of the act of 1799, chapter 128, which provides that in seizures under said act of 1799 the *onus probandi* shall be upon the claimant after probable cause for prosecution has been shown to the court. *The Schooner Abigail*, 3 Mason, 331.

§ 2940. In a suit to recover an alleged excess of duties exacted by the defendant as a collector of customs, the burden is upon him to show that the duties exacted did not exceed the amount authorized by law. *Wilkinson v. Greely*, 1 Curt., 439.

§ 2941. Where a vessel and cargo are seized under the act of March 15, 1820, chapter 122, the burden is on the United States to show that the cargo seized on the vessel was on board at the time of the illegal entry or attempt to enter a port of the United States. *United States v. An Open Boat*, 5 Mason, 232.

§ 2942. In an action to forfeit imported wines for fraudulent undervaluation, where probable cause for the seizure is shown by the prosecution, the burden is on the claimants. 1209 Quarter Casks of Sherry Wine, 2 Ben., 249.

§ 2943. In a suit to forfeit wines for fraudulent undervaluation, the burden is on the claimants after the court has adjudged that the prosecution has shown probable cause. 3109 Cases of Champagne, 1 Ben., 242.

§ 2944. In an action for the forfeiture of goods under the revenue laws, when the United States have shown probable cause for the prosecution, the burden is thrown upon the claimants. *United States v. 25 Cases of Cloth*, 1 Crabbe, 396.

§ 2945. In a prosecution for the forfeiture of goods alleged to have been imported in violation of the collection laws, the burden of proving the innocence of the importation is, under section 71 of the act of 1799, upon the claimants, where probable cause for the seizure is shown. *Taylor v. United States*, 3 How., 197.

§ 2946. In a proceeding for the forfeiture of distilled spirits for a violation of the thirty-first section of the internal revenue act of July 13, 1866, in neglecting to make the entry and return required by this section, where evidence is given on the part of the government tending to show such neglect or failure on the part of the claimants, the burden is cast upon the latter to show that they have complied with the statute. *United States v. 18 Barrels of High Wines*, 8 Blatch., 475.

§ 2947. Where spirits are found upon the premises of a rectifier, the burden is upon him to show that he has paid the tax on them; and if he gives no proof to that effect it is presumed that the tax has not been paid. *A Quantity of Distilled Spirits*, 3 Ben., 70.

§ 2948. In a proceeding *in rem* for the forfeiture of tobacco, under section 48 of the act of June 30, 1864, as amended by section 9 of the act of July 13, 1866, when it is proved that the tobacco has been manufactured, sold and removed without due account, return and entry made thereof in the books and abstracts as required by law, the burden is upon the claimant to show that this was done without intent to defraud the revenue laws or to evade the payment of the tax. If the claimant fails to show this, the jury may infer that his intent was fraudulent. *Lilienthal's Tobacco v. United States*, 7 Otto, 237.

§ 2949. In an information, upon the non-importation acts, for the unlawful importation of goods into the United States, the burden of proving that the vessel was neutral is upon the claimant. *United States v. Hayward*, 2 Gall., 485.

§ 2950. The *onus probandi*, in cases of forfeiture of vessels under the act of congress of March 2, 1799, is upon the claimant. *The Thomas and Henry*,* 1 Marsh., 367.

§ 2951. Where goods have been officially inspected and received, the burden is on the government to show the inferiority of the goods. *Heathfield's Case*,* 8 Ct. Cl., 213.

§ 2952. Where a vessel is libeled for proceeding to a foreign port and discharging her cargo there, contrary to the third section of the act of January 9, 1808, chapter 8, and the claimant admits the fact, the burden of proof rests on him to make out a justification in point of fact as well as law. *Brig Short Staple and Cargo*, 1 Gall., 104.

§ 2953. In an action in admiralty under the statute of July 18, 1866, if want of knowledge in the captain as to the fraudulent importations will avail at all, it must be proved by him as a defense. *United States v. Steamship Missouri*, 9 Blatch., 433.

§ 2954. **Collision.**—To recover damages for a collision the burden of proof is generally upon the libelants. But where fault is shown on the part of the damaging vessel, it is incumbent on her to show that the fault was in no degree the cause of the accident. *The Grace Girdler*, 7 Wall., 196. See MARITIME LAW. See, also, §§ 667, 1727, 2152.

§ 2955. In a libel for damages alleged to have been caused by a collision, the burden of proof is upon the libelant to show by a fair preponderance of evidence that the collision happened and that it was the cause of the injury. *Bergen v. Tug Joseph Stickney*, 1 Fed. R., 624.

§ 2956. Damages arising from a collision will be denied where the libelant does not prove by a preponderance of evidence that it was the fault of the vessel libeled. *The Schooner Summit*, 2 Curt., 150.

§ 2957. The burden is on a vessel which has the wind free to show that she could not have avoided collision with the other vessel by the greatest diligence. *The Heroine*, 6 Blatch., 188.

§ 2958. To maintain a suit for injuries by collision, the prosecuting vessel must prove herself clear of fault and also establish culpable negligence or actual misfeasance against the other. *The Steam Ferryboat Relief, Olc.*, 104.

§ 2959. The owners of a sailing vessel, in an action by them against a steamer for damages caused by a collision, must prove ordinary care and skill on their part and negligence or wilful fault on the part of the steamboat. *The Steamboat New Jersey, Olc.*, 415.

§ 2960. In a case of collision between a steamer and a sailing vessel, the burden of proof is upon the steamer to show a sufficient reason for not keeping out of the way of the sailing vessel. *Perkins v. Schooner Hercules*, 1 Fed. R., 925.

§ 2961. When a collision occurs between a steamer and a sailing vessel, and the latter sues for damages sustained, she sustains the burden of proving that the steamer was at fault. *Steam Tug William Young, Olc.*, 38.

§ 2962. When it is shown that a collision has taken place between two vessels, and that one of them had neglected an ordinary and proper measure of precaution, the burden is upon her to show that the collision was not caused by her neglect, but would have happened if she had performed her duty. *The Schooner Lyon*, 1 Spr., 40.

§ 2963. Where a schooner sailing on her starboard tack in a flood tide and a steamboat sailing in the opposite direction come into collision, the burden is on the steamboat to show negligence on the part of the schooner. *The Washington Irving, Abb. Adm.*, 338.

§ 2964. Where a collision occurred between two steamboats going in opposite directions, and one had ported her helm according to rule, the burden is on the other to show that under the circumstances the first should have gone to starboard. *The Washington*, 3 Blatch., 276.

§ 2965. In a case of collision between a schooner and a steamer, the burden is on the latter to show the schooner's negligence. This will not be sustained by statements that the schooner changed her course, the schooner denying that such was the case. *Schooner Lizzie Major*, 8 Ben., 333.

§ 2966. In a case of collision, where it was the duty of the injured vessel to have a light, the burden is upon her to show by a fair preponderance of evidence that she had a light. *Middlesex Quarry Co. v. Schooner Albert Mason*, 2 Fed. R., 821.

§ 2967. A sailing vessel in a narrow channel had just come round on her proper tack when she was struck by a steamboat. The burden is on the latter to show fault on the part of the schooner. The testimony of those on the schooner as to their own acts will outweigh the contradictory statements of those on the steamboat. Conversations had with the crew of the schooner after the collision, when denied by the crew themselves on the stand, and when inconsistent with the contemporary act of demanding payment for their vessel, will be rejected. *The Steamboat Empire State*, 1 Ben., 57.

§ 2968. If it is proved that one of the vessels injured by a collision was in stays at the time, the burden is upon the other of showing that the collision was occasioned by the former being improperly put into stays, or by inevitable accident. *The Charlotte Raab*, 1 Brown, 453.

§ 2969. Where a vessel which, under the circumstances, is bound to keep out of another vessel's way, alleges that the latter by changing her course prevented the performance of that duty, the burden is on the first vessel to show such negligence by a satisfactory preponderance of evidence. *Schooner Osseo — Schooner Sandy Hook*, 8 Ben., 519.

§ 2970. If a vessel, lying at anchor in the harbor, breaks from her moorings and is driven by the winds against another; also at anchor in its proper and usual place, the burden is upon

the former to show that the collision occurred without fault on her part. *The Freemont*, 3 Saw., 571.

§ 2971. **Seamen's wages.**—A seaman suing for wages must support the allegations of his libel by proof. If the respondent denies the truth of the excuse the seaman alleges for not performing the voyage, the seaman must prove it. *Wilcox v. Palmer*, 3 Wash., 248. See MARITIME LAW. See, also, § 1332.

§ 2972. In a libel for wages, an answer alleging payment places the burden of proving payment on the respondent; and he must maintain the allegation by proof clearly and satisfactorily overbalancing that of the demandant. *The Brig Napoleon, Olc.*, 208.

§ 2973. If seamen suing for wages have broken their contract, the burden is upon them of showing that they had an excuse in law for so doing. *The Steamboat Swallow, Olc.*, 4.

§ 2974. In an action for a seaman's wages, if the respondent relies on a payment made in behalf of the seaman to a third person, the burden is on him affirmatively to establish that third person's authority, and if the testimony is balanced on this point the defense must fail. *Holmes v. Dodge*, Abb. Adm., 60.

§ 2975. In a libel against a vessel for wages, if the owners claim a deduction of a sum paid for medical advice for the seaman, it is upon them to show that the vessel was provided with a medicine chest, according to the act of congress of 1790. *The William Harris*, 1 Ware, 367.

§ 2976. In a suit by a seaman for his wages, where the amount earned by him is not disputed, but payments and other offsets are claimed by the master, the burden of proving these is upon the master. *The Schooner Fritheoff*, 7 Saw., 58.

§ 2977. Where seamen bring an action for wages against the master, and he sets up an embezzlement of cargo and claims contribution from them, it being uncertain by what ones of the crew, if by any, the act was committed, the burden is on the master to show the guilt of the crew and that the right of contribution exists. *Spur v. Pearson*, 1 Mason, 104.

§ 2978. If a seaman in a suit for wages alleges that he was discharged before unlading the cargo, the burden is upon him to prove the fact. His own affidavit is not sufficient for this purpose. *The Schooner Eagle, Olc.*, 232.

§ 2979. Where a seaman sues for extra wages on account of a short allowance of bread, and the claimant contends that there was always an abundance of other provisions, so that the crew had sufficient, the burden is upon the claimant to show what the other provisions were, if this would be any defense. *The Mary Paulina*, 1 Spr., 45.

§ 2980. To maintain a claim for double wages, it being necessary to show that the crew were put on short allowance, and also that the ship did not have on board the provisions required by law when she sailed on the voyage, proof on the part of the libelants that a bad and unwholesome quality was served out, and that they were not allowed a just ratio of that which was good and wholesome, does not cast upon the claimants the burden of showing that the vessel was properly provisioned on her departure. *The Bark Childe Harold, Olc.*, 275.

§ 2981. Upon a claim for short allowance, when it is proved that the crew were put on short allowance, proof of the quantity of provisions supplied the vessel should be furnished by the ship. But when the claim is a stale one, it is reasonable to require the libelant to give evidence importing that the ship was insufficiently provisioned. When he does this, the burden is upon the ship to show by clear evidence that she had placed on board all the provisions required by law. *Piehl v. Balchen, Olc.*, 24.

§ 2982. Under the rule in 1 Peters' Admiralty, on the construction of the act of July 20, 1790, when it has been proved that the crew were on short allowance of food, the burden is on the master to show that the vessel had the legal quantity of provisions on board. *The Elizabeth Frith, Bl. & How.*, 195.

§ 2983. If an answer to a libel by a seaman for wages sets up in defense that the libelant was discharged from the ship at a foreign port, with his own consent, and by authority of the United States consul at that port, it is incumbent on the claimants to set forth in their answer facts justifying the discharge of the libelant, and to support the allegations by competent and sufficient proofs. *The Atlantic*, Abb. Adm., 451.

§ 2984. Where a seaman is discharged in a foreign port without his consent or the approval of the American consul, the burden is on the master to show that he had reasonable grounds for his action. *Nieto v. Clark*, 1 Cliff., 145.

§ 2985. Under the act of 1803, chapter 62, section 3, providing for extra pay to be given to seamen discharged in a foreign port, the burden is on the master, in a libel for these and other wages, to show that such advance has been made. *Orne v. Townsend*, 4 Mason, 541.

§ 2986. **Replevin.**—Upon a plea of property in the defendant, in an action of replevin, the burden of proof is upon the plaintiff. *Williamson v. Ringgold*, 4 Cr. C. C., 39; *Henderson v. Casteel*, 3 Cr. C. C., 365. See § 767.

§ 2987. In replevin, brought for the purpose of trying the legality of a distress for rent,

under a plea of no rent-arrear, the whole burden of proof is on the plaintiff. *Hungerford v. Burr*, 4 Cr. C. C., 349.

§ 2988. In an action of replevin for property, of which the plaintiff was in quiet and peaceable possession at the time it was seized by the defendant, such possession is *prima facie* evidence of title, and throws upon the defendant the burden of establishing the contrary. *Schulenberg v. Harriman*, 21 Wall., 44.

§ 2989. In ejectment, where the defendant, being a mere intruder, relies on an outstanding title in a third person, he must establish it beyond controversy. *Greenleaf v. Birth*, 9 Pet., 292. See §§ 242, 2409.

§ 2990. A plaintiff in ejectment, who offers in evidence a deed containing exceptions, must show that the trespass was upon land not contained within the exceptions. *Hawkins v. Barney*, 5 Pet., 457.

§ 2991. Where an alleged entry is set up by the defendant in an action of ejectment, to avoid the bar of the act of limitations, the burden of proof is upon him to show a legal entry. *Holtzapple v. Phillibaum*, 4 Wash., 356.

§ 2992. If possession for a sufficient length of time to afford a bar by the statute of limitations is proved in defense to an action of ejectment, the burden is upon the plaintiff to prove himself to be within one of the exceptions to the statute, for this will not be presumed by law. *Somerville v. Hamilton*, 4 Wheat., 230.

§ 2993. On the pleadings.—A general replication denies every allegation in the answer which is not responsive to the bill, and such allegations must be proved by the defendant. A decree in a former suit pleaded by way of estoppel comes under this rule, and must be proved. *Humes v. Scruggs*, 4 Otto, 22. See § 1812.

§ 2994. In an action on a bond a plea of *non est factum* throws the burden of proof of showing the signatures to be genuine upon the plaintiff. *Risley v. I. B. & W. R'y Co.*,* 7 Biss., 408.

§ 2995. As a plea of *non assumpsit*, sworn to, puts in issue the execution of the note sued on, it devolves on the plaintiff to prove it. *Gray v. Tunstall*, Hemp., 558.

§ 2996. In an action of debt on a note, where the plea of payment is relied on, it devolves upon the defendant to support the plea by evidence before the plaintiff will be required to adduce any evidence on his part. The plea is an affirmative one, and imposes the burden of proof on the defendant. It admits all the allegations of the declaration. *Archer v. Morehouse*, Hemp., 184.

§ 2997. Where a defendant in his answer admits the receipt of money as executor, but sets up a claim to retain the money in his own hands, the answer is not evidence of the claim, and the burden is on the defendant to prove it. *Tilghman v. Tilghman's Ex'rs*, 1 Bald., 494.

§ 2998. The burden of proof, where matters are set up in the answer in avoidance of the allegations of the bill, is on the defendants. *Flagg v. Mann*, 2 Sumn., 486.

§ 2999. Where defendants are apprised by a bill in equity that a deed executed by them is to be impeached, it is incumbent on them to explain every fact tending to cast suspicion on it. *Alexander v. Todd*, 1 Bond, 175.

§ 3000. If the answer of the defendant admits a fact, but insists on matter by way of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance. *Clarke v. White*, 12 Pet., 178.

§ 3001. The burden of proof is upon the defendants to show that notice of the special matter relied on as a defense has been given to the plaintiffs, as required by the fifteenth section of the patent act of 1836. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet., 448.

§ 3002. The plea of another action pending is an affirmative plea and casts the burden on the defendant to prove it. The proof must be by record evidence. When he shows the issuing of a writ for the same cause of action, he proves, *prima facie*, the pendency of the suit; and it then devolves on the plaintiff to prove, by competent testimony, that the suit has been disposed of or is no longer pending. He cannot show this by parol. *Fowler v. Byrd*, Hemp., 213.

§ 3003. In an action for the hire of a vessel brought upon a sealed agreement, the defendant, by pleading that he "hath paid to the said plaintiffs all and every such sums of money as were become due and payable from the defendant, according to the tenor and effect, true intent and meaning of the said articles of agreement," assumes upon himself the burden of proving that he has paid the hire of the vessel for the time and rate stated in the declaration. *Winter v. Simonton*, 3 Cr. C. C., 104. See 5 Pet., 141.

§ 3004. If the defendant as maker of a promissory note, having pleaded the general issue, has offered to prove that the note was obtained by fraud, the burden is on the plaintiff, who is indorsee, to show that the assignment to him was for a valuable consideration. *McClintick v. Cummins*, 2 McL., 98.

§ 3005. Where the respondent has no personal knowledge of the matter set forth in any

particular allegation of the bill, a denial by him upon information and belief is sufficient to make it necessary for the complainant to prove the same. *Robinson v. Mandell*, 3 Cliff., 169.

§ 3006. Under the statute of Indiana, requiring a plea which denies the execution of a bill, note, etc., to be under oath, the plea, if not sworn to, does not put the plaintiff to the proof of the instrument. On the plea that a note was given without consideration, the burden in the first instance is on the defendant. *McClintick v. Johnston*, 1 McL., 414.

§ 3007. A party, by pleading a record with a *prout patet*, proffers that issue, and it is incumbent on him to maintain it literally. *Whitaker v. Bramson*, 2 Paine, 209.

§ 3008. Where the ratification of an agreement depends wholly upon the defendant's having received certain property and having paid the stipulated price, the burden is on the claimant to prove both these points. *Danolds v. United States*,* 5 Ct. Cl., 65.

§ 3009. The averment of an intermediate indorsement must be proved, although the suit is for the use of the intermediate indorser. *Coyle v. Gozzler*,* 2 Cr. C. C., 625.

§ 3010. In an action under the abandoned or captured property act, where *nul tiel* corporation is not pleaded, and the property has been taken from the possession of the corporation or has been duly reported as owned by it, the plaintiffs will not be required to prove their corporate capacity. *Hebrew Congregation's Case*,* 6 Ct. Cl., 241.

§ 3011. When the necessary citizenship is averred to give jurisdiction to a federal court, it must be taken *prima facie* as existing, and the burden of proof rests upon the party taking exception to the jurisdiction. *Sheppard v. Graves*, 14 How., 505.

§ 3012. The averment of citizenship, in order to give jurisdiction to the United States circuit court, is a necessary averment, and must be proved under the general issue. *Catlett v. Pacific Insurance Co.*, 1 Paine, 594.

§ 3013. Where the defendant in a suit for infringement of patent sets up an unrecorded assignment to himself by way of equitable defense to the legal title in the same interest, he must assume the burthen of showing that the plaintiff is not a *bona fide* purchaser without notice. *Gibson v. Cook*, 2 Blatch., 144.

§ 3014. Where parties sue as assignees of notes and mortgages, and the answer denies the assignments to them, they must prove the assignments as alleged in the bill. *Wyman v. Russell*, 4 Biss., 307.

§ 3015. In cases of tort, where the party prosecuted admits the injury and sets up justificatory or excusatory matters, he takes upon himself the burden of proving affirmatively the excuse as he alleges it. *The Steamboat Rhode Island, Olc.*, 505; 6 N. Y. Leg. Obs., 12.

§ 3016. Carriers.—In an action for the loss of certain money and bank bills delivered to the defendants to be carried from one place to another, the burden of proving that the defendants were common carriers of money and bank bills rests upon the plaintiff. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16. See CARRIERS. See, also, § 1721.

§ 3017. Where property of the libelant was laden on board the respondent's vessel, and its amount ascertained by one system of measurement, but when delivered another system was employed and the amount then found was less than that first ascertained, it being in evidence that there was always more or less variation in such cases, the libelant must prove by a preponderance of evidence that he actually shipped more grain on the vessel than was delivered by her. *Manning v. Hoover*, Abb. Adm., 195.

§ 3018. In all cases of loss, the *onus probandi* is on the carrier to exempt himself from liability, for *prima facie* the law imposes on him the obligation of safety. In cases where notices are given by the carrier for the purpose of qualifying or limiting his responsibility, the burden of proof of negligence is on the shipper, and not of due diligence on the part of the carrier, which is contrary to the general rule where there is notice. *Brig May Queen*, Newb., 464.

§ 3019. To charge a mate on the ground of negligence for a difference between the amount of goods landed from a vessel and that required by the invoice, it must be clearly shown what amount was placed on board and what landed. *Scharlock v. The Globe*, 1 Crabbe, 278.

§ 3020. Where a consignee, without objection, receives goods into the possession of his agents, and subsequently discovers a loss, the burden is on him to show that the loss occurred while the goods were under the carrier's control. *McCready v. Holmes*,* 6 Am. L. Reg., 235.

§ 3021. When a vessel has encountered heavy storms, so that any damage to her cargo would come within the exception of the bill of lading against perils of the sea, the burden is on the shipper to show that the damage was caused by the carrier's negligence. *The Neptune*, 6 Blatch., 193.

§ 3022. Where damage to a ship's cargo is caused by blowing, the burden is on the ship to show due care. *Bark Wilhelmina*, 3 Ben., 110.

§ 3023. The burden is on a carrier who has acknowledged, in a bill of lading, the soundness of goods, in an action against him for damages to the goods, to establish the contrary by due proof. *Ship Howard v. Wissman*, 18 How., 231.

§ 3024. Very slight evidence of non-delivery is sufficient to throw on the carrier the burden

of proving that the goods were delivered. When it was specified that goods should be delivered to either of two consignees, the owner, in an action for non-delivery, must give evidence to show that they were not delivered to either. *The Falcon*, 3 Blatch., 64.

§ 3025. Loss of, or injury to, goods shipped, when proved, casts upon the carrier the burden of showing that he is not at fault. But when the article shipped is a horse or other live stock, which is proved to have been delivered to the carrier in good health and condition, and to have been redelivered to the shipper in a sick and debilitated condition, but without any fractures, wounds, abrasions or other external or visible injury, an injury is not shown which casts the burden on the carrier to exempt himself. The shipper must show some injury to the thing shipped which cannot be the result of its inherent nature or defects. *Hussey v. The Saragossa*, 3 Woods, 380.

§ 3026. If goods have not been delivered by the carrier in like good order and condition as when received, the burden is upon him to exonerate himself from liability. *The Schooner Emma Johnson*, 1 Spr., 527.

§ 3027. If goods received on board in good order are delivered in a damaged condition, the burden of proof is upon the carrier to show that they were damaged by causes for which the ship is not responsible. *The Ship Zone*, 2 Spr., 19.

§ 3028. If a cargo received on board in good condition is delivered in a damaged condition, the burden is upon the master to show that the injury was not sustained through his fault or negligence. *Soule v. Rodocanachi*, Newb., 504.

§ 3029. The burden is upon the ship-owner, in a libel for the loss of goods shipped, to prove the consent of the owners of the goods to their storage on deck. *The Peytona*, 2 Curt., 21.

§ 3030. In a suit to recover the value of goods damaged upon a voyage, where they have been shipped under a bill of lading in the usual form, making a loss occasioned by the perils of the sea an exception to the undertaking to deliver the goods safely, the burden is upon the carriers to bring themselves within the exception. *Hooper v. Rathbone*, Taney, 519.

§ 3031. The burden is upon the common carrier, when sued for the loss of goods shipped, to prove that the loss was occasioned by the dangers of the seas, this being the only exception contained in the bill of lading. *King v. Shepherd*, 3 Story, 349.

§ 3032. The loss of goods committed to a carrier, and in possession of his servants, puts the burden of proof upon him to show how it took place, and that it was not by their fault, but in consequence of some of the unavoidable accidents excepted in the bill of lading. *Bazin v. The Steamship Company*, 3 Wall. Jr., 229.

§ 3033. The injury to goods shipped being proved, it is incumbent on the carrier to show that it was caused by a danger excepted in the bill of lading. And if it appear that it was in consequence of such dangers, then it devolves upon the shipper to make out that the damage might have been avoided by the exercise of reasonable care and skill on the part of the carrier. *The Cleveland*, Newb., 221.

§ 3034. Where goods are shipped, and the usual bill of lading is given, promising to deliver them in good order, the dangers of the seas excepted, and they are proved to be damaged, the *onus probandi* is upon the owners of the vessel to show that the injury was occasioned by one of the causes excepted. After this is shown, the *onus probandi* becomes shifted upon the shipper to show that the injury might still have been avoided by the exercise of reasonable skill and attention. *The Rocket*, 1 Biss., 354; *Richards v. Hanson*, 1 Fed. R., 54; *Turner v. Ship Black Warrior*, 1 McAl., 181; *Bearse v. Ropes*, 1 Spr., 331.

§ 3035. If goods shipped are delivered in a damaged condition at the end of the voyage, and the damage must necessarily have accrued in the course of the voyage, the burden is devolved upon the carriers to show, in order to excuse themselves, that it was occasioned by one of the perils of navigation within the exception in the bill of lading. *Rich v. Lambert*, 12 How., 347.

§ 3036. Where a bill of lading contains an exception from fire risk and the goods are injured by fire, the burden is on him who claims damages to show negligence on the part of the boat. Negligence cannot be inferred from the fact that the boat was on fire. *The Buckeye*, 7 Biss., 23.

§ 3037. When a carrier sets up in defense the clause in the bill of lading "dangers of navigation excepted," the burden is on him to show that the loss in question is within that exception and that usual care and diligence were used to avoid it. *Badgeley v. Schooner Juniata Paton*,* 1 Am. L. Reg., 264.

§ 3038. Where the plaintiff grounds his right of action upon the breach of common law duty by a carrier, the burden of proving such breach rests upon him. *Dixon v. Columbus & Indianapolis R'y Co.*, 4 Biss., 137.

§ 3039. If goods are shipped in packages, and the bill of lading states that they were received in good order, "contents unknown," the admission as to the condition of the goods extends only to the external condition of the cases; and if the evidence on the part of the

carrier lays a foundation for a reasonable inference that the damage resulted from an imperfection in the goods when packed in the cases, or accrued previously to their being shipped on board, the burden is thrown upon the shipper to rebut this inference. *Clark v. Barnwell*, 12 How., 272.

§ 3040. The rule that the burden of accounting for goods lost in transit devolves on the carrier does not apply where the goods are received for transportation beyond the terminus of the road of the defendant, and the loss happens after the defendant has delivered the goods to the next carrier. *Dixon v. Columbus & Indianapolis R'y Co.*, 4 Biss., 137.

§ 3041. In an action against a carrier for loss of or damage to goods shipped, the burden of proving the value of the goods is upon the libellant. *The Pacific*, Deady, 17.

§ 3042. Where cotton was received on a vessel under a bill of lading, and a less quantity delivered than was specified therein, the burden is on the vessel to show that the bill was signed for goods that were never received. *Steamer Saragossa*, 2 Ben., 544.

§ 3043. The words in a bill of lading, "received in good order and condition," accompanied by the clause "weight and contents unknown," are an admission only of the condition of the goods as visible to the eye or apparent from handling; and where there is a question on the condition of the contents of the casks or bales not so apparent, the burden is on the shipper to show the good condition of the contents at the time of shipment. *The Columbo*, 3 Blatch., 521.

§ 3044. Where a bill of lading admitted that casks of wine were received on board in good order, and it appeared that some of the wine had leaked out through a hole in the cask, the burden was on the vessel to show that the hole was caused by a defect in the cask. *Bark Olbers*, 3 Ben., 148.

§ 3045. Negligence.—In an action for injuries alleged to have been received on a highway through the negligence of the town, the burden is upon the plaintiff to show himself free from fault. *Hull v. Richmond*, 2 Woodb. & M., 337. See TORTS.

§ 3046. In an action for damages for injuries alleged to have been received through the negligence of another, contributory negligence is a defense to be proved by the defendant. *Railroad Company v. Gladmon*, 15 Wall., 401; *Knareborough v. Belcher Silver Mining Co.*, 3 Saw., 446.

§ 3047. In an action by a passenger for injuries received from the upsetting of a stage-coach, the upsetting of the coach is *prima facie* evidence of negligence; and it is upon the defendant to prove facts and circumstances which go to reduce the damages, or to excuse him from liability. *McKinney v. Neil*, 1 McL., 540; *Saltonstall v. Stockton*, Taney, 11.

§ 3048. In an action for an injury received by the upsetting of a stage-coach, the fact that the coach was upset and the passenger injured is *prima facie* evidence of negligence; and the burden is upon the defendant to show that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which he was engaged, and that he acted on the occasion with reasonable skill and with the utmost prudence and caution. *Stokes v. Saltonstall*, 13 Pet., 181.

§ 3049. Where, in an action to recover for injuries to a passenger alleged to have been received by the upsetting of a stage-coach, the plaintiff imputes the accident altogether to the misconduct of the driver, it is incumbent on the owners to prove that the driver possessed and exercised that degree of skill which competent drivers, in like business, usually possess, and ought to possess, in order to convey the passengers with safety and comfort; and that he exercised at the time of the accident the utmost prudence and caution. *Saltonstall v. Stockton*, Taney, 11.

§ 3050. By section 13 of the act of July 7, 1838, when a passenger upon a steamboat is injured by the explosion of a boiler, it is *prima facie* evidence of negligence, and it is incumbent on the owners to prove that no negligence was committed by those in their employment. *Steamboat New World v. King*, 16 How., 469.

§ 3051. In an action for the recovery of damages for an injury alleged to have been received through the negligence of a railroad company, where the plaintiff's evidence does not tend to show any contributory negligence on his part, it is not error to instruct the jury that the burden of showing contributory negligence is on the defendant, and that it must be established by a preponderance of evidence. *Indianapolis & St. Louis R. Co. v. Horst*, 3 Otto, 291.

§ 3052. Bottomry bond.—In a suit upon a bottomry bond, the burden of establishing that there were other funds which might have been applied for the purpose of making the repairs, or that they might have been obtained upon the personal credit of the owner, is upon the owner and not on the lender. *The Ship Fortitude*, 3 Sumn., 228. See MARITIME LAW.

§ 3053. The necessity for the supplies and advances for which a bottomry bond is given being proved, it is incumbent upon the owners, if they assert that the supplies and advances could have been obtained upon their personal credit, to establish the fact by competent proof, unless it is apparent from the circumstances of the case. *The Ship Virgin*, 8 Pet., 538.

§ 3054. To support a bottomry bond the creditor must show that the master acted within

the scope of his authority in giving it, or, in other words, that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship; and no presumption arises that they could have been procured upon any reasonable terms, with the credit of the owner, independent of such hypothecation. *The Aurora*, 1 Wheat., 96.

§ 3055. **Embargo bond.**—In an action of debt on an embargo bond, where the unseaworthiness of the vessel is fatal to the defense relied on, if the vessel begins to leak and to show herself unfit to perform the voyage, without any apparent and sufficient cause, the presumption is that she was not seaworthy when the voyage commenced, and the person who affirms her seaworthiness must prove it by sufficient evidence. But if sufficient cause for her leaking is shown, as the existence of severe weather, the burden of proof is thrown upon the party who affirms that she was not seaworthy when the voyage began. *United States v. Mitchel*, 3 Wash., 95.

§ 3056. **Marine insurance — Seaworthiness.**—In a suit by the owners of a vessel against the charterer for breach of covenant of the charter-party in refusing to furnish a cargo, where the defense is that the vessel was unseaworthy, the burden of proving seaworthiness is upon the owners. *The Vincennes*, 3 Ware, 171. See §§ 631, 910, 1306, 2894; also INSURANCE.

§ 3057. Even if a vessel was seaworthy at the beginning of the voyage, there is no presumption that a necessity for repairs arising during the voyage was occasioned by a peril insured against. The burden is still on the insured to prove this, in an action on an insurance policy. *Bullard v. Roger Williams Ins. Co.*, 1 Curt., 148.

§ 3058. In every case in which the assured seeks to recover against the underwriters for repairs made by the master during the course of the voyage, the burden is upon him to show, not only that they were proper and necessary, but that they became so from the extraordinary perils of the voyage, within the policy. *Donnell v. Columbian Ins. Co.*, 2 Sumn., 366.

§ 3059. On the question of the seaworthiness of a vessel, as between the insurers and the insured, where a rational ground is laid for the disability of the vessel to perform the voyage, by proof of severe gales to which she was exposed on the voyage; and more especially where the former condition of the vessel for the two preceding voyages is proved to be that of a sound and seaworthy vessel, the burden is thrown upon the underwriters to prove that she was unseaworthy and not strong enough to perform the voyage. *Watson v. Insurance Co. of North America*, 2 Wash., 480.

§ 3060. The fact that the application for a policy of marine insurance does not contain statements as to the destination of the vessel, her voyage or her master's name, is not evidence that the applicant did not communicate these matters or answer truly all questions in regard thereto. It is for the issuer of the policy to show affirmatively the applicant's misrepresentation. *Folsom v. Mercantile Ins. Co.*, 9 Blatch., 201.

§ 3061. In an action against underwriters on a policy of insurance, where the defenses are set up of misrepresentation, negligent navigation, deviation, and unseaworthiness, the burden on the first three points is on the defendant, but as to unseaworthiness it is on the plaintiff, for the existence of seaworthiness at the commencement of the voyage is a condition precedent to the attaching of the policy. *Tidmarsh v. Washington Insurance Co.*, 4 Mason, 439.

§ 3062. In an action upon a marine policy, the burden is upon the plaintiff to show that the loss arose from some of the perils mentioned in the policy, and in the way stated in the declaration. *Hicks v. Fitzsimmons*, 1 Wash., 279.

§ 3063. In an action upon an open policy of insurance the plaintiff must prove his interest and the value of it, and the bill of lading of the outward cargo is no proof that the plaintiff was interested in the return cargo. *Beale v. Pettit*, 1 Wash., 241.

§ 3064. **Negotiable paper.**—The holder of negotiable paper, who took it before it was due, is not bound to prove that he is a *bona fide* holder for value, without notice; for the law will presume that in the absence of rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defense satisfactory proofs of the contrary. *Swift v. Tyson*, 16 Pet., 1. See BILLS AND NOTES; BONDS. See, also, §§ 260, 565, 941, 1710, 1859.

§ 3065. Possession of a negotiable note is *prima facie* evidence that the possessor is a holder for a valuable consideration, and he is not bound to prove by other evidence that he is a *bona fide* holder. *Welles v. Newberry*, 4 McL., 226.

§ 3066. In a suit by the drawee of a bill of exchange signed and indorsed in blank when delivered, against the drawer or indorser, the burden is upon the defendant to show that there was an agreement in conformity with which the blanks were to be filled up, and that its terms have been violated. *Davidson v. Lanier*, 4 Wall., 447.

§ 3067. When a protested bill is held up for a long time without notice, the whole *onus probandi* is thrown upon the holder: he must prove everything, and nothing is required from the drawer. *Hopkirk v. Page*, 2 Marsh., 20.

§ 3068. A note upon which an action was brought against an indorser was to be discounted

by a bank (the plaintiffs), and was originally payable at sixty days. The bank refused to discount it unless made payable at forty-five days; whereupon the maker, who was the agent of all the parties in the management of the joint adventure, the raising of money for which the note was made and discounted, altered the note accordingly, and it was discounted for the joint benefit of the maker and indorsers. *Held*, that the burden of proof was upon the plaintiffs to show that the alteration was made with the consent or approbation of the defendant, and his knowledge of the alteration at the time he did any act or made any declaration implying a participation in the discount; and that this consent or approbation was not to be inferred from the mere fact of participation in the discount. *Bank of Washington v. Way*, 2 Cr. C. C., 249.

§ 3069. If the holder of a bill of exchange relies on any legal excuse for not giving notice of dishonor according to the rules of law, the burden is upon him to prove it. *United States v. Barker*, 4 Wash., 464.

§ 3070. In an action against the drawer of certain checks, lent by the defendant to a third person for his accommodation, and purchased by the plaintiff of a broker, the contract being usurious under a law authorizing a recovery of the amount lent only, the burden is upon the plaintiff to show that he paid more for the checks than the third person to whom they were lent is proved to have received, if he would recover more than that amount. *Hill v. Scott*, 5 Cr. C. C., 523.

§ 3071. The burden of proof is upon a party charging the note of an individual partner to the partnership account, to show the assent of the other partner, or that the transaction was for the joint account and benefit. *Coote v. Bank of the United States*, 3 Cr. C. C., 95.

§ 3072. An acknowledgment by a party that he indorsed a draft drawn by the defendant, the draft not being shown to him at the time, is sufficient to throw the burden on the other side to prove that there were other drafts drawn by the defendant and indorsed by the same party. *Hyer v. Smith*,* 3 Cr. C. C., 438.

§ 3073. **Patents.**—In an action under the patent act of 1793, to repeal a patent-right on the ground that it was obtained surreptitiously, evidence that the defendant refused to submit his claim to arbitration as provided by the act, and that he subsequently obtained a patent after the plaintiff had obtained his, is not conclusive proof that his patent was obtained surreptitiously or upon false suggestion. The burden in such a case is on the plaintiff to show that the patent was obtained surreptitiously or upon false suggestion. *Stearns v. Barrett*, 1 Mason, 153. See PATENTS.

§ 3074. Under section 15 of the patent act of 1836, it is not for the alien patentees to prove that they endeavored to sell to any person; the burden is on those who seek to defeat the patent to show that the patentees unreasonably failed to sell after application made to them. *Tatham v. Lowber*, 2 Blatch., 49.

§ 3075. The law does not favor the forfeiture of an invention by abandonment, and the burden of proving abandonment beyond reasonable doubt is on him who seeks to obtain the benefit of it. *McCormick v. Seymour*, 2 Blatch., 256.

§ 3076. If an infringer has improved the machine, and, when sued by the owner of the patent, claims a part of the profits as due to his improvement, the burden of showing the amount of such profits rests upon him. *Carter v. Baker*, 1 Saw., 512.

§ 3077. **Miscellaneous.**—When the seal of a corporation is attached to a mortgage, the presumption is that it is rightfully there. But when it is proved that neither the president, nor the secretary *pro tem.*, who signed the mortgage, nor the regular secretary, who was the rightful custodian of the seal, had any knowledge of the way in which the mortgage became sealed, the burden is upon the holder of the mortgage to show that the seal was rightfully and properly affixed. *Koehler v. Black River Falls Iron Co.*, 2 Black, 715.

§ 3078. Directors *de facto* of a corporate body are to be considered *prima facie* as directors *de jure*, and in a suit by the corporation to recover unpaid subscriptions, it is not incumbent on the plaintiff to prove that the managers were elected by a majority of votes. *Rockville & Washington Turnpike Road v. Van Ness*, 2 Cr. C. C., 449.

§ 3079. Where the validity of a deed depends upon an act *in pais*, a party claiming under it is bound to prove the performance of the act. *Tolmie v. Thompson*, 3 Cr. C. C., 123.

§ 3080. The burden is upon the vendor, who claims against creditors of the vendee, to show that the sale was conditional upon the payment of the purchase money, and no title was to pass until payment, if he claims such to be the fact. *In re Binford*, 3 Hughes, 295.

§ 3081. The burden of proving adverse possession for the period of limitation is upon the party alleging it. *Grosholz v. Newman*, 21 Wall., 481.

§ 3082. Where the right of a releasor of his interest in a tract of land to enter upon it exists, under the deed and a contemporaneous agreement, only in case the releasee shall fail to perform the conditions and stipulations of the contract, and an entry by him is sought to be enjoined in equity, the burden is upon him to show that his entry is justifiable. *Marble Company v. Ripley*, 10 Wall., 339.

§ 3083. In an action for breach of covenant, where the covenants in the agreement are dependent or concurrent, the burden of proof is upon plaintiff to prove performance, or an offer to perform the covenants on his part. *Goodwin v. Lynn*, 4 Wash., 714.

§ 3084. To maintain an action upon a conditional acceptance, the plaintiff must prove a performance of the condition. *Read v. Wilkinson*, 2 Wash., 514.

§ 3085. Where a vendor agrees to ship goods of a certain quality as soon as possible, and sues the purchaser because the goods sent are not accepted, the burden is upon the plaintiff to show that he has complied with the contract, not only with respect to the time of shipment, but also as to the quality of the goods. *Pope v. Filley*, 3 McC., 190.

§ 3086. Where laborers are hired to assist the crew in lading the vessel, and it appears that goods have been embezzled from a box during the lading, the crew are *prima facie* responsible; and in a suit for wages, where they are sought to be charged with the loss occasioned by the embezzlement, the burden is upon them to show that it was committed by persons not of the crew. *Marines v. Ship Kensington*, 1 Pet. Adm., 239.

§ 3087. Where it is claimed that goods shipped were injured in consequence of the unseaworthiness of the vessel, the fact that she put into an intermediate port from necessity on account of unseaworthiness casts upon the owner the burden of showing that this deficiency was removed when she departed. *The Bark Gentleman, Olc.*, 110.

§ 3088. Although a mere suspicion, not resting on strong circumstances, unexplained, should not be permitted to outweigh positive testimony in giving effect to a penal statute, yet, a party who sets up *vis major* as an excuse must make out the excuse so as to leave no reasonable doubt of his innocence. *Brig Struggle v. United States*, 9 Cr., 71.

§ 3089. When a foreign merchant sends an account current to another residing in this country, between whom there are mutual dealings, and he keeps it two years without any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, so far at least as to cast upon him the *onus probandi*. *Freeland v. Heron*, 7 Cr., 147.

§ 3090. As against the owner, the burden is upon the town to prove a dedication of land. This proof should be clear and cogent, and when it consists of casual disjointed conversations and remarks, it should be closely scrutinized, and, unless in harmony with the established circumstances of the case, but little heeded. *Lownsdale v. City of Portland*, Deady, 39.

§ 3091. Where one who can neither read nor write denies that he understood his deed to have the effect apparent on its face, it is for the person who took the deed from him and is seeking to enforce it against him to show that he fully understood its import. *Selden v. Myers*, 20 How., 506.

§ 3092. A vessel apparently Spanish, but whose national character was not distinctly proved, was captured by two privateers from Buenos Ayres, and a prize crew put on board. Members of this crew killed the prize-master, and were indicted for murder committed on the seas. There was no proof who were the owners of the privateers, nor where they resided, nor what were the ships' papers, nor where or at what time they were equipped for war. They were built at Baltimore, and the crews consisted chiefly of Englishmen, Frenchmen and Americans, the captains being both domiciled at Baltimore. It was held that, under these circumstances, the burden of proving the national character of the vessel on which the crime was committed was on the prisoners. *United States v. Holmes*, 5 Wheat., 412.

§ 3093. In Alabama a garnishee who sets up a claim to the property in his hands must prove the *bona fides* of his claim if it is derived from the debtor after the origin of the creditor's demand. *Williams v. Hill*, 19 How., 246.

§ 3094. The return of the commissioners at an election for mayor of the city of Washington is *prima facie* evidence that the votes were good, and throws the burden of proof upon the relator to show that bad votes were given for the person returned as duly elected. *United States v. Carbery*, 2 Cr. C. C., 358.

§ 3095. The defendant having offered to prove that he had paid a bond of the testator, it was held that he need give only *prima facie* evidence of the debt. *Fairfax v. Fairfax*, 2 Cr. C. C., 25.

§ 3096. In an action to set aside a collector's sale of land for taxes, it is incumbent on the vendee to show the authority to sell, and also to show that the land was liable for the whole sum for which it was sold. *Stead v. Course*, 4 Cr., 403.

§ 3097. Where proof of identity has been given, the proof in rebuttal must be utterly irreconcilable with it, in order to prevail. The burden of proof is on the party who claims that which is in the possession of another. *Stansbury's Case*, 1 Crabbe, 243.

§ 3098. Property in a slave is to be established by the usual rules of evidence. Undisturbed possession is evidence of ownership, and the burden is on him who is not in possession. *Johnson v. Tompkins*, 1 Bald., 577.

§ 3099. In debt on bond upon the issue of payment, the burden is on the defendant, and the

plaintiff need not produce the original bond at the trial. *Darlington v. Groveman*, 1 Cr. C. C., 416.

§ 3100. In an action against one who has published, under the form of a privileged communication, matter claimed to be libelous, the burden is on the plaintiff to show malice. *White v. Nicholls*, 3 How., 266.

§ 3101. A sale of a vessel by her master, *virtute officii*, is not conclusive, and when reviewed, the burden of proof is on the purchaser to show as against the former owner that the sale was both *bona fide* and necessary. *The Henry*, Bl. & How., 465.

§ 3102. In order to charge a surety for the default of his principal, a public officer, in not accounting for money in the officer's hands, it must appear that such money came into his possession, either in fact or in judgment of law, at a time previous to the expiration of his term of office. *Bryan v. United States*, 1 Black, 149.

XXIII. PLEADING AND EVIDENCE.

§ 3103. **General rule.**—The proofs must be according to the allegations of the parties; and if they go to matters not within the allegations, the court cannot act upon them as a ground for its decision. *Harrison v. Nixon*, 9 Pet., 483. See §§ 1812, 2993, 3246.

§ 3104. The rule is well settled that the allegations and proofs must coincide, and that the court cannot look outside of the pleadings to consider evidence not in accordance with the issues made by the parties. *The Morton*, 1 Brown, 137.

§ 3105. There must be in the pleadings allegations broad enough to cover any evidence that is offered, otherwise it is inadmissible. *Nesmith v. Calvert*, 1 Woodb. & M., 34.

§ 3106. No decree can be founded upon evidence of matters not in issue. *Bradley v. Converse*,* 4 Cliff., 366.

§ 3107. The requirement that the proofs must correspond with the allegations in the declaration is fulfilled if the substance of the declaration is proved: The purpose of the rule is that the opposite party may be fairly apprised of the specific nature of the questions involved in the issue. *Nash v. Towne*, 5 Wall., 689.

§ 3108. Evidence which would be inadmissible as evidence in chief, because varying from the petition, may be admissible in rebuttal. *Zacharie v. Franklin*, 12 Pet., 151.

§ 3109. There can be no proofs offered of facts not put in issue. *Taylor v. Luther*, 2 Sumn., 228.

§ 3110. Evidence offered under a count which is afterwards withdrawn is not incompetent if it is relevant to any count. *United States v. Biebusch*, 1 McC., 42 (§§ 2601-6).

§ 3111. If a party has no opportunity to show an estoppel by pleading, he may exhibit the matter thereof in evidence on the trial, under any issue which involves the fact, and both the court and the jury are bound thereby. *Philadelphia, Wilmington, etc., R. Co. v. Howard*, 13 How., 307.

§ 3112. **Illustrations of general rule.**—If the validity of a location, averred in a bill in equity, depends on extrinsic facts to be proved in the cause, evidence on the point cannot be considered unless the validity of the location is put in issue. *Crocket v. Lee*, 7 Wheat., 522.

§ 3113. Where an answer sets up the dismissal of a bill filed previously, by the complainants against the defendants, for the same relief, this is distinct affirmative matter and must be proved or it can have no effect. The confirmation in the previous case of an auditor's report is conclusive in this case. *Bank of United States v. Beverly*, 1 How., 134.

§ 3114. Evidence will not be admitted to prove a consideration different from that alleged. *Watson v. Dunlop*, 2 Cr. C. C., 14.

§ 3115. On a bill to redeem mortgaged premises, where the answer of the defendant asserts a mortgage title in the whole premises, he cannot set up in evidence, on a collateral inquiry before the master, that the mortgage was but of a moiety of the estate. *Gordon v. Lewis*, 2 Sumn., 143.

§ 3116. Whenever time is material, either in matters of contract or tort, the plaintiff is confined in his evidence to the time stated in the declaration. Thus, where a declaration for the infringement of a patent alleges the infringements to have taken place within a certain time, the proof must be confined to the time as alleged. *Eastman v. Bodfish*, 1 Story, 528.

§ 3117. Evidence not tending to support the issue tendered by the party offering it is not competent. Thus, in an action against a firm as acceptors of a check, where the making and accepting of the check is the only issue tendered by the defendants, evidence as to whether the check was for the private benefit of the member who accepted it in the firm name, and whether the plaintiffs knew the fact, is incompetent. *Bank of Commerce v. Selden*,* 1 Minn., 340.

§ 3118. A declaration alleging a sale of flour, stored at Neenah, under an agreement that the defendants, on the request of the plaintiffs, after navigation at Neenah aforesaid should open in the spring of 1863, and a reasonable time before the 31st of May, 1863, would procure, furnish or provide a steamer on which to ship said flour, and ship the same to the plaintiffs at Boston, and deliver the same on board such steamer free of charge to the plaintiffs, to be transported in the ordinary manner of transportation, was held to be supported by a letter and bill of sale, dated in February, 1863, and stating that the flour was stored, and was sold free on board steamer at Neenah, since the contract was executed in midwinter, when navigation was closed, and both parties knew that the flour could not be transported till spring, and the plain inference was that it was to remain in the store-house where it was until spring navigation opened, and delivered on board the steamer before spring navigation closed, which was the 31st of May. *Nash v. Towne*, 5 Wall., 689.

§ 3119. **Rules of court.**—A rule of court declaring that it shall not be necessary for the plaintiff to prove the execution of the bond, bill or note, in an action thereon, unless the defendant shall file his plea and affidavit denying the execution, is a proper rule and within the power of the court. *Mills v. Bank of United States*, 11 Wheat., 431.

§ 3120. In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, it is the practice of the supreme court and of the other courts of the United States to allow the value to be given in evidence. *Ex parte Bradstreet*, 7 Pet., 634.

§ 3121. In equity the court is confined to the issues made by the pleadings, and proofs without the requisite allegations are unavailing. *Rubber Company v. Goodyear*, 9 Wall., 788. See XVII, XXXII.

§ 3122. In chancery, as well as at law, the proofs must correspond with the allegations in the pleadings. Thus, where the assignee of a patent sues to restrain the defendant from using the patented machine, and the defendant sets up a license, the plaintiff cannot show an abandonment of such license by the defendant without a statement to that effect in his bill. *Wilson v. Stolley*, 4 McL., 275.

§ 3123. In equity cases the allegations and proofs must agree, and the court can consider only what is put in issue by the pleadings. Averments without proofs and proofs without averments are alike unavailing. *Washington Railroad v. Bradleys*, 10 Wall., 299.

§ 3124. In equity the proofs must coincide with the allegations. If the plaintiff sets up title under a will, he cannot, in his proofs, rely upon a codicil not mentioned in his bill. *Langdon v. Goddard*, 2 Story, 267.

§ 3125. A party is not allowed to state one case in a bill or answer and make out a different one in the proofs. The *allegata* and *probata* must agree; the latter must support the former. If the answer puts the defendant's case upon a contract of purchase, the proofs cannot put it upon a conveyance. *Boone v. Chiles*, 10 Pet., 177.

§ 3126. Where the amendments to a bill in equity harmonize perfectly with the allegations of the answer, it is of no consequence to the defendants that some testimony on the part of the plaintiffs may be in conflict with the amendments, when such testimony does not sustain the allegations of the answer. *Battle v. Mutual Life Ins. Co. of New York*, 10 Blatch., 417.

§ 3127. The decree of a court of equity must be according to the *allegata*, as well as the *probata*, and if the defendant prove matter not alleged, which would be a good defense, the court will not found its decree upon it, because the plaintiff is not bound to introduce proof on that point and is not expected to be prepared to answer it. *Robinson v. Cathcart*, 3 Cr. C. C., 377.

§ 3128. Where, according to the practice, a bill of particulars is treated as a part of the declaration, and the bill states the claim of the plaintiff to be two promissory notes particularly described, it is not competent for him to give evidence of and recover upon the pre-existing debt or original consideration. *Bank of United States v. Lyman*, 1 Blatch., 297.

§ 3129. **In admiralty.**—No evidence is admissible in admiralty which is not in proof of facts put in issue by the pleadings. *The Schooner Boston and Cargo*, 1 Sumn., 329. See §§ 698, 1322.

§ 3130. In admiralty the proofs cannot avail the parties further than they correspond with the allegations, and all evidence not brought within the fair and reasonable scope of the pleadings will be disregarded. *The Steamboat Rhode Island, Olc.*, 505.

§ 3131. In admiralty, all evidence not brought within the fair and reasonable scope of the pleadings will be disregarded. *Naugatuck Navigation Co. v. Steamboat Rhode Island*,* 6 N. Y. Leg. Obs., 12.

§ 3132. A defendant in a suit in admiralty who neither excepts to nor answers the libel, cannot offer any evidence in his behalf. But if it appears that he has neglected this on account of his ignorance of the practice of the court, the court may permit his counsel to make suggestions and offer proper evidence in the interest of justice as *amicus curiæ*. *The David Pratt*, 1 Ware, 495.

§ 3133. **Assault.**— On plea of not guilty in assault and battery, the plaintiff is not bound to prove that the defendant made the first assault; but to support the plea of *son assault demesne*, the defendant must prove that the plaintiff made the first assault. *Stevens v. Lloyd*,* 1 Cr. C. C., 124.

§ 3134. **Assumpsit.**— Evidence that the defendant boarded and lodged at the plaintiff's house six months cannot be given, either under *indebitatus assumpsit* for matters properly chargeable in account, according to an account therewith filed, where none is filed; or general *indebitatus assumpsit* for goods sold and delivered; or *quantum meruit* for goods sold and delivered; or common money counts; or *insimul computassit*. *Semmes v. Lee*, 3 Cr. C. C., 439.

§ 3135. It seems that evidence may be given upon a count in *indebitatus assumpsit* for matters properly chargeable in account, "as by a particular account thereof herewith into court exhibited appears," when no such account is in fact exhibited, where the defendant has pleaded *non assumpsit* to all the counts. *Ibid.*

§ 3136. An account proved to have been for a considerable time in the defendant's possession, and evidence that in conversation with the witness the defendant did not object to the items, except that he was charged by the plaintiff with daily board for a part of the time, when he ought to have been charged with yearly board only, will not support *insimul computassit*, but is good evidence upon a count for goods sold and delivered, so far as it consists of charges of that kind, and also upon *indebitatus assumpsit* for matters properly chargeable in account. *Ibid.*

§ 3137. On *assumpsit* and *non assumpsit* the record of a former judgment between the same parties upon the same cause of action may be given in evidence. *Ridgway v. Ghequier*,* 1 Cr. C. C., 87.

§ 3138. Upon a count in *indebitatus assumpsit* for a certain sum for work and labor, there must be proof of an express promise to pay a certain sum. *Farrell v. Knapp*,* 1 Cr. C. C., 131; *Krouse v. Deblois*,* 1 Cr. C. C., 138; *Rambler v. Choat*,* 1 Cr. C. C., 167.

§ 3139. In *indebitatus assumpsit* for work and labor done, the plaintiff may give evidence of a special agreement according to which the work was performed. *Pipsico v. Bontz*, 3 Cr. C. C., 425.

§ 3140. In *assumpsit* against the indorser of a note, the court refused to receive evidence of work and labor done by the maker for the plaintiff on account of the note, because the account should be filed or pleaded. *Whetcroft v. Burford*, 2 Cr. C. C., 96.

§ 3141. Under a plea of *non assumpsit* to an action on a promissory note, the defendant cannot give evidence to prove that he has sustained damages by the breach of the plaintiff's warranty in the contract upon which the note was given. *Cheongwo v. Jones*, 3 Wash., 359.

§ 3142. In *assumpsit* upon a promissory note, the record of a former judgment may be given in evidence under the general issue; and, it seems, without notice of the special matter. *Whitaker v. Bramson*, 2 Paine, 209.

§ 3143. In actions of *assumpsit*, and on the case, a former recovery may be given in evidence without being pleaded in bar. But it must be shown that the matter in dispute is the same. If the action is on a bill, and the declaration in a former suit describes the bill sued on exactly, the burden is thrown upon the plaintiff to prove another bill of the same tenor, date and sum. *Lonsdale v. Brown*, 4 Wash., 86.

§ 3144. Under the plea of *non assumpsit*, the defendant may offer evidence that the instrument sued on was given upon a usurious contract. *Andrews v. Pond*, 13 Pet., 65.

§ 3145. In an action by a builder upon a contract for building a house, the defendant may, under a plea of *non assumpsit*, prove, in reduction of the contract price sued for, an imperfect and unfaithful performance, and injurious consequences resulting therefrom. *Van Buren v. Digges*, 11 How., 461.

§ 3146. A copartnership of the plaintiff with another may be proved under *non assumpsit*; but if the defendant is sued alone, and relies upon a partnership with another, he must plead it. *Coffee v. Eastland*,* 1 Cooke (Tenn.), 159.

§ 3147. A partnership debt may be given in evidence to support an *assumpsit* by one alone laid in the declaration. *Edmondson v. Barrell*, 2 Cr. C. C., 228.

§ 3148. In *assumpsit* for goods sold and delivered the defendant may prove a partnership between the plaintiff and a witness by the witness himself. On an *indebitatus* count "for matters properly chargeable in account as by a particular account thereof, herewith brought into court may more fully appear," no account being filed, the words "as by a particular account," etc., referring to the account as annexed, may be rejected, and evidence of money lent be shown under the count. *Lovejoy v. Wilson*, 1 Cr. C. C., 102.

§ 3149. In *assumpsit*, where the defendant had pleaded in abatement that the promise, if any, was made by him jointly with his partner, the jury were instructed that upon this issue the defendant need not prove that the plaintiff knew of a partnership between the defendant and any other person. *Norwood v. Sutton*, 1 Cr. C. C., 327.

§ 3150. In *assumpsit* for work and labor, the plaintiff cannot give evidence of the mutual dealings and accounts between the parties, under the general replication to the plea of limitations. It must be stated in the replication. *Clarke v. Mayfield*, 3 Cr. C. C., 353.

§ 3151. Contracts, illegality, etc.—The illegality of a contract sued on may be shown, no matter what the state of the pleadings. *Oscanyan v. Arms Company*, 13 Otto, 261. See §§ 513, 870, 1700.

§ 3152. In an action of *assumpsit* in the circuit court of the United States to recover commissions which it was alleged the defendant had agreed to pay to the plaintiff for his services in effecting a sale of arms to the Turkish government, evidence of the illegality of the contract was held admissible under the general issue, although the plea was filed after the passage of the practice act of June 1, 1872, requiring the pleadings to conform to the pleadings in like causes in the state courts, and such evidence would not be admissible under such a plea in the courts of the state, the practice not having in fact been changed to suit the practice act at the time the plea was filed. *Oscanyan v. Winchester Repeating Arms Co.*, 15 Blatch., 79.

§ 3153. Where a bill charges fraud in the inception of the contract only, subsequent transactions cannot be inquired into other than as relating to the fraud as charged. *Bank of United States v. Lee*, 13 Pet., 107.

§ 3154. In an action against a coal company for failure to deliver coal according to contract, letters written by the president of the company containing his private instructions to and correspondence with the local agent of the company at the place of delivery cannot be received in evidence, the particular reasons or motives of the company in not furnishing the coal not being in issue. *Grand Tower Company v. Phillips*, 23 Wall., 471.

§ 3155. Where a party sells goods to one whom he alleges to be the agent of a quartermaster, and all of the allegations of the petition are traversed, he must prove the appointment of both the quartermaster and his agent. *Calkins' Case*,* 1 Ct. Cl., 382.

§ 3156. Special and general counts.—A special agreement executed may be given in evidence under general counts. *Bank of Columbia v. Patterson*, 7 Cr., 299.

§ 3157. In cases where there are general and special counts in a declaration, and the evidence does not support the special counts, the plaintiff is allowed to apply the same evidence in support of the general counts. And, on a parity of reasoning, the defendant should be permitted to give in evidence, upon the plea of *non assumpsit*, the same facts which have been adjudged inapplicable to special pleas, but which might have been received on the general plea, if the special pleas had not been pleaded. *Levy v. Gadsby*, 3 Cr., 180.

§ 3158. Where, in an action of *assumpsit*, a verdict in favor of the plaintiffs was rendered generally upon the declaration, consisting of special and general counts, that verdict will not operate as an estoppel on the defendants when offered in evidence in a subsequent action, founded on the special counts, between the same parties; but it is competent for the defendants to show on what part of the declaration, or whether on the whole of it, the verdict was actually rendered. Nor does it matter, in such a case, that the court subsequently applied the verdict to the first count, being the special count. *Washington Steam Packet Co. v. Sickles*, 24 How., 333.

§ 3159. Where a declaration contained one count upon a special contract and one on a *quantum meruit*, it was held competent for the defendant to prove a special contract entirely different from the one declared on, and that this would defeat the recovery on either count. *Steam Packet Company v. Sickles*, 10 How., 419.

§ 3160. In *assumpsit* on a special promise, and for money had and received, though, if the contract offered differ from that stated in the special count, the variance as to that is fatal, yet the receipt written at the bottom of the contract for the purchase money is good evidence on the count for money had and received. *Jamieson v. Alexander*, 1 Cr. C. C., 6.

§ 3161. In an action of *assumpsit* for the price of a machine—the declaration containing the special contract in regard to the sale, and the common counts—the special contract being barred by the statute of limitations, an express promise to pay may be shown under the general count, and the special contract may be shown in evidence as the consideration of the express promise. All the circumstances of the case may be gone into to show the amount due. *Ames v. Le Rue*, 2 McL., 216.

§ 3162. General issue.—Under the general issue in *assumpsit* all matters may be given in evidence which go to discharge the action. *Dibble v. Duncan*, 2 McL., 553.

§ 3163. Everything which disaffirms the contract, or which shows it to be void, may be given in evidence on the general issue in an action of *assumpsit*. Under this plea the defendant may question the validity of the consideration on which the contract was founded, and the constitutionality of the law in which it originated. *Craig v. State of Missouri*, 4 Pet., 410.

§ 3164. Under the plea of the general issue in *assumpsit*, evidence may be received to show not merely that the cause of action never existed, but also to show that it did not subsist at the commencement of the action. Thus, if the note sued on is merged in a judgment, then

the judgment is a bar to the action, and an exemplification of its record is admissible under the general issue. *Mason v. Eldred*, 6 Wall., 231.

§ 3165. Under the general issue, in an action of *assumpsit*, upon common counts, the defendant may show that upon almost any ground he is under no legal obligation to the plaintiff for the cause of action set out in the petition; and, under this plea, he may also show a partial or total failure of consideration. *Dawes v. Peebles*, 6 Fed. R., 856.

§ 3166. Under the general issue in an action to recover an amount due for labor done, the defendant may show that the plaintiff is a member of a partnership which is indebted to him, in the same transaction, to an amount exceeding that of the plaintiff's demand. *Buckingham v. Burgess*, 3 McL., 364.

§ 3167. Under the general issue in an action of *assumpsit*, a former judgment between the same parties, supported by parol proof that the suit in which it was rendered was for the same cause of action, is admissible in evidence. *Young v. Black*, 7 Cr., 565.

§ 3168. Under the general issue in *assumpsit*, a final judgment determining the rights of the parties against each other, made by a court having jurisdiction of the parties and the subject-matter, may be received in evidence. If this were otherwise, the evidence would be admissible under an agreement of the parties filed in the case, stipulating that either party may offer in evidence under the general issue any matter admissible, as if specially pleaded. *Insurance Co. v. Harris*, 7 Otto, 331.

§ 3169. In an action of *assumpsit* by the assignee of a promissory note against the maker, where there is a plea of the general issue, the indorsement must be proved, although the local law provides that the writing sued shall be received without proof of execution unless its execution is denied under oath. Such a law does not apply to an indorsement, unless the suit is upon the indorsement against the indorser. *Stroud v. Harrington*, Hemp., 116.

§ 3170. Where, under the state law, the execution of a written instrument cannot be questioned unless denied by a sworn plea, a county sued upon bonds alleged to have been made by it cannot, under the general issue, object to the admission of the bonds in evidence because no evidence of their execution has been offered. *Chambers County v. Clews*, 21 Wall., 317.

§ 3171. Under the plea of general denial, a violation by the plaintiffs of the contract sued on, before the commencement of the suit, and a failure on their part to comply with its stipulations, cannot be proved. The allegations and proof must agree. *Wilcox v. Hunt*, 13 Pet., 378.

§ 3172. *Quære*: Whether, under the general issue in *assumpsit*, evidence of payment after the commencement of the suit can be given. *Deale v. Krofft*, 4 Cr. C. C., 448.

§ 3173. A defense that the plaintiff is not a corporation cannot be set up under the general issue, which plea admits the existence of the corporation. *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff., 555.

§ 3174. Evidence of such adverse possession as affords a bar is admissible in evidence under the general issue in ejectment. *Hogan v. Kurtz*, 4 Otto, 773.

§ 3175. Evidence tending to deny the jurisdiction of the court on account of the citizenship of the parties cannot be given under the general issue. *Evans v. Gee*, 11 Pet., 80.

§ 3176. Inquiry into the citizenship of the parties, with a view to questioning the jurisdiction of the court, cannot be made under the general issue. *Sheppard v. Graves*, 14 How., 505.

§ 3177. In an action of trespass brought to try title to land, a freehold or mere possessory right in the defendant may be given in evidence under the general issue. *Cooley v. O'Connor*, 12 Wall., 391.

§ 3178. Evidence of justification is not admissible under the general issue in an action of trespass. *Martin v. Clark*,* Hemp., 259.

§ 3179. **Bankruptcy.**—In an action, under the thirty-fifth section of the bankruptcy act of 1867, by an assignee in bankruptcy to recover of the defendant for goods conveyed to him by the bankrupt in fraud of the act, the declaration alleging that the bankrupt did "transfer, convey and assign," etc., the plaintiff is not limited to proof of a technical assignment under the state law. *Andrews v. Graves*, 1 Dill., 108. See §§ 626, 860, 1852.

§ 3180. **Bonds—Pleas of payment and non est factum.**—In an action on a bond, matters which make the bond void may be given in evidence under the plea of *non est factum*. But matters cannot be proved in avoidance of the bond unless specially pleaded. *Greathouse v. Dunlap*, 3 McL., 303. See § 551.

§ 3181. Upon a plea of payment, evidence of the payment of a sum smaller than that mentioned in the bond sued on, and acknowledgment of satisfaction, is competent and will warrant the finding of the jury for defendant. *Henderson v. Moore*,* 5 Cr., 11.

§ 3182. Under a declaration against only one of the obligors in a bond, charging him as jointly and severally bound, a joint bond of the defendant and another cannot be received in evidence, the plea being *non est factum*. *Postmaster-General v. Ridgway*, Gilp., 135.

§ 3183. Where a collector's bond does not state for what particular district he was appointed,

and the declaration thereon does not state the fact, there is no foundation for proof of it by the production of the commission or by any other evidence. *United States v. Jackson*, 14 Otto, 41.

§ 3184. A surety in a joint and several bond given to the United States, when sued separately, cannot, under the plea of payment, give in evidence the record of proceedings against the other surety in which he was arrested and imprisoned, but discharged by order of the president under the provisions of the act of March 3, 1817. The discharge, being a mere release of the person and not of the debt, has no bearing on the issue. *United States v. Beattie*, Gilp., 92.

§ 3185. In a suit on the bond of a purser in the navy, letters of the fourth auditor and of the secretary of the navy, directing the pay of the defendant to be retained on account of his liability under the bond, and afterwards informing him that his account was closed and his pay was to be resumed, may be received in evidence under the plea of payment. *Ibid.*

§ 3186. Where the petition in a suit upon county bonds alleges that they were issued under authority of an act of the legislature, and purchased by the plaintiffs for value and before maturity, the general issue puts in issue the authority to issue the bonds, the *bona fides* and notice. *Chambers County v. Clews*, 21 Wall., 317.

§ 3187. Conversion — Value.— In an action for the conversion of “a trunk containing sundry clothes,” and “a chest containing sundry tools,” evidence of the value of the tools and clothes cannot be given, the defendant not being charged with converting the tools and clothes. *Ball v. Patterson*, 1 Cr. C. C., 604.

§ 3188. Covenant.— In an action of covenant, a plea of covenants performed, with leave to give in evidence everything which amounts to a defense, to which issue is taken, amounts to an agreement that the defendant may give in evidence anything which he might plead, or which, in point of law, can protect him from the claim; and notice need not be given of the matter intended to be offered as a defense. *Webster v. Warren*, 2 Wash., 456.

§ 3189. In an action of covenant on a policy of insurance, evidence to avoid the policy is not admissible under a plea of performance of the covenants in the policy. *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cr., 206.

§ 3190. In an action on a joint covenant of warranty, the defense that it is sued on as several may be taken under an answer that there is nothing due on the covenant sued on, when the plaintiff comes to offer the covenant in evidence. *Patrick v. Leach*, 1 McC., 250.

§ 3191. Under a system of pleading that recognizes the distinction in the forms of action at common law, evidence of a verbal promise is inadmissible in an action of covenant. And the act of congress requires the circuit courts to conform to the mode of pleading of the state in which the court sits. *Phillips, etc., Construction Co. v. Seymour*, 1 Otto, 646.

§ 3192. Nil debet.— In an action of debt for damages assessed by an inquisition taken under the act of congress of March 3, 1809, incorporating the Georgetown & Alexandria Turnpike Company, the defendants, under a plea of *nil debet*, may give evidence of partiality, fraud and misconduct on the part of the jurors upon the inquest. But one of the jurors upon the inquest cannot be examined as a witness to prove misconduct on the part of the others. *Custiss v. Georgetown & Alexandria Turnpike Co.*, 2 Cr. C. C., 81.

§ 3193. Infancy cannot be proved under *nil debet* to debt on a note, the note of an infant being voidable, not void. *Young v. Bell*,* 1 Cr. C. C., 342.

§ 3194. A former recovery may be proved under *nil debet*; and in action of debt on a promissory note, parol evidence is admissible to show that a former recovery in an action for goods sold and delivered was for the same matter. *Welsh v. Lindo*,* 1 Cr. C. C., 508.

§ 3195. Limitations cannot be proved under *nil debet*. *Gardner v. Lindo*,* 1 Cr. C. C., 78.

§ 3196. The statute of limitations cannot be given in evidence on the plea of *nil debet* to an action of debt on an accepted order. *McIver v. Moore*, 1 Cr. C. C., 90.

§ 3197. Payment.— Under a plea of payment, proof of the discontinuance of the suit cannot be given in evidence. *Latapee v. Pechalier*, 2 Wash., 180. See §§ 1645, 3180. See, also, PAYMENT.

§ 3198. Under a plea of payment, evidence may be given which shows that *ex equo et bono*, the debt claimed should not be paid. If the debt has, in whole or in part, been actually paid; or if by any means it has been extinguished, as by a contract of a superior nature; or has been released; or if the debt be not in conscience due; or has by some means been satisfied, so that it would be unconscientious for the plaintiff to demand it, such evidence may be given. *Ibid.*

§ 3199. Limitations.— Where a subsequent promise, or acknowledgment of a debt, is made, it may be given in evidence to remove the bar of the act of limitations, though the suit be brought upon the original cause of action. But if the new promise vary the terms of the original contract, as if the former be conditional and the latter absolute, the former cannot be given in evidence, because the proof would not correspond with the allegation. *Lonsdale v. Brown*, 3 Wash., 404. See §§ 246, 2424, 3195-96.

§ 3200. Proofs are inadmissible to show that a party plaintiff is within the exceptions of the statute of limitations when relied on by plea or answer, unless the exception is stated in the bill or specially replied, or the plaintiff amends his bill by adding a suitable allegation to meet the bar. *Piatt v. Vattier*, 9 Pet., 405.

§ 3201. **Deeds.**—Under a general allegation in a bill that a deed is a mortgage, without any allegation that there was a defeasance, a defeasance may be proved, or confessions of the other side of the existence of a defeasance. *Bentley v. Phelps*, 3 Woodb. & M., 403. See §§ 890, 1015, 1292, 1661, 1867, 2432, 2447, 2453, 2458, 2468, 2484, 2489.

§ 3202. It seems that where the bill of complaint is not one of redemption complainant cannot show a right to redeem. *Tobey v. Leonard*,* 2 Cliff., 40.

§ 3203. A deed conveying only an undivided interest in a tract of land to the plaintiff is admissible evidence under a declaration claiming the whole tract. *Doe v. McFarland*, 9 Cr., 151.

§ 3204. If a bill alleges that a deed was without consideration, and the deed mentions a consideration of one dollar, the allegation in the bill may be rebutted by showing the payment of a certain sum in addition to the nominal consideration, without an allegation of the fact in the answer. *Jenkins v. Pye*, 12 Pet., 241.

§ 3205. **Ejectment.**—The Oregon code does not allow a defendant in ejectment to give any evidence of an estate in himself or another in the property, unless the same be pleaded in the answer. *Stark v. Starr*, 1 Saw., 15. See §§ 242, 2409, 2989.

§ 3206. In an action of ejectment, under a plea of not guilty, the defendant may give evidence of possession without warrant and location. *Bank of United States v. Benning*, 4 Cr. C. C., 81.

§ 3207. Where the defendants in ejectment claimed under an equitable title, they could not offer evidence to show that the survey made of the plaintiff's claim by the public officer was incorrect, in order thereby to resist the plaintiff's legal title. *Greer v. Mezes*, 24 How., 268.

§ 3208. **Executors and administrators.**—In an action by an executor, under the plea of *non assumpsit*, the validity of his appointment cannot be inquired into. *Kane v. Paul*, 14 Pet., 33.

§ 3209. It may be shown that a defendant is executrix *de son tort* although she has not been charged as such in the pleading. *Harper v. West*, 1 Cr. C. C., 192.

§ 3210. Prior outstanding judgments cannot be proved under *plene administravit*; they must be specially pleaded. *Hines v. Craig*,* 1 Cr. C. C., 340.

§ 3211. If the letters testamentary are revoked pending an action brought by an executor, the fact cannot be given in evidence without being pleaded. *Yeaton v. Lynn*, 5 Pet., 224.

§ 3212. In a garnishment case under a plea of *nulla bona*, the garnishee cannot give in evidence an assignment of the debt by the debtor and notice to him before the service of process. Such assignment must be specially pleaded. *Baker v. Mix*,* 3 Cr. C. C., 1.

§ 3213. In an action on a policy of insurance, an averment of an entire interest in the plaintiffs in the subject insured cannot be supported by evidence of a joint interest with others. Nor can an averment of a joint interest with others be supported by proof of a sole interest. *Catlett v. Pacific Insurance Co.*, 1 Paine, 594.

§ 3214. **Purchaser in good faith.**—If an answer to a libel for materials furnished for repairs does not set up the right of a purchaser of the vessel in good faith, for a valuable consideration, without notice of the lien, it cannot be set up by evidence. *The Barque Chusan*, 2 Story, 455.

§ 3215. **Malicious holding to bail.**—If a declaration for a vexatious suit and malicious holding to bail states that the sum for which bail was demanded was indorsed on the writ, the plaintiff can resort to no other evidence to establish this fact. And if no such indorsement appears on the writ, which is set out in the exemplification of the record of the suit complained of, it is not competent to ask of the marshal who executed the writ the amount he was directed to demand. *Ray v. Law*, Pet. C. C., 207.

§ 3216. **Resignation of office.**—To a petition for a *mandamus* to compel a township clerk to make and deliver to the supervisor of the township a certified copy of a judgment recovered against it by the petitioner, in order to its being placed on the tax-roll for collection and payment, the clerk answered that he had resigned his office. It was held that the petitioner might introduce evidence for the purpose of showing that the attempted resignation was simulated and fraudulent, and that it could not be shown that a successor to the clerk had been appointed after the cause was at issue. *Thompson v. United States*, 13 Otto, 480.

§ 3217. **Money counts.**—A note of which the plaintiff is indorsee and the defendant indorser is admissible in evidence under a count for money had and received. *Bank of United States v. Lyman*, 1 Blatch., 297.

§ 3218. A promissory note made by the defendant and indorsed to the plaintiff by the payee is good evidence under money counts for the original consideration. *Brown v. Noyes*, 2 Woodb. & M., 75.

§ 3219. Upon *assumpsit* against the indorser of a note having this memorandum on it, "credit the drawers," such a note with such a memorandum was said not to be evidence, on the count for money had and received, of money had and received by the defendant to the use of the plaintiffs. *Bank of Alexandria v. Young*, 2 Cr. C. C., 52.

§ 3220. Where counts for money had and received are joined with a special count for damages for the non-delivery of goods sold to the plaintiffs by the defendants, and the price has been paid in money or money's worth, evidence may be offered to show that the defendants converted the goods to their own use, in order to support the money counts, for the plaintiffs may have damage for the non-delivery of the goods or a judgment for the price paid with interest, at their election. *Nash v. Towne*, 5 Wall., 689.

§ 3221. Where a Pennsylvania coal company, by its agents, sold coal in Massachusetts, and the agents took a note for the money payable to their order as agents of the company, and indorsed it to the president of the company, a citizen of New York, who sued the purchasers, in a special count on the note and other counts for goods sold, etc., it was held that these facts might be proved under the money counts, whether admissible under the special count or not; and that the note was admissible under the money counts as well as under the special one. *Heckscher v. Binney*, 3 Woodb. & M., 333.

§ 3222. An admission by the defendant of a balance due on a note cannot be proved under the money counts. *Turner v. Green*,* 2 Cr. C. C., 202.

§ 3223. Negligence.—In an action against a postmaster to charge him with the loss of a sum of money sent by mail, when the issue is taken upon the neglect of the postmaster, it is not competent to give in evidence neglect in the assistant acting under him. *Dunlop v. Munroe*, 7 Cr., 242; 1 Cr. C. C., 536. See § 3045.

§ 3224. In an action against a ship for damage to goods shipped, where the libelants put their case upon bad and careless stowage of the goods, and carelessness in landing, re-loading and re-storing, and upon leaks in the deck of the ship, and the answer puts these allegations in issue, evidence of the seaworthiness and soundness of the vessel cannot be given, that fact not having been put in issue by the pleadings. *McKinlay v. Morrish*, 21 How., 343.

§ 3225. In an action against a carrier for damage to goods shipped, where the bill alleges that the goods were in good order when shipped, and the answer avers that they were unfit to be shipped, and does not attribute the injury to an inevitable cause, evidence of such a cause is inadmissible. *Turner v. Ship Black Warrior*, 1 McAl., 181.

§ 3226. In an action for injuries received by the plaintiff while in the defendant's employment, caused by a defective and insecure platform on which the plaintiff was at work, and which, as alleged, was negligently provided by the defendant, the defendant's knowledge of the defects may be proved under the general allegation of negligence, without a special averment of such knowledge. *Knaresborough v. Belcher Silver Mining Co.*, 3 Saw., 446.

§ 3227. In an action for personal injuries by a passenger, arising through the negligence of the carrier, the plaintiff was allowed to prove that on account of a wound on the head his mind was so impaired that he was incapable of attending to his business for a long time, although the declaration did not contain any specification of such business, or of its nature or extent, or any statement that the plaintiff was obliged to or did relinquish it. *Wade v. Leroy*, 20 How., 34.

§ 3228. The custom of a bank to demand payment on the day after the last day of grace may be proved though not averred. *Coyle v. Gozzler*,* 2 Cr. C. C., 625.

§ 3229. *Nul tiel record*.—In an action upon a judgment, and under a plea of *nul tiel record*, evidence of payment is inadmissible. *Tunstall v. Robinson*, Hemp., 229.

§ 3230. In a suit upon a judgment, where the record shows that the defendant was not served with process, but that he voluntarily appeared by attorney, it cannot be shown, under a plea of *nul tiel record*, that the attorney had no authority to appear. *Hill v. Mendenhall*, 21 Wall., 453.

§ 3231. Patents — Trade-marks.—In a suit to enjoin the infringement of a patent, evidence of what was old and in general use at the time of the alleged invention is admissible, without any averment in the answer touching the subject. If the action is one at law, such evidence is admissible under the general issue without special notice. This evidence is admissible for three purposes, and no other,—to show what was then old, to distinguish what was new, and to aid the court in the construction of the patent. *Brown v. Piper*, 1 Otto, 37.

§ 3232. In a suit to enjoin the infringement of a patent, the respondent filed a plea, admitting the main facts alleged in the bill, alleging that he had rights under contract in the use of said patent emanating from one of the complainants, that the other complainants were without interest, and that the parties in interest were both citizens of the state, and denying the jurisdiction. *Held* that, under such a plea, a writing under private signature purporting to be an assignment of the patent-right by one of the complainants, and *ex parte* affidavits taken prior to the time of filing the plea, and produced without any notice to the complainants, were not admissible in evidence. *Lilienthal v. Washburn*, 8 Fed. R., 707.

§ 3233. In an action for imitating and using the plaintiff's trade-mark, under an allegation of sales made by the defendant within a certain period, evidence may be given of several sales made on different days within that period. *Taylor v. Carpenter*, 2 Woodb. & M., 1.

§ 3234. If, in an action on the case against the commissioner of patents for refusal to furnish copies of records of his office, no special damage is alleged in the declaration, evidence tending to prove special damage is properly rejected. *Boyden v. Burke*, 14 How., 575.

§ 3235. **Replevin.**—If the complaint in an action of replevin alleges property and right of possession in the plaintiff, and the answer traverses directly these allegations, under the issue thus formed, any evidence is admissible on the part of the defendant which tends to show that the plaintiff has neither property nor right of possession. Evidence of title in a third person may be given. *Schulenberg v. Harriman*, 21 Wall., 44.

§ 3236. The plea, no rent in arrear, in an action of replevin admits the demise as laid in the avowry. *Alexander v. Harris*, 4 Cr., 299.

§ 3237. In replevin on the plea no rent arrear and issue, it was held that a note having been taken for the rent by the landlord from a third person, if the jury should believe that credit was given to such third person by the landlord, whereby the tenant lost the sum intended to be secured by the note, the facts were competent evidence under the issue to show that there was no rent due to the landlord. *Josse v. Schultz*, 1 Cr. C. C., 135.

§ 3238. **Slander.**—In an action for slander the plaintiff cannot give evidence of special damage not alleged in the declaration. But he may recover although he fails to support the averment of special damage. *Kelly v. Huffington*, 3 Cr. C. C., 81.

§ 3239. In an action for slander, where the plaintiff claims special damage by being prevented from obtaining employment by reason of the slander, he cannot give evidence of any particular cases in which he was refused employment on that account, without naming in his declaration the particular persons by which such employment was refused. *Cramer v. Cullinane*,* 2 MacArth., 197.

§ 3240. Where the declaration charged that the defendants jointly said that the plaintiffs were robbers and thieves, the court held that words spoken of one of the plaintiffs only could not be given in evidence in support of the declaration, nor could words spoken by each of the defendants separately, and not in the presence of each other. *Davis v. Sherron*, 1 Cr. C. C., 287.

§ 3241. **Trespass.**—If the declaration lays the trespass from a certain date to the time of bringing the action, a single trespass may be proved anterior to the time laid, but not divers trespasses. Divers trespasses may be proved within the time laid. *United States v. Kennedy*, 3 McL., 175.

§ 3242. On a plea of not guilty in an action of trespass for breaking into a house, evidence of justification is inadmissible. *Goddard v. Davis*,* 1 Cr. C. C., 33.

§ 3243. In an action of trespass, aggravation may be proved without being set up in the declaration. *Stanton v. Seymour*, 5 McL., 267.

§ 3244. Where, in an action of trespass *de bonis asportatis* against a sheriff and attaching creditors, the question of the title of the plaintiff to the goods is put in issue, it is admissible for the defendant to show that the plaintiff's title rested upon a fraudulent and collusive sale to him by the attachment debtor's agent without authority. Proof of the attachment is also admissible in connection with the other testimony, though it does not of itself constitute a complete defense. *Deitsch v. Wiggins*,* 15 Wall., 539.

§ 3245. **Trover—Infancy.**—In an action of trover, infancy may be given in evidence under the plea of not guilty, not as a bar but to show the nature of the act relied on as a conversion. *Vasse v. Smith*, 6 Cr., 226.

XXIV. VARIANCE.

§ 3246. **In general.**—A variance is an erroneous description of the instrument referred to, so that it does not appear to be the same when produced in evidence, either on oyer or at the trial. *Dixon v. United States*, 1 Marsh., 177.

§ 3247. If the legal effect of an instrument be the same, whether the words be inserted or not, the variance is immaterial. *Cannell v. Milburn*,* 3 Cr. C. C., 424.

§ 3248. In case of variance, the plaintiff may amend at any stage of the trial before the case is submitted to the jury. *Smith v. Barker*,* 3 Day (Conn.), 312.

§ 3249. **In pleadings in admiralty** there are no technical rules of variance and departure. *Duport de Nemours v. Vance*, 19 How., 162. See §§ 698, 1322, 3129.

§ 3250. In a case of collision between a schooner and a steamer proceeding in opposite directions, and approaching each other, it is a vital departure for the respondent steamboat's allegation in defense to be, that the collision was due to the schooner's holding on the starboard

tack, when the proof is that it was caused by her luffing up as if to go to the larboard tack, and thus attempting to return to her old tack. *The Washington Irving*, Abb. Adm., 338.

§ 3251. *Miscellaneous cases.*—The court refused to suffer a by-law approved on the 27th of March to go in evidence to support the averment of a by-law passed on the 26th of March. *Common Council of Alexandria v. Brockett*, 1 Cr. C. C., 505.

§ 3252. Where a declaration described the defendants in the first count as surviving partners of another partner, then deceased, and in the second count stated a cause of action against the defendants only, it was held that evidence which showed a cause of action arising since the death of the deceased partner supported the second count, and there was no variance. *Schimmelpennick v. Turner*,* 6 Pet., 1.

§ 3253. An allegation in an information for the forfeiture of teas imported, that they were not accompanied by the marks and certificates required by law, is not supported by evidence of the want of certificates only. *Six Hundred and Fifty-one Chests of Tea v. United States*, 1 Paine, 499.

§ 3254. An allegation of letters testamentary granted to John Pratt, and John Pratt, junior, is supported by letters granted to John Pratt, senior, and John Pratt, junior. *Turner v. White*, 4 Cr. C. C., 465.

§ 3255. Where a petitioning creditor alleges that preference was given by the bankrupt to a certain person, he cannot show in proof that it was given to another. *Ex parte Shouse*, 1 Crabbe, 482.

§ 3256. An award under the hands and seals of J. Mechlin and Jno. P. Ingle, and reciting that the matters in difference had been submitted to them, will not support an averment of an award or umpirage made by John P. Ingle, on the failure of the arbitrators Nevitt and Mechlin to make an award within the time prescribed. *Goldsborough v. McWilliams*, 2 Cr. C. C., 401.

§ 3257. Where a covenant in a submission to arbitrators, after mentioning the claims referred to the decision of the arbitrators, and an umpire if necessary, adds the words, "as provided in articles of submission this day executed;" and such articles were never executed; there is no variance if the declaration for breach of the covenant makes no mention of such articles. *Smith v. Morse*, 9 Wall., 76.

§ 3258. *Bonds.*—If a declaration, purporting to set out the writing obligatory sued on according to its legal effect, describes it as payable on or before a certain day, and it appears that the words "on or before" are not in it, the variance is fatal, since these words change the effect of the instrument. *Kikindal v. Mitchell*, 2 McL., 402. See §§ 551, 3180.

§ 3259. The plaintiff declared upon a bond, dated the 3d of October; and upon *oyer* the bond appeared to bear date on the 3d of January preceding. The variance was held to be fatal. *Cooke v. Graham*, 3 Cr., 229.

§ 3260. When, in a suit on a bond, the declaration describes the instrument as sealed with the seals of four persons, and it appears that the bond is signed by two as partners, and one seal opposite the partnership signature, and by the other two individually, with seals, the variance is fatal. *Tingey v. Carroll*,* 3 Cr. C. C., 693.

§ 3261. On *scire facias* if there be a material variance between the record of the recognizance and the recital of it in the *scire facias*, the judgment must be for the defendant. *Barnes v. Lee*, 1 Cr. C. C., 430.

§ 3262. On *scire facias* against the surety of a witness, who was bound by his recognizance to appear at the June term, and not to depart without leave of court, the breach assigned being that the witness failed to appear according to the recognizance, it is not evidence to support this allegation, that the record shows a failure of the witness to appear at the *November* term—there being no record of the respite of the recognizance. *United States v. Butler*, 1 Cr. C. C., 422.

§ 3263. In an action upon a recognizance, where the warrant and recognizance given in evidence showed that the charge which the accused bound himself to appear for and answer to was one which, if proved, and not palliated by exculpatory evidence, amounted to murder, and the recognizance set forth in the declaration showed the offense to have been nothing more than a trespass, the variance was held to be material and fatal. *Dillingham v. United States*, 2 Wash., 422.

§ 3264. When a declaration sets out that a bond was made on a certain day and does not describe it by the date, a variance in the time is immaterial. Otherwise if the date is part of the description of the instrument. *United States v. Le Baron*,* 4 Wall., 642.

§ 3265. Where a declaration on an embargo bond declared the vessel to be a registered one, and the bond represented her as a licensed vessel, there was held to be no variance, this averment of the declaration not being in that part which professed to describe the bond. *Dixon v. United States*, 1 Marsh., 177.

§ 3266. When the plea to an action on a bond alleges that the bond was given in pursuance

of a corrupt agreement, and alleges the agreement to have been made in November, whereas the proof shows it to have been concluded in September, the variance is immaterial. *Harper v. Smith*,* 1 Cr. C. C., 495.

§ 3267. **Contracts.**—If the contract proved varies essentially from the one set out in the bill, the variance is fatal. *Tufts v. Tufts*, 3 Woodb. & M., 456. See §§ 513, 870, 1700, 3151.

§ 3268. Judgment arrested where there was a variance between the covenant alleged and that produced on oyer. *Ingle v. Collard*,* 1 Cr. C. C., 152.

§ 3269. Where a declaration on a written contract alleges it to be a writing obligatory, and on oyer the instrument proves to be without seal, this is a fatal variance and is cognizable on general demurrer. *Clark v. Phillips*,* Hemp., 294.

§ 3270. Where a declaration set out an instrument as sealed, but the copy offered in proof had no seal, and the witness who made it was not able to state that the original was sealed, it was held not admissible in evidence. *Hobsen v. Porter*,* 2 Colo. T'y, 28.

§ 3271. Where, under a statute of Arkansas, a summons for the collection of small debts described the instrument sued on as a note, whereas the instrument was an obligation under seal, it was held that the variance was fatal. *Madding v. Peyton*,* Hemp., 192.

§ 3272. Where the declaration alleges an absolute promise, and the proof shows a conditional one, the variance is fatal. *Trask v. Duval*,* 4 Wash., 97.

§ 3273. A declaration in *indebitatus assumpsit* for a certain sum is not supported by proof of a special contract. *Talbot v. Selby*,* 1 Cr. C. C., 181.

§ 3274. A contract alleged to have been made by the firm of A. and B. cannot be supported by evidence of a contract made by the firm of A., B. and C., the latter firm having been dissolved by the death of C. after the making of the contract; though the evidence might be admissible in connection with other evidence showing that the contract was renewed and continued by the new firm. *Boyce v. Edwards*, 4 Pet., 111.

§ 3275. In an action of account against one C. as bailiff of certain goods and sums of money received as property of the plaintiff A., the proof being of goods and money received by the hands, not of C., but of persons not named in the declaration, and as the property, not of the plaintiff A., but as the property of plaintiff A. and one B., as partners, the variance thus appearing was held fatal. *Jordan v. Wilkins*,* 2 Wash., 482.

§ 3276. Averment of a contract to build a ship; proof, a contract to finish a ship. A fatal variance. *Smith v. Barker*,* 3 Day (Conn.), 312.

§ 3277. When a declaration in setting out the effect of a written contract, but not purporting to describe or recite it, puts in words that are not in the contract, but which do not vary the meaning, the variance is not material. *Ferguson v. Harwood*,* 7 Cr., 414.

§ 3278. Where the declaration averred an authority (not stating it to be in writing) to draw one hundred thousand francs, and the written authority shown in evidence was blank as to the sum to be drawn, the variance was held not to be material. *Rabaud v. De Wolf*, 1 Paine, 580.

§ 3279. An account headed Mrs. Anne Fenwick was admitted against the defendant, although her name was properly Mary Anne Fenwick. *Rogers v. Fenwick*, 1 Cr. C. C., 136.

§ 3280. In an action on a contract, where the declaration alleged that the plaintiffs, by the name and description of Henry Darst & Co., and the defendant, respectively, signed and sealed the instrument, an instrument bearing only the signature and seal of Henry Darst & Co., and the defendant, was admitted in evidence, upon proof of the execution of the deed by one of the plaintiffs with the assent and concurrence of the others. *Darst v. Roth*, 4 Wash., 471.

§ 3281. A declaration of a sale of goods to the plaintiff for a certain amount *in hand paid* is supported by evidence of the sale, that a sight draft was drawn in payment of the goods, and that the draft was paid; and such evidence cannot be objected to as not supporting the declaration. *Nash v. Towne*, 5 Wall., 689.

§ 3282. In an action on a contract for the delivery of stock, made with the plaintiff by a broker on behalf of the defendant, that the declaration states an engagement to transfer stock to the plaintiff "or order," and the written contract offered in evidence does not contain the words "or order," is not a material variance, it not being necessary to set forth the written contract in the declaration at all, and it only being offered as additional evidence to prove the oral agreement. *Livingston v. Swanwick*, 2 Dall., 300.

§ 3283. Where the bill alleged that the contract was to pay certain bonds in coin, whereas they were only payable in lawful money, the variance was held not to be fatal, the principal object of the bill being not to establish that claim, but to get possession of and preserve from destruction the fund out of which they were payable, and the objection not having been taken by demurrer or answer. *Wallace v. Loomis*, 7 Otto, 146.

§ 3284. **Judgments.**—Where a judgment is pleaded, in matters of description, the record produced must conform strictly to the plea. If any circumstances descriptive of the record be untruly stated, though they are not necessary to be stated, it will be fatal on *nul tiel record*. *Whitaker v. Bramson*, 2 Paine, 209. See §§ 258, 2717, 2757, 2761, 2774.

§ 3285. Where a plea of former judgment averred that the plaintiffs recovered in a former suit their damages for the non-payment of the notes sued on, and the record showed that judgment was rendered for want of an affidavit, the variance was held to be fatal on a plea of *nul tiel record*. *Ibid*.

§ 3286. A variance between a declaration on a judgment and the transcript offered in evidence, either in the amount of the judgment or the names of the parties, is fatal. *Lawrence v. Willoughby*,* 1 Minn., 87.

§ 3287. Where the declaration described a judgment as rendered in the circuit court for the district of Wisconsin, and the plea was *nul tiel record*, a record of a judgment between the same parties, for the same amount, and of the same date as that described in the declaration, in the circuit court for the *eastern* district of Wisconsin, was held to have been properly excluded. *Dow v. Humbert*, 1 Otto, 294.

§ 3288. If the declaration in an action of debt on a decree in chancery omits the clause of the decree giving interest, the variance is fatal. *Thompson v. Jameson*, 1 Cr., 283.

§ 3289. **Malicious prosecution — Return of writ.**— A count in a declaration for malicious prosecution in bringing a civil action against the plaintiff and demanding excessive bail stated the writ to have been returnable to the first Monday in December, 1809, whereas the writ offered in evidence appeared to be returnable to the 1st of March, 1809. *Held*, that the evidence did not support the declaration, and that the record could not be read except as evidence of malice in support of other counts. *Munns v. Dupont*, 3 Wash., 31.

§ 3290. A charge of negligence on the part of the defendant and his servants may be supported by proof of negligence of the servants. *Dobbin v. Foyles*, 2 Cr. C. C., 65. See §§ 3045, 3223.

§ 3291. **Bills and notes.**— Where a declaration sets out a negotiable promissory note in the common form, a note under seal does not support the declaration and cannot be read in evidence. *Parkison v. McKim*,* 1 Burn. (Wis.), 53. See §§ 260, 565, 941, 1710, 1859, 3064.

§ 3292. A note payable any number of days after date cannot be given in evidence under a count describing it as one payable on demand. *Page v. Bank of Alexandria*, 7 Wheat., 35.

§ 3293. If a note sued on is not stated in the declaration to be payable at any particular time, the conclusion of law is that it is due immediately or on demand, and a note payable a certain time after date cannot be received in evidence. *Sebree v. Dorr*,* 9 Wheat., 558.

§ 3294. Where a declaration upon a note does not state when the note is payable, a note payable at sixty days cannot be given in evidence. And, on executing a writ of inquiry under the laws of Virginia, the necessity of showing a note conforming to the declaration is just as strong as on trying the issue raised by *non assumpsit*. *Sheehy v. Mandeville*,* 7 Cr., 208.

§ 3295. A declaration on a bill of exchange described it as "payable at the City Bank, New York City, in the state of New York." The bill, on its face, was payable at the City Bank, New York City. *Held*, that there was no variance which would exclude the admission of the bill. *Orr v. Lacy*, 4 McL., 243.

§ 3296. It is not a variance if a declaration on a note gives the state in which the place of its execution is situated, and the state is not given in the note. *Sheppard v. Graves*, 14 How., 505.

§ 3297. A note dated at Cincinnati is admissible in evidence under a declaration thereon describing it as dated at Cincinnati, in the state of Ohio. *Drake v. Fisher*, 2 McL., 69.

§ 3298. Where, in a suit on a note, the declaration described the plaintiff as being of New York, and the note described him as of Pearl street, New York, the variance was held to be immaterial, and was disregarded. *Conant v. Wills*, 1 McL., 427.

§ 3299. When a declaration on a bill of exchange alleges that the drawer's name is Elisha Brown, and the bill, when produced, is signed E. Brown, and the witness who proves the handwriting says the name is Elijah Brown, the variance is fatal. *Craig v. Brown*,* Pet. C. C., 139.

§ 3300. Averment that the draft was indorsed to Hyer and Burdett, "survivors of Bremner;" the indorsement shown was "to the order of Messrs. Hyer, Bremner and Burdett." Variance held material. *Hyer v. Smith*,* 3 Cr. C. C., 438.

§ 3301. Averment that the note was made by defendants, not charging them as partners, signed in their own proper hand, and payable to order; proof, a note signed "Ford & Chapman," in the handwriting of Chapman only, not payable to order. A fatal variance. *Carrington v. Ford*,* 4 Cr. C. C., 231.

§ 3302. Averment that the due bill was made to the wife *dum sola*, but the bill offered in evidence appeared to have been made after marriage. A fatal variance. *Smith v. Clarke*,* 4 Cr. C. C., 293.

§ 3303. In debt on a promissory note under the Virginia statute of 1786, December 4, the declaration being upon a note given by one for account of himself and another, and in another count upon a note which the two promised to pay,—and the note itself being signed by one

party, and containing no such statement of account,—it was held that there was no variance, and that parol evidence was competent to prove that the note was given for account of the partnership. *Bank of Alexandria v. Mandeville*, 1 Cr. C. C., 575.

§ 3304. Where the declaration states a note for \$1,400, and the proof shows a note for \$1,457, the variance is fatal. The same variance between the notice of non-payment and the note proved is likewise fatal. *Bank of Alexandria v. Swann*, 4 Cr. C. C., 136.

§ 3305. A note drawing interest is not admissible under an averment of a note without interest. *United States v. Lee*,* 4 Cr. C. C., 446.

§ 3306. In a suit on a note with interest, etc., proof of a note without interest is a fatal variance. *Coyle v. Gozzler*,* 2 Cr. C. C., 625.

§ 3307. It is a variance to describe a note as payable generally when it is in fact payable in a particular place. *Covington v. Comstock*,* 14 Pet., 44.

§ 3308. If the place where the note is payable, if payable at a particular place, is not stated in the declaration, the variance will be fatal. *Sebree v. Dorr*,* 9 Wheat., 558.

§ 3309. When, in an action on a promissory note, the declaration counts upon the note, but does not describe it as payable at any particular place, but the note is payable at a particular place, the variance is fatal, but an amendment may be granted. *Stone v. Lawrence*,* 4 Cr. C. C., 11.

§ 3310. **Real actions.**—Evidence of a demise from year to year for two years at \$120 a year, and for one year at \$100 a year, will not support an averment of a demise from year to year for three years at \$120 a year. *Dorsey v. Chenault*, 2 Cr. C. C., 316. See §§ 242, 2409, 2989, 3205.

§ 3311. When a declaration in a writ of right lays a title in three separate demandants, each equally interested, and the proof is of title in two only, the variance is fatal. *Scott v. Widdington*,* 1 McL., 193.

§ 3312. **Patents.**—Where the declaration in an action for violation of a patent-right professes to set forth the specification as a part of the grant, according to its tenor, the slightest variance is fatal. The variance was held to be fatal where the word *whirl* in the specification was called *wheel* in the declaration, the specification speaking of the *wheel* and the *whirl* as different parts of the machine. *Tryon v. White*, Pet. C. C., 96. See PATENTS.

§ 3313. **Slander.**—Allegation, in slander, *he stole*; proof, *you stole*. A fatal variance. *Birch v. Simms*,* 1 Cr. C. C., 550.

§ 3314. **Enticing a servant.**—In case for enticing a servant, an allegation by the plaintiff, that the servant “for a certain price” agreed to serve him, is supported by proof that the plaintiff paid the price to a third person. *Milburne v. Byrne*, 1 Cr. C. C., 239.

§ 3315. **In criminal cases.**—The date alleged in an indictment, unless it is of the essence of the crime, need not be proved as alleged. *United States v. Blaisdell*, 3 Ben., 132. See §§ 1475, 1972, 2162, 2920.

§ 3316. If an indictment for administering noxious drugs with intent to produce a miscarriage describe the drug administered, the proof need not correspond, since it is not necessary to name the drug. *Dougherty v. The People*,* 1 Colo. T'y, 514.

§ 3317. A variance between the indictment and the evidence is not fatal provided the substance of the matter be found. A variance in the first name of one of the owners of the vessel is not material in an indictment under the act of congress of 1825 for an assault committed on board of a vessel lying within a foreign jurisdiction, belonging to citizens of the United States, it being sufficient to prove that the owners are citizens of the United States, without proving who they are. *United States v. Howard*, 3 Sumn., 12.

§ 3318. In an indictment for conspiracy, a variance between the time as alleged and the time as proved, at which an overt act was committed, is immaterial. *United States v. Graff*,* 14 Blatch., 381.

§ 3319. Where an indictment, under section 30 of the act of March 2, 1867, for a conspiracy to defraud the United States, charged the conspiracy to have been entered into in Champaign county (Ohio), and the proof showed that the entire transaction took place in Montgomery county, the variance was held not to be fatal, both of these counties being within the district. *United States v. Smith*, 2 Bond, 323.

§ 3320. In an indictment, under section 30 of the act of congress of March 2, 1867, for conspiracy to defraud the United States, it was charged that the spirits referred to in the indictment were removed from the distillery of a certain person, whereas the proof showed that they were removed from the bonded warehouse connected with the distillery. *Held*, that the variance was not fatal. *Ibid*.

§ 3321. In a prosecution under section 11 of the penitentiary act, passed March 2, 1831, for passing a counterfeit bank note, where the note has been lost after the indictment and before the trial, it is not necessary to prove that the note passed by the defendant corresponded in words and figures with that set out in the indictment. But it must be proved that it corresponded in the

names of the cashier and president, so far as that there is not in the one any letter added or omitted which would vary the sound of the name; and that the note passed had upon its face the letters "No." prefixed to the number 15,402, as set forth in the indictment. *United States v. Hall*, 4 Cr. C. C., 229.

§ 3322. Where the variance is plain, the court will decide the question by rejecting the evidence; where it is doubtful they will refer it to the jury, whose decision will be conclusive. Thus, where an indictment for passing a counterfeit check charged that the check was signed by Jno. Hulse, and the check offered in evidence appeared to be signed by Jna. Hulse, and in the indictment the place was called Fayelville, while in the check it was Fayetteville; and the indictment alleged the order to purport to be drawn on the cashier of the corporation of the president and directors of the Bank of the United States, and the order was drawn on the cashier of the Bank of the United States; and it appeared in evidence that there was a branch of the Bank of the United States at Fayetteville, of which John Hulse was president, it was left for the jury to decide, on a comparison of the check with the indictment, whether the place and names were the same. *United States v. Hinman*, 1 Bald., 292.

§ 3323. Where an indictment under sections 5431 and 5434 of the Revised Statutes did not, in setting out the counterfeit notes, exhibit any imprint of the seal of the treasury, notes were admitted in evidence which exhibited such imprint, the court holding that section 5172 of the Revised Statutes, requiring that the notes shall "express upon their face that they are secured by United States bonds deposited with the treasurer of the United States, by the written or engraved signature of the treasurer and register and by the imprint of the seal of the treasury," did not render the imprint of the seal a part of the contract. *United States v. Bennett*, 17 Blatch., 357.

§ 3324. It was held to be no fatal variance that notes admitted in evidence were circulating notes of a national banking association, while the notes set forth in the indictment, which was under sections 5431 and 5434 of the Revised Statutes, were styled therein national bank currency notes. *Ibid.*

§ 3325. Where an indictment for counterfeiting described the coins made as fifty-cent and twenty-five cent pieces, instead of designating them as half dollars and quarter dollars, as does the statute authorizing their coinage, the variance was held immaterial. *United States v. Burns*, 5 McL., 23.

§ 3326. In a prosecution under the act of 1831 for cutting and removing timber from the public lands, the proof must be of the kind of timber described in the indictment. If the cutting of pine trees is charged, proof of the cutting of oak or hickory cannot be given. It must also be shown that the timber was cut on the township, range and section specially set forth. *United States v. Darton*, 6 McL., 46.

§ 3327. Where an indictment for stealing a letter containing money described the notes more particularly than was necessary, and unnecessarily stated whose property they were, it was held that these matters must be proved as laid. *United States v. Brown*, 3 McL., 233.

§ 3328. Upon the trial of an indictment for stealing from the mail a letter containing a draft, a draft drawn by Jos. Johnson is not admissible in evidence under a count alleging the draft to have been drawn by Joseph Johnson, although it is sufficient to set forth the draft according to its legal effect. *United States v. Keen*, 1 McL., 429.

§ 3329. Upon an indictment under section 45 of the postoffice law for buying, receiving and canceling a treasury note which the defendant knew was stolen from the mail, describing the note as bearing interest at one per cent., the note produced bore interest at "one M per centum." *Held*, that the variance was fatal. *United States v. Hardyman*, 13 Pet., 176.

§ 3330. An indictment for stealing the property of A. is supported by proof that the property belonged to the estate of a deceased person which was in the possession and management of A. *United States v. Barlow*, 1 Cr. C. C., 94.

§ 3331. If an indictment for stealing bank notes from the mail states that they were in a letter directed to "M. G., Esquire, cashier," and the person who directed the letter states, though not positively, and after the lapse of two years, that it was directed to "M. G., Esquire," it is not a material variance, the letter not being produced. *United States v. Burrows*, 3 McL., 405.

§ 3332. In a prosecution against a defendant for practicing medicine for pay, without a license and diploma, evidence of specific instances of practice and receiving pay for it, not stated in the indictment, and of which no notice has been given, cannot be received. *United States v. Williams*, 5 Cr. C. C., 62.

§ 3333. Upon an indictment for carrying on a trade or business, evidence may be given of a specific act of sale made on a day subsequent to the day laid in the indictment, if it tends to prove that the business was carried on on or before the day charged, and goes to the jury under a caution from the court that it is not conclusive of the fact alleged in the indictment, but only tends to prove it. *United States v. Riley*,* 5 Blatch., 204.

§ 3334. Where the defendant is indicted for carrying on the business of a retail liquor dealer

without having taken out the license required by the internal revenue law, the exact time is not material on the proof, and it may be shown that the defendant sold a glass of liquor on the day following the one alleged in the indictment, in the bar-room which had been long occupied by him and which was fitted up as a retail liquor shop, as tending to prove that the same business was carried on there before. *Ibid.*

§ 3335. Where an indictment charged perjury at a trial before the circuit court held on the 19th day of May, and the record showed that the court was held on the 20th day of May, the variance was held fatal. *United States v. McNeal*, 1 Gall., 387.

§ 3336. In a prosecution for perjury for false swearing in a deposition, any discrepancy between what the defendant swore to in the deposition, and what is set out in the indictment as having been sworn to by him, is fatal. *United States v. Coons*, 1 Bond, 1.

§ 3337. On an indictment for keeping a gaming house between April 10th and June 10th, acts committed prior to April 10th were admitted in evidence, on the ground that the day laid is not material, so that it is within the period of limitation or of a prior acquittal or conviction. *United States v. McCormick*,* 4 Cr. C. C., 104.

§ 3338. An indictment charged the issuing of a receipt for the payment of money without putting the required stamp upon it. The statute, being that of March 3, 1865, says, "receipts for any sum of money, or for the payment of any debt." The proof was of a receipt for board and horse hire. It was held that the variance was not fatal. *United States v. Moore*, 11 Fed. R., 248.

§ 3339. An indictment under the slave trade act of April 20, 1818, charging the defendant with fitting out the vessel, will be supported by evidence that he commanded, authorized and superintended the fitment through his agents, without his personal presence. *United States v. Gooding*, 12 Wheat., 460.

XXV. OBJECTIONS.

[See APPEALS AND WRITS OF ERROR.]

§ 3340. **In general.**— Exceptions to the admission of testimony are irregular in cases where a jury is waived. *Martin v. Ihmsen*, 21 How., 394.

§ 3341. Where the question propounded to a witness is competent, but the answer goes beyond the question and is incompetent, the objection should be made to the answer by motion to exclude it. An objection to a competent question does not extend to an incompetent answer. *Gould v. Day*, 4 Otto, 405.

§ 3342. Courts lean against exceptions to testimony. *Evans v. Eaton*, 7 Wheat., 356.

§ 3343. In the examination by a court of errors of the admissibility of evidence, the party ought to be confined to the specific objection taken to it. *Hinde v. Longworth*, 11 Wheat., 199.

§ 3344. Where the respondent's counsel did not object to the examination of the libelants themselves as witnesses, the court received the testimony. *Ferrara v. Barque Talent*, 1 Crabbe, 216.

§ 3345. Where specific objections are made to the admission of evidence, the court may assume that all others are waived. *Belk v. Meagher*, 14 Otto, 279; *Evanston v. Gunn*, 9 Otto, 660.

§ 3346. Written evidence having been offered, it was objected to by the defendant, and the objection overruled. Before the jury had gained any knowledge of its contents the plaintiff offered to withdraw it, but the defendant objected, and it was read to the jury in his behalf. *Held*, the objection became inoperative. *United States v. Graff*,* 14 Blatch., 381.

§ 3347. Where evidence is given to the jury without objection, and the court afterwards decides that it is inadmissible, the jury will be instructed to disregard it. *Bank of United States v. Johnson*, 3 Cr. C. C., 228.

§ 3348. A note was offered in evidence, with the blank indorsement of the plaintiff and one other. It was objected to on account of the plaintiff's indorsement, and the plaintiff was allowed to strike the indorsement out. *Blue v. Russell*,* 3 Cr. C. C., 102.

§ 3349. **Ground must be stated.**— On the taking of testimony before an examiner, an objection to testimony, which does not state the ground of the objection, is not legal or valid. *Brown v. Hall*, 6 Blatch., 401.

§ 3350. A general objection to a deed offered in evidence, that it bears evidence on its face of being fraudulent, will not be noticed by the supreme court. The marks of fraud must be particularly pointed out. *Thomas v. Lawson*, 21 How., 331.

§ 3351. **Error must be pointed out.**— It is incumbent on the party excepting to the admission of evidence to make out the error clearly and satisfactorily. *Ventress v. Smith*, 10 Pet., 161.

§ 3352. It is incumbent on those who seek to show that the examination of a witness has been improperly rejected to establish their right to have the evidence admitted; for the court will be presumed to have acted correctly until the contrary is established. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet., 448.

§ 3353. It is the duty of a party taking exception to the admission of evidence to point out the part excepted to, when the evidence consists of a number of particulars, so that the attention of the court may be drawn to the particular objection. If the objection is directed generally to all the matters stated in the bill of exceptions, and any of this evidence is admissible, the objection is properly overruled. *Moore v. Bank of the Metropolis*, 13 Pet., 302.

§ 3354. It is the duty of a party excepting to the admission of evidence to point out the part excepted to, so that the attention of the court may be drawn to it. Where the objections are very general and indefinite, without pointing out the portions of the answers to the interrogatories in the deposition which are inadmissible, except in gross, and embrace matters clearly competent and relevant, the exception will be overruled. *United States v. McMasters*, 4 Wall., 680.

§ 3355. Exceptions to the ruling of the court in admitting evidence should be sufficiently specific to enable the court to understand the precise ground of objection to its admissibility, and unless they are so they cannot be regarded as a proper foundation for a writ of error. *Stockwell v. United States*, 3 Cliff., 284.

§ 3356. To render an exception to an interrogatory which is not objectionable in form available, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts to which the interrogatory related, and that such facts were material. *Railroad Company v. Smith*, 21 Wall., 255.

§ 3357. The party objecting to the testimony of a witness, a part of whose testimony is admissible and a part of which is inadmissible, is bound to point out and discriminate the part to which the objection applies. But the court may in its discretion grant a new trial on account of the admission of improper testimony under such circumstances, where the discrimination is not made. But it ought not to do it where the testimony is of such a character as ought not to have changed the verdict. *Carr v. Gale, Dav.*, 328.

§ 3358. Time to object.—Evidence must be objected to when offered. *United States v. Moreno*, 1 Wall., 400.

§ 3359. The objection of a variance must be taken at the time the evidence is offered. After the evidence is closed, the party cannot claim the right to have any evidence excluded on that ground. *Roberts v. Graham*, 6 Wall., 578.

§ 3360. Objection to the admission of evidence on the ground of variance must be made in the lower court. *Gorman v. Lenox*, 15 Pet., 115.

§ 3361. An objection to the admission of evidence for want of an allegation of the fact in the bill should be taken at the hearing, or it will not be considered on a motion for a rehearing. *Bently v. Phelps*, 3 Woodb. & M., 403.

§ 3362. Unless objection is made to the admission of evidence when offered, it will be presumed to be admitted by consent. And if no motion is made to withdraw it from the jury, during the trial, the objection will not be heard on a motion for a new trial. *Farmers' Loan and Trust Co. of New York v. McKinney*, 6 McL., 1.

§ 3363. Parol proof of the contents of a writing is sufficient where no objection to its competency is made at the time. It is too late to urge the objection on the argument. *Bissell v. Farmers' and Mechanics' Bank of Michigan*, 5 McL., 495.

§ 3364. Where the record of the proceedings of a court of admiralty of a foreign country has been read in evidence without objection, it is too late to object to it in the argument. *Russel v. Union Insurance Co.*, 1 Wash., 409.

§ 3365. If no objection is taken at the trial to the absence of evidence, it is too late to make the objection after the verdict. *Catlin v. Springfield Fire Ins. Co.*, 1 Sumn., 434.

§ 3366. Witnesses cannot be examined before the master, to the credit of a person whose testimony was read at the hearing without objection, the objection to his competency or credibility being then fully known. Failure to object at the hearing is a waiver of the objection. *Gass v. Stinson*, 2 Sumn., 605.

§ 3367. The admission of evidence cannot be complained of in the supreme court when no exception was taken to it in the court below. *Rogers v. The Marshal*, 1 Wall., 644; *Schuchardt v. Allens*, 1 Wall., 359.

§ 3368. According to the rule of the supreme court, in equity cases, objections to depositions not taken in the court below cannot be urged. *Mechanics' Bank of Alexandria v. Seton*, 1 Pet., 299.

§ 3369. Cross-examination of a witness, without raising a known objection to his competency, prevents the raising of the objection at the trial in equity. *Flagg v. Mann*, 2 Sumn., 486.

§ 3370. Objections to the admissibility of evidence must be made when the evidence is offered, or the party can never avail himself of them. Thus the objection that the answer in an admiralty suit must be regarded as full proof because the replication was filed out of time must be taken when the proof is offered under the replication. *Thomas v. Gray*, Bl. & How., 493.

§ 3371. If a release of his interest by a witness, appearing on its face to be duly executed, is offered in evidence in order to render the witness competent, objection that the execution of the release has not been proved must be taken at the time, or it will be considered to have been waived. *Downey v. Hicks*, 14 How., 240.

§ 3372. A party in an admiralty suit cannot be permitted to go to a final hearing without objecting to the competency of evidence, and to raise an objection to the proofs on a reference before the clerk. *The Trial*, Bl. & How., 94.

§ 3373. In an admiralty suit, an objection to a deposition, on the ground that the witness was interested, must be made at the hearing; it comes too late if made at the argument. *Nelson v. Woodruff*, 1 Black, 156.

§ 3374. A deposition should be objected to at the time of offering to read it. If once admitted the court cannot take it from the jury by instruction. *Doty v. Strong*,* 1 Burn. (Wis.), 158.

§ 3375. Where a master rejected evidence, and no exception was taken in the court below, the point is not open in the supreme court. *Kinsman v. Parkhurst*, 18 How., 289.

§ 3376. The admission of evidence which was not objected to at the trial can afford no ground of exception to the verdict. *United States v. Fourteen Packages*, Gilp., 235.

§ 3377. If no objection is made at the time of the admission of hearsay evidence, all objection to it is considered as waived. If a general objection be made to the admission of certain evidence, and no ground of objection is specified, the objection will not be considered. If a ground of objection is stated, all grounds not specified are considered as waived. *Fischer v. Neil*, 6 Fed. R., 89.

XXVI. INTRODUCTION OF EVIDENCE.

1. *In General.*

SUMMARY — *Evidence not relevant when offered, admissible if counsel offers to connect it by subsequent proof*, § 3378; *so, of proof of agency*, § 3379.

§ 3378. In criminal as well as civil cases, the order in which evidence shall be introduced is in the discretion of the presiding judge. If counsel offer a piece of evidence, irrelevant as the case stands, but promising to connect it subsequently by other evidence, it is within the discretion of the judge to allow them to put it in in that order. *United States v. Flowery*, §§ 3380-3385.

§ 3379. When the admissions of an agent are offered against the principal, the agency must be proved, but the declarations may be proved first by permission of the judge, on the offer of counsel to prove the agency later. *First Unitarian Society v. Faulkner*, §§ 3386-88.

[NOTES.— See §§ 3389-3420.]

UNITED STATES *v.* FLOWERY.

(District Court for Massachusetts: 1 Sprague, 109-116. 1845.)

Opinion by SPRAGUE, J.

STATEMENT OF FACTS.—Peter Flowery was indicted under the statute of 1818, for causing a vessel, called the *Spitfire*, to sail from the port of New Orleans, with intent to employ her in the slave trade. The jury returned a verdict of guilty, and his counsel now move for a new trial, for several causes. The most important, and that which has been pressed with the greatest earnestness, is that evidence was admitted that the *Spitfire*, on a former voyage, carried a cargo of slaves from Rio Pongo to Cuba. This was objected to, on the ground that Flowery had no connection therewith. The district attorney thereupon stated that he should introduce evidence that Flowery had knowledge of such former voyage. It is now insisted that such evidence was not

subsequently introduced, and that the testimony objected to should not have been admitted, upon the statement of the district attorney.

§ 3380. *Evidence which would be irrelevant, if standing alone, may be admitted on the statement of counsel that it will be properly connected; the rule is the same in criminal as in civil cases, but it is for the court to say at what part of the proposed chain counsel shall begin.*

It is conceded to be the practice, in civil cases, to admit evidence under such circumstances, but it is urged that it ought to be otherwise in criminal cases. We know of no such distinction. The practice and the principle are the same in both. Where a chain of testimony is proposed, the links of which, unconnected, would be irrelevant, counsel must be allowed to begin somewhere, upon the expectation that the other links are to be afterwards supplied, and for this the court rely upon the statement of counsel, professional honor being a guaranty against abuse. But the order in which such evidence shall be introduced is under the control of the court, who may direct the counsel to begin at any part of the proposed chain of evidence, as the purposes of justice may seem to require.

It is urged that the court, after the evidence was closed, should have instructed the jury to lay this testimony out of the case. In the first place, no such instruction was requested; and in the next, the evidence, subsequently introduced, justified the statement of the district attorney, upon which it was originally admitted, and rendered it proper to be submitted to the final consideration of the jury. The evidence tended to show that the Spitfire was a schooner of about ninety-nine tons burden, built at Baltimore in the year 1841, and there registered in 1842, by the name of Cabellera, as the property of one Gordon; that subsequently she was in the Rio Pongo, under his command, where a bill of sale of her was made to one Peter Faber, who had a slave factory on that river, from which, under the command of Gordon, she carried a cargo of slaves to Cuba, and there landed them, and immediately Gordon delivered up the schooner to some Spaniards.

This was supposed to be about the month of May, 1843. The name of Cabellera was erased from her counter, when she took on board the slaves. The next that we hear of her is in September of the same year, when she was at Havana, under the command of Flowery, by the name of the Spitfire, bound, as the shipping articles state, on a voyage to Key West, New Orleans, and back to Havana. She proceeded on this voyage, with one John Scosure on board, as a passenger. On her arrival at New Orleans, she was stated, in the shipping list, to be for sale, but was carried to the opposite side of the river, where she lay for several weeks, undergoing extensive repairs; both masts were taken out, and new ones put in; she was coppered, painted, and some new sails and rigging furnished. Afterwards, a bill of sale was made, purporting to be from one Falker, of Key West, by one Anquera, as his attorney at New Orleans, to Peter Flowery, in consideration of \$7,500; and a charter-party was made between Flowery and Scosure, for a voyage from New Orleans to Havana, and thence to the Rio Pongo, for which Scosure was to pay \$5,000. The vessel could not be registered as American, because she had been owned by foreigners. The bill of sale and charter-party appear to have been executed at New Orleans, on the 20th and 25th days of November, 1844, and she sailed from New Orleans on the 26th, for Havana, with Scosure on board as a passenger, and thence proceeded to Faber's factory on the Rio Pongo, where she was seized.

There was testimony that she was originally constructed with eight places for sweeps, quarter-houses, and a trunk on deck, extending partly over the main hold, and partly over the cabin, with holes in the sides, nine by twelve inches, for ventilation, and that in a former voyage there had been a bulk-head in the hold, to divide the male from the female slaves. There was also evidence, tending to show that the name, Cabellera, had been painted in black letters on the taffrail, and that Flowery, while at New Orleans, caused them to be painted over, so as to conceal them. The question is not, whether all this proves that Flowery knew of the former voyage, but whether there is anything to be submitted to a jury on that point; and in our opinion there is.

Flowery resides in New York, and formerly commanded a vessel running between that place and Havana. Not long after the termination of the first voyage, he is found, in command of the Spitfire, at Havana. When, and under what circumstances, did he become connected with this vessel, owned by foreigners? Were there not indications of the business in which she had been engaged; the marks of the bulk-head in the hold, quarter-houses, row-locks, and especially the trunk on deck, peculiarly adapted to the slave trade, and to no other? Again, upon her arrival at New Orleans, why were such extensive repairs made upon a vessel, then only between two and three years old? If the purpose was to change her appearance, so that she should not be recognized on her reappearance on the African coast, we see a sufficient reason for the new masts, new sails, and new paint. The importance of disguising her will be better appreciated, when it is recollected that her seizure was owing to her being recognized by Turner, who, having been mate on her former voyage, discovered her identity, notwithstanding the change she had undergone. Again, Flowery says that he became the purchaser of this vessel, at New Orleans, and gave the extraordinary price of \$7,500. Would he have done this, without any inquiry into her previous history? And especially, would he have taken a bill of sale, declaring that she could not have the privileges of an American vessel, because she had been owned by a foreigner, without investigation? And further still, there was evidence that he not only knew of her former name, Cabellera, but had himself caused it to be painted over and concealed. Upon the last point, there was, indeed, rebutting evidence of great force; but of the effect of the whole, it was the province of the jury to judge.

It is further urged by the learned counsel, that if Flowery knew of the former voyage it has no legitimate bearing upon the question whether this was a slave voyage or not, and is, therefore, irrelevant. We are to bear in mind that there were two propositions to be maintained by the government, both of which were denied by the defendant; first, that this was a slave voyage; and, second, that he had knowledge of, and intended to employ the vessel in it, when he sailed from New Orleans. One question was, whether the sale to Flowery was real, or colorable. If Flowery knew that she had been engaged in the slave trade, and liable to forfeiture, would he, *bona fide*, have purchased her, and paid the exorbitant price of \$7,500? The knowledge of the former voyage tended to show that this sale was fictitious, and in this, as well as in other respects, went to the question of *scienter* and intent.

§ 3381. *A new trial will not be granted on the ground of the introduction of improper evidence which was not objected to.*

The second ground upon which a new trial is asked is the testimony of one Smith, as to a conversation at Faber's factory between Faber and a Spaniard

and a Frenchman, who went from Havana in the Spitfire. To this it is sufficient to say that the evidence was not objected to; and although we are of opinion that the testimony as to conversations between the Spaniard, Frenchman and Flowery, on the outward passage, and the part acted by them, would, under all the circumstances in evidence in the case, have been sufficient to have authorized its introduction, if it had been resisted, we do not think it necessary to dwell upon it.

§ 3382. *When a witness states that a party is reputed to be the owner of property, he may be asked, on cross-examination, in what that property is reputed to consist.*

The third ground is, that the district attorney was permitted to ask in what the property of Scosure was reputed to consist. The facts are as follows: One McLellan, a witness for the defendant, after testifying that he knew Scosure, and that he resided at Havana, was asked by the counsel for the defendant whether Scosure was a man of property. To which the witness answered that he was reputed to be a man of large property; that he was reputed to own property to the amount of three or four hundred thousand dollars. The defendant's counsel then asked him whether Scosure was reputed to own property in this country; to which the witness answered that he was, to the amount of \$100,000.

The district attorney, in cross-examination, asked the witness in what the property of Scosure consisted; to which he replied, that he did not know. He then asked in what it was reputed to consist. This question was objected to. The court ruled that it might be put, in reference to the property of which the witness, in his direct examination, had testified that Scosure was reputed to be the owner. The district attorney then asked whether Scosure was reputed to be the owner of cargoes of vessels. The witness inquired whether he was bound to answer. The defendant's counsel objected to the question, and it was not pressed. The question put by the district attorney was proper, in order to test the correctness of the original statement made by the witness, and is clearly within the established principles and practice of cross-examination.

§ 3383. *The court will not disturb a verdict, rendered on ample evidence, merely because counsel were allowed too great latitude in argument.*

The two following grounds are, that the district attorney was permitted to argue to the jury that Scosure had been previously engaged in the slave trade, and that certain passports found on board the Spitfire were obtained for the purpose of protecting her against seizure. The objection is merely that counsel was allowed too great latitude in arguing as to the inferences to be drawn from the evidence. If this were so, we should not, for that reason alone, disturb a verdict, rendered upon ample testimony, and with which the judge who presided at the trial is entirely satisfied.

§ 3384. *The course of argument to be allowed must rest in some degree upon the discretion of the court; a line of argument, clearly unfounded and irrelevant, would not be allowed.*

The course of argument to be allowed must rest in some degree, at least, upon the judicial discretion of the court. A line of argument, clearly unfounded or irrelevant, would not be permitted. But there are many cases, and especially those which are voluminous and complicated, in which it may well be presumed that counsel perceive bearings and applications of evidence which are not at once apparent to the court; and when it is made a question whether the evidence tends to a certain conclusion, the views of counsel, in other words,

his argument, must be heard, before the court can be called upon to decide. This will be in the presence of the jury, and it will not generally be material whether it be in form addressed to them, or to the court; but it will conduce to the convenience and dispatch of business, that the argument should at once be addressed to the jury, and the court afterwards should give such instructions as they may deem proper.

But we think there was some evidence, slight perhaps, but still something, before the jury, from which counsel might well be permitted to argue that Scosure had been engaged in the slave trade. But it has been urged that, if this fact were established, it would be immaterial and irrelevant. We do not think so. The defendant gave evidence that there was such a person as Scosure, possessing great wealth, in order to repel the suggestion that the charter-party was fictitious. Suppose they had been able to show that his business was a regular and legal course of trade between Havana and the Rio Pongo, would it not have been admissible, at least on the question of the *scienter* and intent of Flowery? And on the other hand, if the government could show that his business was the slave trade, between Havana and the Rio Pongo, it would be competent evidence to the same point.

As to the passports, it was contended, in behalf of the defendant, that they were perfectly innocent papers, intended merely for the personal protection of the individuals. On the other hand, it was insisted that the persons named in them were not mere passengers, and that the passports were designed to conceal their true character and prevent suspicions, if boarded by an American or English man-of-war, before reaching the Cape de Verds. That one of them was not a passenger is certain; he was shipped as and performed the duties of cabin-boy, throughout the voyage. The other two, a Spaniard and a Frenchman, performed most of the duties of mate, there being no person, in the shipping articles, holding that station; they regularly stood watch, took observations, kept the run of the vessel, and marked her course, one on a French and the other on a Spanish chart; and had books of navigation in the French and Spanish languages, respectively. After arriving on the African coast, on seeing a British steamer, the Spaniard concealed certain papers and money, and the Frenchman, being in the boat, threw overboard a flag, appearing to be Spanish, declaring that if the English found that they would seize the vessel. On arriving in the Rio Pongo, both these persons went to Faber's slave factory, lived in his house, and were heard bargaining with him for a cargo of slaves. There was testimony that these two persons and Flowery, on the outward passage, had frequent conversations in which they spoke of the voyage as a slave voyage, and of the amount they should make if they succeeded in carrying a cargo of slaves to Cuba. All the passports were for persons going from Havana to the Cape de Verds, for which the Spitfire was cleared; yet she passed in sight of those islands without touching.

We think this not only competent, but strong evidence, that the ostensible was not the real purpose for which those passports were obtained; that the Spaniard and Frenchman, and the Spanish cabin-boy, were represented as passengers to prevent the suspicions that might arise, if they appeared to be a part of the crew of an American vessel; and that the district attorney had a right so to argue.

§ 3385. *As to the objection that two circuit courts were held separately, by the two judges, at the same time.*

The last objection rests on the supposition that there were two circuit courts,

holden separately, by the two judges, at the same time. This is a mistake. Flowery was tried at the regular term holden by the district judge, by adjournment, in the usual manner, from day to day, in the court room. In the meantime the judge of the supreme court was, by agreement of parties, hearing a cause in another room. This was not intended to be a circuit court. No judgment or decree was passed. Had the result of the hearing called for any, it might have been, by consent of parties, afterwards entered in court. Upon this statement of the facts, the counsel, upon a suggestion from the bench, have forborne to press the objection; and we have no occasion to consider whether it be competent for the two judges to hold the circuit courts, in different rooms, at the same time, or not.

FIRST UNITARIAN SOCIETY *v.* FAULKNER.

(1 Otto, 415-423. 1875.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Services were rendered by the plaintiffs, as architects, in making plans and designs, and in furnishing drawings, specifications, and estimates for the corporation defendants, preparatory to the erection and completion of a church edifice for their religious society. Annexed to the declaration is a bill of particulars, setting forth the claim of the plaintiffs, which is as follows:

For services as architects in making designs, plans, drawings, specifications and estimates for a church building, with basement, to cost \$78,000.....	\$2,730 00
For second design and drawings, showing the elevation of the church building, with chapel in rear and tower between the church and chapel, to cost \$70,000.....	700 00
For modification of the above design, with chapel in rear and tower at angle of the church, to cost \$70,000.....	700 00
For design of church with basement, but without tower, to cost \$40,000.....	400 00
	\$4,530 00

Due service was made, and the defendants appeared and pleaded that they never promised in manner and form as alleged in the declaration. Issue being joined the parties went to trial; and the verdict was for the plaintiffs, in the sum of \$3,862.50, part of which was subsequently remitted, and judgment was rendered for the plaintiffs in the sum of \$2,900. Exceptions were duly filed by the defendants to the rulings and instructions of the court, and they sued out the present writ of error.

Enough appears in the transcript to show that the plaintiffs were partners, seeking employment as architects, and that the firm was represented in all the negotiations reported in the bill of exceptions by the junior member of the firm. Testimony was given by him at the trial, tending to prove that the plaintiffs, at the request of the defendants, had submitted plans to the latter for a church edifice, in competition with other architects, for the examination and choice of those composing the defendant corporation. Evidence was also offered by the plaintiffs, consisting of the testimony of the same witness, tending to prove conversations between him and the pastor of the church, and of the action of the plaintiffs in consequence thereof; and they also offered his testimony in evidence tending to show statements and admissions purporting to have been made by the pastor, in relation to the employment of the plaintiffs by the defendants as architects at a social meeting of the church; to all

of which the defendants objected, because no evidence had been given tending to show that the pastor was, in any sense, the agent of the defendants, or that he had any authority to act for them in relation to the employment of the plaintiffs as architects.

Responsive to that objection, the plaintiffs stated to the court that they expected to prove that the pastor acted in that behalf as the agent of the society, and that the society acquiesced in his acts, and upon that understanding the objection was overruled, the court remarking that the testimony would become material if the plaintiffs should subsequently give evidence to prove the agency of the pastor at the time of the interview with the business partner of the plaintiffs, when the plans were submitted or modified, and also at the social meeting of the society, when certain members of the building committee and many members of the society were present.

Exceptions were taken by the defendants to the ruling of the court in admitting these several declarations and admissions; but the bill of exceptions shows to the satisfaction of the court that the evidence was admitted subject to the condition that the plaintiffs should subsequently prove that the party who made the declarations was the agent of the society. No such evidence was afterwards introduced by the plaintiffs; but the bill of exceptions also shows that the attention of the court was not again called to the subject, and that the case was submitted to the jury on the hypothesis that it was not proved that the plaintiffs were the architects of the society.

§ 3386. *Although declarations of an agent are not competent evidence, unless the agency is proved, yet it is in the discretion of the presiding judge to admit them and allow the proof of agency to be made later.*

Declarations of the pastor were not competent evidence, unless it was proved that he was the agent of the society, and that the declarations or admissions were made in respect to matters within the scope of his agency. But it is not absolutely necessary that the proof of agency in every such case should be first introduced. Except in special cases, it is the better practice that the foundation, in such a case, should be laid before the declarations or admissions are admitted; but it is competent for the presiding judge, if in his judgment the ends of justice require it, to relax the rules of practice, and to admit the evidence offered before the proper foundation for the admissibility of the same is laid, if he is well assured by the party offering the evidence that the agency in question will be subsequently proved.

Rules of practice, in conducting jury trials, are necessarily somewhat flexible; and that remark applies as well to the rules having relation to the order of proof as to those which regulate the number of witnesses which a party may examine, or the time, manner or extent of a cross-examination. All agree that in ordinary cases the plaintiff must begin, and the general rule is that he must introduce all of his substantive evidence before the defendant is required to open his defense; and the corresponding general rule applicable to the defendant is that he must introduce all of his substantive evidence before the plaintiff is required to give evidence in rebuttal.

Beyond all doubt, those are good general rules; but it is competent for the presiding judge to relax either of them, in case the ends of justice so require, and to allow evidence to be given by either party in such other order as he, the said judge, in the exercise of a sound discretion, may direct. Where an agreement was offered in evidence, and it was necessary, in order that it should be competent for the consideration of a jury, that proof should be given that

the signer was authorized to execute it, and the instrument having been admitted before the authority of the signer was proved, the opposite party excepted to the ruling of the court in admitting it; but Judge Story held that there was nothing in the exception, and remarked that "it was as competent for the party to prove the authority after, as it was before, giving the agreement in evidence." *Bank v. Guttschlick*, 14 Pet., 29.

Equally decisive are the views of this court as expressed in a subsequent case in the same volume. Speaking of the general subject, the court say that the mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the circuit courts, with which this court ought not to interfere, unless it shall choose to prescribe some fixed general rules upon the subject. *Railroad Company v. Stimpson*, 14 Pet., 463; *Wood v. U. S.*, 16 id., 361; *Kelly v. Crawford*, 5 Wall., 790.

State courts have adopted the same rules of practice; and they are of such immediate necessity, that we should come to the same conclusion, even if the question was not controlled by the repeated decisions of this court. *Smith v. Britton*, 4 Humph., 202; *Cushing v. Billings*, 2 Cush., 159; *Caton v. Carter*, 9 G. & J., 477. Whenever the strict rule is relaxed in such a case, it is the duty of the party to whom the indulgence has been extended to make good the assurances given to the court; and, in case of unreasonable delay, it would be quite proper for the court to call attention to the subject, and inform the delinquent party that the evidence admitted would be stricken out unless proof to lay the foundation for its admission was introduced before the evidence was closed. Nor must it be understood that the other party can remain silent, and suffer an error to be committed by the court, in order that he may have a valid exception if the verdict is in favor of his adversary.

Viewed in any light, it was not an error in the court to admit the evidence, and the attention of the court not having been again called to the subject, and inasmuch as the bill of exceptions shows that the evidence admitted, in view of the hypothesis adopted by the court in submitting the case to the jury, became entirely immaterial, the exception is overruled.

Evidence was exhibited tending to show that the defendants, at a legal meeting held on the 22d of January, 1872, appointed a building committee consisting of five persons, preparatory to the erection of a new church edifice, and instructed the committee to obtain plans for such a building, and to submit the plans to the society. Plans were accordingly solicited; and it appears that several were submitted to the committee at a subsequent meeting, and among others the plan prepared by the business partner of the plaintiffs. Preference, it seems, was given to the plan of the plaintiffs, as appears by the action of the committee. They voted to adopt the plan presented by the plaintiffs, subject to certain conditions: (1) That it be modified according to the wishes and suggestions of the committee. (2) That the *contract* for building the church shall not exceed \$58,000. (3) That the action of the committee be ratified at a legal meeting of the society.

Alterations were made in the plan; and the society subsequently instructed the committee to build the church according to the first plan of the plaintiff architect, provided the same could be built, all complete and satisfactory, at a cost not to exceed \$58,000, including such materials as the society had on hand; and, if it could not be built at that cost, to build according to the plan of another architect, which was submitted to the society at that meeting.

Proof was also introduced by the defendants showing that bids or contracts for the building of the church according to the plaintiffs' plan could not be procured for less than \$78,000; in consequence of which the society refused to construct the church building according to that plan. Payment for the plans and modifications of the same furnished by the plaintiffs being refused, they instituted the present suit to recover compensation for the services rendered in that behalf by their business partner.

Extended comments upon the evidence given to the jury were made by the presiding justice; to a certain portion of which remarks the defendants excepted. Before advertng to those remarks, it is proper to state that the judge instructed the jury that if what the business partner of the firm did, after the qualified acceptance of his plan, was done upon the same conditions under which the various competing plans were originally submitted, then the plaintiffs could not recover; nor could they recover upon the theory that it was understood between the parties that in case the plan of the plaintiffs should be ultimately rejected, as in fact it was, they were to have a reasonable compensation for their services; by which is meant, as the court here understands the matter, that there was no sufficient evidence in the case to prove such an express agreement. He also instructed the jury that the defendants were *only* liable for the acts of agents duly authorized, or for acts of persons subsequently ratified by the society; and he also gave the jury instructions as to the rule of damages in case they should find for the plaintiffs.

Plans had been submitted in the beginning by several architects; and the presiding justice, in the course of his remarks, adverted to that fact, and to the inquiry whether the plans were submitted with the understanding on both sides that there was to be no compensation unless the plans were accepted; and he added, that, if such was the understanding, then every architect worked at his own risk and cost. All we know upon the subject, continued the judge, is what is stated by the plaintiff witness; from which it is perhaps fairly to be inferred that the plans originally presented were submitted upon that understanding by all the architects in competition at that time. But the difficulty in the case, said the judge, is that the plan of the plaintiffs was subsequently accepted in a qualified sense. If the original plan submitted by the plaintiffs had been rejected at the time, there could have been no controversy. Except for that qualified acceptance, there would have been no trouble; but the difficulty now is to ascertain on what footing the parties stood in relation to the plans and modifications of the same presented by the business partner of the plaintiffs. He supposes he was the architect of the church; which, perhaps, is not strange, as the committee seem to have supposed that they had a right, on certain conditions, to make him such.

Throughout the remarks, the theory of the judge appears to have been that the plans were presented by the architects in the beginning at their own risk and cost; and the main purpose of this charge seems to have been to submit the question to the jury, in view of the whole evidence, whether the condition that they were to work at their own risk and cost, in case their plans were ultimately rejected, ceased to operate against the plaintiffs in consequence of the acts of the committee and the action of the society; or in other words, whether or not it was the understanding, in view of all that took place subsequent to the qualified acceptance of the original plan presented by the business partner of the plaintiffs, that he was to go on at his own expense, and risk his own labor and that of those who were in his employment, if in point of

fact the plans and the modifications of the same which he presented should finally be rejected by the society. Those explanations prepare the way for an examination of that part of the charge of the court which is the subject of the only remaining exception to be considered in the case.

§ 3387. *As to criticisms on instructions in a court of errors.*

Mere verbal criticisms of the charge of the judge are not entitled to any considerable weight in a court of errors. Such courts look at the substance and legal effect of the language employed, without much regard to mere inaccuracy of expression, unless the error is one which might prejudice the rights of the party seeking redress.

Indirect allusion is made by the judge to the second condition in the vote of the committee adopting the plan of the plaintiffs, that the cost of the church when completed should not "exceed \$58,000;" and he remarked that there must be a reasonable construction given to that language. Contracts, said the judge, it is manifest, might have been let to parties apparently responsible at the time, for that price, and yet the actual cost might have turned out to be much greater. There are certain elements, continued the judge, always entering into matters of the kind, making it necessary that the language should be reasonably construed, in reference to the subject-matter and the circumstances; and when so construed, his opinion was, and he so stated to the jury, that it could not be supposed that the meaning of the resolution was that the church should not cost, to a dollar, beyond that amount; that the sum specified was intended as a reasonable limit, applying to the language the ordinary rules which reasonable men would apply to such a transaction.

In the course of the charge he also adverted to the fact that one of the building committee had given the language of the condition a closer construction, and continued his remarks by saying that he understood the condition to mean that though it was in the nature of a limit to the architect and to the committee, yet that the language must receive a reasonable construction; and that it should be regarded, not as an absolute limit, but one as nearly exact and absolute as the subject-matter and the nature and circumstances of the case would admit.

Even if taken literally, it would be very difficult to point out any legal error in those remarks; but the remarks are somewhat qualified by what follows in the succeeding sentence, in which the judge proceeds to say to the effect that the view previously presented to the jury is in no respect material, except so far as it may bear on the question whether the business partner of the plaintiffs was all the time performing service at his own expense and with the understanding that, if his plans were ultimately rejected, he was to receive no compensation. Those remarks, it is obvious, had respect to the theory of the defendants that the plaintiffs' plans had never in any way, or to any extent, been adopted either by the society or the committee.

Quite a different theory was maintained by the plaintiffs; and in respect to that the judge remarked that, if the plans had been accepted and the contract made at the price specified in the second condition of the vote of the committee, it would scarcely be contended, if it turned out that the society had to expend a sum greater than the prescribed limit, that the plaintiffs would not be entitled to anything for services performed as architects. Suppose, said the judge, the contractor should become bankrupt or fail: was the architect to have nothing for his services, even if the church did cost more than the contract price?

Two or three passages of the charge, it must be admitted, are quite indefinite and somewhat obscure; but they are not more so than the exceptions of the defendants, which are addressed to nearly a page of the remarks of the judge, without any attempt to specify any particular paragraph or passage as the subject of complaint; nor does the assignment of errors have much tendency to remove the ambiguity.

§ 3388. *Instructions are entitled to a reasonable interpretation.*

Instructions given by the court to the jury are entitled to a reasonable interpretation; and they are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party. *Castle v. Bullard*, 23 How., 189 (§§ 26-32, *supra*). Even now, though the complaining party has filed an assignment of errors and submitted a written argument, it is by no means certain what the precise complaint is, unless it be that the verdict, in their view, is for the wrong party. Courts of error have nothing to do with the verdict of the jury, if it is general and in due form, except to ascertain, if they can, whether improper evidence was admitted to the jury, or whether the jury were misdirected by the presiding judge. No error of the kind is shown in the record, and the judgment is affirmed.

§ 3389. *Order of proof.*—The order in which evidence is introduced is a matter in the discretion of the court, and not a strict right of the parties. *Wood v. United States*, 16 Pet., 342.

§ 3390. The order of introducing evidence, and the times when it shall be introduced, are matters properly belonging to the practice of the circuit courts, with which the supreme court ought not to interfere. And the admission or refusal of evidence in rebuttal which should have been introduced in chief is discretionary with the court, and cannot be assigned as error. *Johnston v. Jones*, 1 Black, 210.

§ 3391. The order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the circuit court, with which the supreme court ought not to interfere, unless it shall choose to prescribe some fixed general rules on the subject, under the authority of the act of congress. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet., 448.

§ 3392. The proper order in a criminal case is, first, to prove that an offense has been committed; and, secondly, that the accused committed it. *United States v. Woods*,* 4 Cr. C. C., 484.

§ 3393. The order of proofs, where several things are to be established to lead to a result, is a matter of discretion in the court. Thus, a witness may be asked whether he was the agent of a corporation, before inquiring into the manner of creating his agency. *Conard v. Atlantic Insurance Co.*, 1 Pet., 386.

§ 3394. Upon an indictment for barratry, evidence of an agreement by the defendant with a third person to commit barratry, and a letter as general evidence, are premature, before any evidence has been given of any particular act of barratry. *United States v. Porter*, 2 Cr. C. C., 60.

§ 3395. Where a promissory note offered in evidence by the plaintiff, who is holder of the note, appears on its face to have been altered, although the defendant, who is maker, has not denied its execution under oath, the plaintiff must explain the alteration before the note can be read. *Low v. Merrill*,* 1 Burn. (Wis.), 185.

§ 3396. An agreement, purporting to have been executed by an agent, may be given in evidence before the authority of the agent is proved. *Bank of the Metropolis v. Guttschlick*, 14 Pet., 19.

§ 3397. In a suit against a partnership for a debt, an agreement, signed by one of the partners in the firm name, may be admitted in evidence, subject to proof thereafter to be given of a ratification by the other partner, where it is objected that the agreement was made after the dissolution of the firm. *Kelly v. Crawford*, 5 Wall., 785.

§ 3398. There is no rule of law which authorizes a trial court in Montana Territory, in regulating the order of admitting evidence, to exclude competent evidence because other evidence is not offered first. *Campbell v. Rankin*, 9 Otto, 261.

§ 3399. In a prosecution for conspiracy, it is a matter of practice whether the court will hear the confessions of persons not on the record, to implicate the defendants, upon assurance given by the prosecution that they will connect the persons with the conspiracy. But the better and

safer rule is not to hear such confessions until *prima facie* evidence is given connecting the witness with the conspiracy. *United States v. Cole*, 5 McL., 513.

§ 3400. **Evidence in rebuttal.**—In an action on a contract, where the breach complained of was that the goods delivered were not of the quality mentioned in the contract, the plaintiff, after the defendant had rested, was allowed to rebut an anticipated argument, founded on the defendant's testimony, that it was the duty of the plaintiff's agent to have examined the goods before delivery, by proving by the agent that the defendant told him he need not examine the goods, as he was bound by the contract to furnish goods of a good quality. *Gilpins v. Consequa*,* Pet. C. C., 85.

§ 3401. The plaintiffs may give evidence to explain or contradict any matters which come out in the testimony offered by the defendants. But if the plaintiffs have examined witnesses on the same matter in their opening, and nothing new on that subject has come out in the defendants' evidence, such evidence on the part of the plaintiffs is improper. *Gilpin v. Consequa*, 3 Wash., 184.

§ 3402. If evidence introduced in rebuttal tends to prove the case of the party adducing it, its admission is discretionary with the court, whether it is strictly rebutting or not. *Grand Trunk R. Co. v. Richardson*, 1 Otto, 454.

§ 3403. **Shifting line of proof.**—Whether a party may open his case upon one line of proof and during the trial shift to another is a matter of discretion for the court. *Turner v. Yates*, 16 How., 25 (§§ 62-68).

§ 3404. **Object of act of 1789.**—The purpose of the thirteenth section of the judiciary act of 1789, providing that "the mode of proof by oral testimony and examination of witnesses, in open court, shall be the same in all the courts of the United States, as well in the trial of causes in equity, and admiralty and maritime jurisdiction, as of actions at common law," was not to introduce a law of evidence respecting the competency of witnesses, but a mode of proceeding merely. *United States v. Dunham*,* 21 Law Rep., 591.

§ 3405. **Evidence in chief.**—It is too late to offer evidence in chief after the close of the testimony. *Kemble v. Lull*, 3 McL., 272.

§ 3406. On the trial of an indictment for using the mail to promote lotteries, after the prosecution had announced the evidence on their side closed, the defendant moved for an acquittal, on the ground that no evidence had been introduced tending to prove the existence of a lottery. *Held*, that it was in the discretion of the court to allow the prosecution time to supply this proof. *United States v. Noelke*, 17 Blatch., 554.

§ 3407. **Recalling witness.**—A witness, after being examined in chief, cannot be called again and examined as to new matter not brought out by the cross-examination, unless the court, in its discretion, permits it. *United States v. Wilson*, 1 Bald., 78.

§ 3408. A witness who has been fully examined and discharged may be recalled and examined as to a new point not before examined. *Collins v. Johnson*, Hemp., 279.

§ 3409. **Miscellaneous.**—Where an unwritten agreement to admit certain evidence was alleged by counsel on one side and denied by the other, the court refused to hear affidavits as to the agreement, but decided to hear the evidence and admit or reject it, according to its competency. *Lambert v. Smith*, 1 Cr. C. C., 361.

§ 3410. A party is not allowed to wait until the testimony of the other side is closed, and then by producing a stipulation relative to the admission of certain facts to make it the ground for striking out a portion of the testimony. *United States v. Graff*,* 14 Blatch., 381.

§ 3411. Where certain evidence is admissible in several cases, and the time in which that evidence might have been put in has expired in some cases and not in others, the time may be enlarged, though the party desiring the evidence might otherwise be precluded by his laches from introducing it. *Wooster v. Howe Machine Co.*,* 10 Fed. R., 666.

§ 3412. Where it was evident on the proof that a vessel was *bona fide* owned by neutrals, but it was not so evident as to her cargo, which was claimed by the same owners, and further proofs were ordered on this point, further proofs were also allowed to be taken by either party as to the ownership of the vessel. *Ship Alliance*, Bl. Pr. Cas., 646.

§ 3413. In a petition for freedom, the counsel for the defendant having suggested that the petitioner's witnesses were of bad character, the court directed that they should be excluded from the court room while each was giving his testimony. *Negro Joice v. Alexander*, 1 Cr. C. C., 528.

§ 3414. No testimony taken after time can be read at the hearing against an objection made and not waived. *Wooster v. Clark*,* 9 Fed. R., 854.

§ 3415. If a witness has been examined without a release, and, upon the adjournment over of the jury, it is decided that he is incompetent on account of interest, and he is released by the party calling him, he must be examined anew, unless it is waived. *Beltzhoover v. Stockton*, 4 Cr. C. C., 695.

§ 3416. At the close of the evidence for the prosecution in a criminal case, a request was

made, in behalf of the defendant, that the court instruct the district attorney to call as a witness in behalf of the government one M. The request was refused and M. was not then called. Subsequently, and when the evidence for the defense had been given, the district attorney offered M. as a witness to give evidence in rebuttal. The witness was then objected to and the objection overruled. *Held*, that there was no error. *United States v. Bennett*, 17 Blatch., 357.

§ 3417. Books and papers are not made evidence in the cause by being used by a witness to refresh his memory. *Stanley v. Whipple*, 2 McL., 35.

§ 3418. An affidavit made in support of a motion for a continuance, which motion is overruled, is in no judicial sense before the court at the trial, and can be used, if at all, only when introduced by one of the parties for some legitimate purpose. *Campbell v. Rankin*, 9 Otto, 261.

§ 3419. It is irregular to allow the defendant, in support of his objection to the relevancy of evidence offered by the plaintiff, to inject into the plaintiff's case testimony upon the merits of the defense. *United States v. Hunt*, 15 Otto, 183.

§ 3420. Where an American vessel was sent in on suspicion, but before reaching port was captured by the enemy and condemned, in an action against the first captor by the owners of the condemned vessel, evidence of part of the vessel's papers produced at that trial and condemnation cannot be offered to show that there was no original cause of capture, unless all the papers are offered. *The Rover*, 2 Gall., 240.

2. *Examination and Cross-examination of Witnesses.*

SUMMARY—*Religious scruples; permitted to affirm*, § 3421.—*Examination of adverse party*, § 3422.

§ 3421. A witness who has applied for membership in the Quaker sect, although not yet fully admitted to the privileges of membership, yet if no one has opposed the application and he is considered a member of that community, and he has religious scruples about swearing, may, under the laws of Maryland, as administered in the federal courts, be allowed to testify on affirmation. *King v. Fearson*, § 3423.

§ 3422. No provision is made by the United States statutes for any examination of the adverse party to a suit before trial. Such examination must be had at the trial in open court like that of any other witness. A state statute which provides that one party to a suit may examine the other on interrogatories before the trial is controlled by the United States statute and the practice of the federal courts, and such examination will not be allowed in the federal courts sitting in that state. *Beardsley v. Littell*, §§ 3424-25.

[NOTES.—See §§ 3426-3467.]

KING v. FEARSON.

(Circuit Court for the District of Columbia: 3 Cranch, C. C., 435, 436. 1829.)

STATEMENT OF FACTS.—Kurtz was offered as a witness upon his affirmation, and being objected to that he was not a member of the Society of Quakers, it was proved that he was so considered by the society, having made application for membership and no objection having been interposed.

§ 3423. *Proper construction of the constitution of Maryland on the subject of religious liberty.*

Opinion by CRANCH, J.

That the constitution of Maryland ought to have a liberal construction. That the professed object of the provision was to prevent oppression upon the consciences of men; and that the three cases of Quakers, Tunkers and Menonists were rather put by way of example than as confining the privilege to those sects only, and leaving all other cases of conscience to the severe operation of the law. That every other case of really conscientious scruples was within the meaning of the law; the only question being as to the fact of conscientious scruples or the membership of the witness in relation to his religious scruples; and not in relation to the discipline or civil privileges attached

to membership. So that a member of a society, in regard to its religious persuasion, upon the point of the unlawfulness of oaths, was within the protection of the constitution, although he should not be a member as to its civil privileges, according to the rules of the society, nor subject to its moral discipline.

BEARDSLEY v. LITTELL.

(Circuit Court for New York: 14 Blatchford, 102-107. 1877.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—This is an action at law to recover damages for the infringement of letters patent. It is at issue and ready for trial. The plaintiff now presents to the court his affidavit, setting forth that the testimony of the defendant Littell is material and necessary for the plaintiff upon the questions of the kind and description of the machine used by the defendants, and claimed to be an infringement of the plaintiff's patent, "the amount which he has used the same," and the profits resulting from such use; that these matters are peculiarly within the knowledge of said defendant, and cannot well be proved except by his testimony; and that it is necessary to take his examination before the trial, in order that the plaintiff may properly prepare for the trial. On this affidavit an application is made for an order that the defendant appear for examination as a witness before the trial.

§ 3424. *The practice of United States courts as to the examination of witnesses is not controlled by the laws of the state in which the court is sitting.*

Section 389 of chapter 6 of the Code of Procedure of the state of New York provides as follows: "No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter." Section 390 provides as follows: "A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission." Section 391 provides as follows: "The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance." It is provided by section 914 of the Revised Statutes of the United States, that "the practice, pleadings and forms and modes of proceeding in civil actions, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The application now made is founded on the view that the practice of examining an adverse party before the trial, as a witness, in a suit at law, has become the practice of this court by virtue of the above section 914. This is not a correct view.

§ 3425. *In a court of the United States, a party to a suit must be examined in open court and not before the trial. The subject of examining witnesses is controlled by the statutes of the United States.*

Section 861 of the Revised Statutes provides that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." There is nothing in the constitution or statutes of the United States which sanctions any other mode of trial, in a common law action, than a trial by a jury, in the presence of the court, unless such a trial is waived. Therefore, when the statute speaks of the examination of witnesses in open court, in the trial of an action at common law, it means the examination of witnesses in the presence of the court and the jury, at the trial, and not before the trial. But, as some witnesses might be out of the jurisdiction of the court, or would probably be absent from such jurisdiction at the time of trial, provision was to be made for such cases. Hence the words, in section 861, "except as hereinafter provided." In pursuance of this view, section 863 makes provision for taking by deposition, *de bene esse*, before trial, by certain specified officers, out of court, the testimony of witnesses who, though within the United States, are beyond the reach of a subpoena, or who are bound on a voyage to sea, or who are about to go, before the trial, out of the United States, or who are about to go, before the trial, to some place within the United States which is beyond the reach of a subpoena, or who are ancient and infirm. Section 866 makes provision for taking depositions under a *dedimus potestatem*, "according to common usage," that is, by commission, and for taking depositions *in perpetuam rei memoriam*. Sections 882 and following sections provide for documentary evidence. These are all the statutory provisions enacted by the United States on the subject; and it is quite clear that they cover the whole subject of oral testimony, in actions at common law, in the courts of the United States. There is nothing in section 914 which supersedes them; and, under them, the examination of an adverse party as a witness, before trial, in a common law suit, cannot be had.

It may well be doubted whether there is anything in section 914 which applies to the subject of the evidence of witnesses, either as to its character or competency, or the mode of taking it. The expression "practice, pleadings, and forms and modes of proceeding," is well satisfied without including in it the subject of evidence. At all events, it cannot be regarded as covering matters connected with the subject of the evidence of witnesses, which are regulated by specific provisions of law found in the same title of the same statute.

In the case of *The Indianapolis & St. Louis R. Co. v. Horst*, 3 Otto, 291, the supreme court of the United States, in commenting on section 914, say that the language of that section, that the conformity mentioned in it is to be "as near as may be," means, "not as near as may be *possible*, or as near as may be *practicable*;" that the indefiniteness of the expression devolves upon the federal court the duty of construing and applying the provision in each case, and gives to the court the power to reject any subordinate provision in a state statute, which, in its judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in the federal court; and that, while section 914 is, to a large extent, mandatory, it is also, to some extent, only directory and advisory. In the spirit of that language, it may be observed that section 389 of the Code of Procedure of New York abolishes an action to obtain discovery under oath, in aid of the prosecution or defense

of another action, and then section 391 allows an examination of an adverse party as a witness before trial, evidently as a substitute for a discovery before trial, in an ancillary action. But a suit in equity to obtain a discovery under oath, in aid of the prosecution or defense of a suit at law, is not abolished in the courts of the United States. The distinction between suits in equity and actions at common law exists in the courts of the United States. Such distinction is recognized by the constitution, and cannot be abolished by congress. It is also recognized in section 914. Therefore, one of the reasons for the practice, in the courts of the state of New York, of examining an adverse party as a witness before trial, in a suit at law, does not exist in respect to the federal courts.

It is also worthy of consideration that section 391 of the Code of Procedure of New York provides that the party to be examined shall be examined before a judge of the court or a county judge, and shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance. The examination, if allowed in the federal court, must take place before a judge of the court. There is no alternative officer, to take the place of the county judge. If the party cannot be compelled to go out of the county where he resides, the benefit of the provision would practically be confined to suits pending in the counties where the federal judges should happen to reside or to be present, unless the party to be examined could incidentally be found in such county. There would be no uniformity in such a provision, and such a practice could hardly be said, as a general practice, to conform "as near as may be" to the state practice.

Moreover, in view of the limited judicial force in the courts of this district in comparison with the amount of the business pending in those courts, and of the fact that the examination, if had, must take place before a judge of the court, it is quite clear that an allowance of the practice would "unwisely incumber the administration of the law," especially in view of the fact that a party may, at the trial, be called as a witness by the adverse party, in a suit at law, and may, if a case exists under section 863, be examined as a witness, before trial, on behalf of the adverse party, by deposition *de bene esse*. The application is refused; and I am authorized to say that the circuit judge concurs in the foregoing views.

§ 3426. Examination of witnesses.—Under the act of congress of 1789, a party to a suit in equity has a right to demand an examination *ore tenus* of witnesses before an examiner within the jurisdiction of the court. *Sickles v. Gloucester Co.*,* 3 Wall. Jr., 186.

§ 3427. A question to a witness, which the law will not permit him to answer, is improper, and the court will not permit it to be put. But if the question be such as if merely answered in one way would disgrace or criminate him, the question is proper and may be put, because it is the privilege of the witness to refuse to answer it, and not the law which forbids him to do so. *United States v. Craig*, 4 Wash., 729.

§ 3428. It is not admissible to ask a witness, on his examination in chief, whether he has ever mentioned the circumstances he has testified to, before, in order to corroborate his testimony. Testimony in chief, tending merely to support the credit of a witness, is not admissible except in reply to some previous impeachment. *United States v. Holmes*, 1 Cliff., 104 (§§ 4339-51).

§ 3429. Questions propounded merely to ascertain the names of persons whom the party may desire to call as witnesses to disprove the case of the opposite party may be excluded. *Storm v. United States*, 4 Otto, 76.

§ 3430. In an action against a common carrier for the loss of horses shipped, it is improper to ask of the plaintiff, when examined as a witness, for whom the agent assumed to act in making the agreement for the transportation of the horses and furnishing the cars. He should be asked what was said and done. *Railroad Company v. Pratt*, 22 Wall., 123.

§ 3431. Objection was made to a deposition because an *ex parte* certificate of facts having been given by some of the witnesses, they were asked if the certificate contained the truth, instead of being interrogated as to the facts stated in it. *Held*, that the answers to those questions could not be read. *Richardson v. Golden*,* 3 Wash., 109.

§ 3432. Upon an indictment for a nuisance, in keeping a common gaming-house, the question, "who dealt the cards," is too general, and will be excluded. *United States v. Strother*, 3 Cr. C. C., 432.

§ 3433. — **leading questions.**—A leading question is one which suggests or leads to the answer; one which, embodying a material fact, admits of an answer by a simple negative or affirmative. *United States v. Angell*, 11 Fed. R., 34.

§ 3434. A question must not be so propounded to a witness as to indicate the answer desired. *United States v. Dickinson*, 2 McL., 325.

§ 3435. The admission of leading questions on the direct examination must depend on the judgment of the court. *Ibid*.

§ 3436. Upon the cross-examination of a witness, he may be asked leading questions to draw from him a further disclosure than was made upon the principal examination, and in reference to the matter testified about. But if the cross-examination respects new matter, leading questions cannot be asked. *Harrison v. Rowan*, 3 Wash., 580.

§ 3437. Upon an indictment for selling liquors without a license, against one Angell, a question asked of a witness, "Did you drink liquor at Angell's that day?" was held to be leading, and was ruled out on the main examination, although put to contradict a former witness, it not being a case where such former witness had stated that such and such expressions were used, or certain things said, and the question, objected to as leading, was whether those particular expressions were used, or those things said. *United States v. Angell*, 11 Fed. R., 34.

§ 3438. On a trial for robbery on the high seas alleged to have been committed by the officers and crew of the *Panda* upon the Mexican, witnesses for the government, with the chart of the Mexican's route on her voyage (which had already been proved in the case) before them, were allowed to be asked whether, under the circumstances stated, of the supposed time of the starting of both vessels, the Mexican and the *Panda* would or would not be likely to meet at the point marked out on the chart. *Held*, that the question was proper and not leading. *United States v. Gibert*, 2 Sumn., 19.

§ 3439. — **miscellaneous matters of practice.**—If the plaintiff calls a witness to rebut evidence given by the defendant, he cannot ask him any question not intended to contradict or discredit any of the defendant's witnesses, nor rendered necessary by any evidence given by the defendant. *Evans v. Eaton*, Pet. C. C., 322.

§ 3440. Upon an issue to try whether a will is valid, the plaintiff, by asking questions respecting the sanity of the testator, upon the examination-in-chief, is not prevented on that account from examining witnesses to rebut the evidence of the defendant on that subject, although it was irregular for the plaintiff to give evidence of sanity in the first instance. *Harrison v. Rowan*, 3 Wash., 580.

§ 3441. It cannot be permitted, in suit for the infringement of a patent, to ask a witness whether a certain person has applied to the plaintiff for a license to use his invention, and offered to pay for the same, when it does not appear that the person has any machine of the kind or has ever used one. *Evans v. Hettick*, 3 Wash., 408.

§ 3442. Where a witness, on his cross-examination, disclosed the fact that he and his brother were present, without any payment of witness fees, as witnesses for the defendant, and that his brother had given him a paper with reference to the expenses of the suit, which he had given back and had not seen since, it was held that he might be asked to state the contents of the paper, in order to test his temper and credibility, the witness having stated that he did not know who signed the paper, and its contents not therefore being injurious to the defendant. *Klien v. Russell*, 19 Wall., 433.

§ 3443. After the jury had returned to give their verdict the defendant was not allowed to examine a witness who had come in after the jury had retired. *Riley v. Cooper*, 1 Cr. C. C., 166.

§ 3444. Where the jury, after retiring, returned into court at their own request to interrogate a witness, the court refused to allow the counsel to ask the witness any questions. *United States v. Greenwood*, 1 Cr. C. C., 186.

§ 3445. Where the jury, having retired, returned to re-examine witnesses, the bar were informed that in such cases neither party has a right to ask questions or to make any motion to the court in the presence of the jury. *Virginia v. Zimmermann*, 1 Cr. C. C., 47.

§ 3446. In the course of a criminal trial in the United States circuit court, it became necessary to ascertain whether the land on which the crime was committed had been granted by the proprietors, as well as ceded by the state, to the United States. Upon inspection of the copies of the town records introduced to prove this fact, it was plain that the dates of some of

them had been erroneously stated by the certifying officer in his great haste. The originals were therefore sent for, and introduced in evidence on the oath of the town clerk that they were the true records, after the counsel for the defense had closed their argument to the jury. The court then refused to permit the defense to interrogate the witnesses who had been produced by the United States to testify to a single fact and had been cross-examined by the defense fully and exhaustively as to their answers concerning this fact. The ruling of the court in excluding such testimony was held to be correct. *United States v. Cornell*, 2 Mason, 91.

§ 3447. When a party to a suit has been notified under the statute to appear and be examined as a witness, and appears accordingly, he may be examined as a witness although the party who gave the notice does not wish it. *Parkinson v. McKim*,* 1 Burnett (Wis.), 53.

§ 3448. On an order of reference in bankruptcy proceedings to a receiver to take testimony, a witness was examined and cross-examined and his testimony taken down by a stenographer, who after considerable delay furnished a long-hand copy to the party calling for the reference. The testimony was not submitted to and signed by the witness, because his further attendance could not be secured, his whereabouts being unknown. *Held*, that under general order No. 10, requiring testimony thus taken to be read over to and signed by the witness, such testimony must be suppressed, the delay of the stenographer furnishing no excuse. *In re Cary*,* 9 Fed. R., 754.

§ 3449. Whether a re-examination of persons found on board a captured vessel shall be admitted in evidence or not is a question for the discretion of the court. If the case as it stands upon the original depositions is a clear one in favor of the claimants, the court will hesitate about admitting the evidence; but where the evidence clearly called for the condemnation of the vessel, and the testimony on the re-examination was consistent in itself and corroborated by other evidence in the case, such re-examinations may be admitted. *The Stephen Hart*, Bl. Pr. Cas., 387.

§ 3450. The wife of a witness was appointed commissioner to examine him, where it appeared that there was no other suitable person in his neighborhood. *Ship Norway*, 2 Ben., 121.

§ 3451. It is incumbent on those who insist upon the right to put particular questions to a witness, to establish such right beyond a reasonable doubt, for the very purpose stated by them; and they cannot afterwards desert that purpose and show the pertinency or relevancy of the evidence for any other purpose, not then suggested to the court. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet., 448.

§ 3452. As a matter of right a witness once called cannot be recalled and examined as to new matter after cross-examination, but the court may allow it in its discretion. *United States v. Wilson*, Bald., 78.

§ 3453. **Cross-examination.**—Leading questions may be asked on cross-examination. *Dawes v. Corcoran*,* 1 Cr. C. C., 137.

§ 3454. An irrelevant question cannot be asked on cross-examination merely for the purpose of discrediting a witness by contradicting him. *United States v. Dickinson*, 2 McL., 325.

§ 3455. When a witness on cross-examination refuses to state the name of a person, with whom he has had dealings not directly connected with the case, and the court in its discretion allows him to continue in such refusal, this exercise of discretion will not be revised by a higher court on appeal. *Rea v. Missouri*,* 17 Wall., 542.

§ 3456. It is usual to allow questions to be put to a witness to affect his credibility; but it is within the discretion of the presiding judge to determine whether, in view of the evidence previously introduced, and of the nature of the testimony given by the witness in his examination-in-chief, it is fit and proper that questions of the kind should be overruled, and to what extent such a cross-examination should be allowed. *Storm v. United States*, 4 Otto, 76.

§ 3457. The cross-examination of a witness must be confined to the subject-matters inquired of in the direct examination. *Carr v. Gale*, Dav., 328.

§ 3458. A party has no right to cross-examine a witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must call him as his own witness. *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet., 448; *Houghton v. Jones*,* 1 Wall., 702.

§ 3459. If a party to the suit, on being examined as a witness, is asked on his cross-examination a question not connected with what he stated in his examination-in-chief, and his answer is in his own favor, he sustains no injury from the error, and it is not ground for a new trial. *Cramer v. Cullinane*,* 2 MacArth., 197.

§ 3460. A party has no right to cross-examine a witness, without leave of the court, as to any facts and circumstances not connected with matters stated in his direct examination, except to show bias or prejudice in the witness, or to lay the foundation for evidence of prior contradictory statements. But if the court relaxes the rule and allows the cross-examination to extend to other matters pertinent to the issue, the judgment will not be reversed for that reason, if it has worked no injury to the opposite party. *Wills v. Russell*, 10 Otto, 621.

§ 3461. A witness may be asked questions, on his cross-examination, to test the value of his opinion expressed in his testimony in chief. *Chicago v. Greer*, 9 Wall., 726.

§ 3462. Where the plaintiffs gave in evidence an account, admitted by the defendants to be correct, and proved that certain checks had been delivered to one of the defendants and called upon him to produce them, it is competent for the defendant to ask one of the plaintiffs' witnesses, on cross-examination, whether a certain check, constituting one of the items of that account, was drawn by Mr. Coote in the name of the firm. *Patriotic Bank v. Coote*,* 3 Cr. C. C., 170.

§ 3463. Where a defendant, in putting in his evidence, introduces no new evidence in relation to the contract on which the plaintiff sues, the plaintiff will not afterwards be allowed to examine witnesses in relation to the contract. *Gilpins v. Consequa*,* Pet. C. C., 85.

§ 3464. Where a complaint was made before a commissioner, for the extradition of a criminal, the complainant being the foreign consul, and it appearing on the face of the complaint that he pretended to no personal knowledge of the matters stated in the complaint, the prisoner cannot cross-examine him before any other evidence is offered by the prosecution. *In re Farez*, 7 Blatch., 345.

§ 3465. When a witness is called in rebuttal by the defendants, it is not competent to ask him, on cross-examination, whether a certain one of the defendants' witnesses is not subject to fits of insanity. *Evans v. Hettick*, 3 Wash., 408.

§ 3466. A witness cannot, in cross-examination, be asked a question as to any fact, tending to disgrace him, which the party would not be permitted to prove by evidence *aliunde*. *United States v. Hudland*, 5 Cr. C. C., 309.

§ 3467. Where several claimants interpleaded, testimony given for one could not be used against another who had had no opportunity of cross-examining the witness. *Woodruff's Case*,* 4 Ct. Cl., 486.

XXVII. IMPEACHING WITNESSES.

SUMMARY—*Impeachment of character must be limited to character for veracity. Proper form of the questions, §§ 3468, 3470.—Witness who impeaches must have knowledge of character, § 3469.—Reputation is same as character, § 3470.—Contradictory statements, §§ 3471-73.*

§ 3468. When a witness is summoned to impeach the testimony of a former witness, the questions must be limited to the character or reputation of the witness for veracity, and cannot go into his general character or special character on other points, *e. g.*, lewdness, drunkenness, etc., nor into particular facts in the personal knowledge of the impeaching witness. He should be asked whether he knows the character of the impeached witness. If the answer is affirmative, whether as regards veracity his character is good or bad; if bad, whether, knowing that, he would believe the witness under oath. *United States v. Vansickle*, §§ 3474-77.

§ 3469. When a witness is offered to impeach the character of another witness, he must know what is generally said of the witness whose credit is impeached, by those among whom he resides. Any question which does not call for such knowledge is improper. When it appears to the court that such knowledge was gained at a time so remote from the transactions involved as to be entirely unsatisfactory and immaterial, it is within the discretion of the presiding judge to reject it. *Teese v. Huntingdon*, §§ 3478-81.

§ 3470. When one witness is put on the stand to impeach the credit of another, the proper question to ask him is whether he knows the general reputation of the other for truth. Reputation in such a case is synonymous with character. *Knode v. Williamson*, §§ 3482-84.

§ 3471. Evidence of contradictory statements cannot be given in evidence to impeach the testimony of a witness, unless the witness has previously been asked, on cross-examination, whether he made such statements to the person to whom it is intended to prove that he made them, about the time claimed. This rule applies where the witness is testifying by deposition and the contradictory statements are contained in a letter. *Conrad v. Griffey*, §§ 3485-86.

§ 3472. When a witness has been impeached, by proof of his having made statements inconsistent with his testimony at the trial, evidence is not admissible to support his testimony of statements made *subsequent* to the contradictory statements, and consistent with his testimony at the trial. *Semble*, that such statements are not admissible, though made prior to the contradictory statements, unless, perhaps, when no motive for false statements appears. *Conrad v. Griffey*, §§ 3487-88.

§ 3473. In admiralty, when a witness is to be contradicted by proof of previous statements of his, inconsistent with his testimony, it is not necessary to call his attention to the contradictory statements and ask if he made them or allow him an opportunity to explain them. *Howland v. Conway*, §§ 3489-90.

[NOTES.—See §§ 3491-3528.]

UNITED STATES *v.* VANSICKLE.

(Circuit Court for Michigan: 2 McLean, 219-225. 1840.)

Opinion of the COURT.

STATEMENT OF FACTS.—The defendant was indicted for knowingly and corruptly obstructing the marshal in the service of a subpoena on a witness, in certain criminal cases, in which he, with others, was defendant, under the twenty-second section of the act of congress of the 30th April, 1790. The plea of not guilty was entered, and a jury were called and sworn to try the issue.

Remember Lummis, a witness, stated that the defendant took her from place to place while the marshal or his deputy was in pursuit of her to summon her as a witness. That the defendant had frequent interviews and conversations with her, whilst she was kept out of the way, and that he proposed to give her a tract of land if she would avoid the process; and he represented to her that if the process were served she would be taken to Detroit and confined in jail, unless she could give bail for her appearance. By this means the process was eluded for some weeks, until the witness became dissatisfied and resolved to appear, and communicated such intention to those who found means to aid her determination. Other witnesses, called by the prosecuting attorney, in many important particulars corroborated the statements of this witness.

The witnesses on the part of the defendant were sworn and examined chiefly with the view to discredit Remember Lummis, the principal witness for the prosecution. And a question was made as to the form and substance of the questions to be propounded to the impeaching witnesses. On the part of the defendant it was contended that they had a right to examine into her general character and standing in society; and, particularly, whether she was not a lewd woman in general estimation. On the other side it was insisted that the questions must be limited to the general character of the person impeached as to truth and veracity; and whether the witness, from his knowledge of her character, would believe her under oath.

§ 3474. *Mode of examining into character of a previous witness.*

It is singular that there should be great contrariety in the decisions on this question, which is of almost daily occurrence in the administration of justice. All the authorities agree that the inquiry must be general, whether it relate to veracity or to character in a more enlarged sense. A witness is compelled to appear and testify, and it would be most unjust to permit specific facts to be proved against him, of which he has had no notice, and which materially affect his reputation. Every individual is supposed to be able, at all times, to establish or defend his general character; which is nothing more than the prevailing opinion of the community where he resides. For this charge, being made in a general form, may be met and refuted in the same manner.

The regular mode of examining into general character, says Phillips on Evidence (1 vol., ed. 1839, 292), is to inquire of the witnesses whether they have the means of knowing the former witness' general character, and whether, from such knowledge, they would believe him on his oath. In answer to such evidence against character, the other party may cross-examine those witnesses as to their means of knowledge and the grounds of their opinion.

In the case of *Hume v. Scott*, 3 Marsh., 260, the proper question was held to be, "what is the general moral character of the witness?" and, in their opinion, the court say that the jury may draw unfavorable inferences as to the truth of

the witness, from his general turpitude. In the case of *The People v. Herrick*, 13 John., 84, the reasoning of the court would seem rather to sustain the above position. They say the conviction of an infamous crime, as petit larceny, would as much destroy the credibility of a witness as if it related to his truth. *The State v. Boswell*, 2 Dev., 209. You may prove the witness to be of bad moral character. The question need not be restricted as to his veracity. To the same effect is the case in 1 Hill, 251, 258-9. And in the case of *The Fulton Bank v. Benedict*, 1 Hall, 558, the court say, to inquire only as to general character for truth seems too narrow.

§ 3475. *Inquiry as to character of a witness is limited to veracity.*

But the weight of authority limits the inquiry to the veracity of the witness impeached; and it seems the question as to general character is too vague. The witness cannot advert to particular facts, or to his personal knowledge of the character of the individual impeached, but to his general reputation for truth. This reputation is general character. To form a general character as to truth it is not necessary that the individual should have sworn falsely, or, indeed, that he should ever have been examined as a witness. The public opinion is by no means limited to this, as to a man's veracity. It is formed by combining the elements of his character; and it is this result of the public mind which is to impeach the witness.

A man who is notoriously immoral, who is believed to be dishonest, and who is addicted to misrepresentation, can never have a good character for truth. And as it regards defects of character, that community has yet to be discovered which does not feel, at least, as strong an interest in the investigation of a man's faults as his virtues. The character of every man is known in the community where he resides. His acts, whether good or bad, have been scrutinized, and, in most instances, if not in all, an opinion has been formed as to his veracity. It is this opinion which is evidence, and not the particular circumstances which led to the formation of such an opinion. In behalf of the witness these circumstances may be inquired into to show that they originated in the controversy then pending, or that an erroneous impression had been made on the public mind.

It is said in some of the cases cited that the inquiry as to the veracity of the witness is too limited; and that the inquiry should be as to character generally. That if the answer shall be, the witness sustains a bad character, the question may then be asked, in behalf of the witness, whether the character spoken of is in regard to his veracity. But if general character, without limitation, is the object of inquiry, why suffer it to be thus qualified? If the question as to the veracity of the witness be proper, in support of the witness, to explain or do away the effect of general bad character, does it not show that it is the question, and the only question, which should, at first, have been propounded. This is incontrovertible, unless bad character in the abstract, and without reference to truth, be proper evidence.

Now what shall constitute bad character? Shall the witness be questioned on this point? And if he be, may he say that the witness impeached is generally believed to be a common prostitute. That this was proper was decided in the case of *The Commonwealth v. Murphy*, 14 Mass., 387. This, however, was overruled in the case of *The Commonwealth v. Moore*, 3 Pick., 194. In the case of *Evans v. Smith*, 5 Mon., 365-6, unchaste character was held admissible to impeach a witness. But this decision is believed to be against the whole current of authorities, English and American.

We do not mean to say that the chasteness of the witness may not become a proper question on an indictment for a rape, or in a case which may be supposed; but that it is not a proper question, under ordinary circumstances, to discredit a witness. If such a question be proper, shall it be limited to the character of a female? Must it not as well apply to the other sex? Again, the question is asked, what shall constitute general bad character? In some communities a mason or an anti-mason, an abolitionist or anti-abolitionist, a man who plays cards or engages in horse-racing, may be esteemed, as the opinions of the majority in the neighborhood may preponderate, to have an immoral or bad character.

Shall this opinion, then, of bad character, so indeterminately formed, be evidence on which to destroy the credit of a witness? If this opinion be evidence, it is so without showing the basis on which it rests. For, as has been shown, it is unnecessary, if it be not improper, in the first instance, to prove how this opinion has been formed. Is it evidence in the broadest sense without explanation or restriction? That it is evidence so far as bad character has, in the public opinion, affected the veracity of the witness, is admitted. But is it evidence independently of this?

§ 3476. *Particular facts cannot be proved to impeach a witness, but only his general character shown.*

The witness must be impeached, not by proving particular facts, for these he is not supposed to be prepared to meet, but by showing his general character in the public estimation. Facts are not to be proved from which the jury may infer a bad character, but it is the inference, drawn by the public, which is evidence; an inference already drawn and embodied in the public opinion, and which, as a fact, is susceptible of proof. Now, what is the fact thus to be proved? Is it as to the bad character of the witness generally, or his bad character as to veracity?

The object of the examination would seem to be a sufficient answer to this inquiry. It is to shake and overthrow the credit of the witness. Now this is effectually done by showing that in the neighborhood in which he lives, and where his character is best known, he is not considered worthy of credit. Shall a public opinion which does not reach his credibility be proved as a fact from which the jury may infer a want of credibility? This would be an inference from public opinion which had not been drawn by the public. And would it not be a most dangerous species of evidence? It would be a conclusion inferred, not from original facts, but from an opinion formed on those facts by the public. It would be an inference on an inference. This would be a new rule, not yet incorporated, it is believed, into the law of evidence.

Ancient boundaries may be proved by reputation. But is this done by proving the existence of any facts, in public opinion, short of the boundaries. Marriage is often proved by reputation. The fact of living together as man and wife, and being so recognized by each other and the public, is received as evidence of marriage. But this is a legitimate inference arising from the facts proved. Living together and recognition are not established as a matter of reputation, but as facts, distinct from public opinion. And from these facts a jury may infer, as well as the public, that the parties were married. And the same rule applies as to proof of pedigree by reputation.

If it were competent to prove that the impeached witness was a common prostitute, had been guilty of stealing, or of any other infamous crime, the inference that she is unworthy of credit might be legitimate. But these

things, if true, cannot be established either by proof of the facts, or that they are believed to be true in public opinion. The inquiry, it is insisted, must be general as to character, and if that, in the public estimation, be bad, however it may have been formed, and without the least reference to the veracity of the witness, it is evidence to shake and overthrow that veracity. As the rule now stands, we think, a witness can only be impeached, under this head, by proof of general character as it regards his veracity.

§ 3477. *Questions to impeach a witness.*

The impeaching witness may be asked if he is acquainted with the general character of the impeached witness. If he answer in the affirmative, he should then be asked whether, as it regards his veracity, it be good or bad; and if bad, whether, from his knowledge of the prevailing opinion of the public, he would believe the witness under oath.

TEESE v. HUNTINGDON.

(23 Howard, 2-14. 1859.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the northern district of California. According to the transcript, the declaration in this case was filed on the 18th day of March, 1856. It was an action of trespass on the case for an alleged infringement of certain letters patent purporting to have been duly issued to the plaintiffs for a new and useful improvement in a certain machine or implement called a sluice-fork, used for the purpose of removing stones from sluices and sluice-boxes in washing gold. As the foundation of the suit, the plaintiffs in their declaration set up the letters patent, alleging that they were the original and first inventors of the improvement therein described, and charged that the defendants, on the 2d day of July, 1855, and on divers other days and times between that day and the day of the commencement of the suit, unlawfully and without license vended and sold a large number of the improved forks made in imitation of their invention. To this charge the defendants pleaded the general issue, and, in addition thereto, set up in their answer to the declaration two other grounds of defense. In the first place they denied that the plaintiffs were the original and first inventors of the improvement described in the letters patent, averring that the supposed improvement was known and used by divers other persons in the United States long before the pretended invention of the plaintiffs. They also alleged that the improvement claimed by the plaintiffs as their invention was not the proper subject of a patent within the true intent and meaning of the patent law of the United States.

§ 3478. *Pleadings and notices necessary in patent cases in order to disprove that patentee was first inventor.*

By the fifteenth section of the patent act of the 4th of July, 1836, the defendant, in actions claiming damages for making, using, or selling, the thing patented, is permitted to plead the general issue, and for certain defenses, therein specified, to give that act and any special matter in evidence which is pertinent to the issue, and of which notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. Within that provision, and subject to that condition, he may, under the general issue, give any special matter in evidence tending to prove that the patentee was not the original and first inventor or discoverer of the thing patented, or a substantial and

material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery by the patentee, or had been in public use, or on sale, with the consent and allowance of the patentee, before his application for a patent. But whenever the defendant relies in his defense on the fact of a previous invention or knowledge or use of the thing patented, he is required to "state in his notice of special matter the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used."

Two written notices were accordingly given by the defendants of special matter to be offered in evidence by them at the trial, in support of the first ground of defense set up in the answer to the declaration. One was dated on the 28th day of August, 1856, and the other on the 19th day of September of the succeeding year, but they were both duly served and filed in court more than thirty days before the trial. Upon this state of the pleadings the parties on the 20th day of October, 1857, went to trial, and the jury, under the rulings and instructions of the presiding justice, returned their verdict for the defendants.

§ 3479. *In suit for infringement of patent, counsel fees cannot be considered in estimating the measure of damages.*

After the plaintiffs had introduced evidence tending to prove the alleged infringement of their patent, they claimed that counsel fees were recoverable as damages in this action, and offered proof accordingly, in order to show what would be a reasonable charge in that behalf.

That evidence was objected to by the defendants, upon the ground that counsel fees were not recoverable as damages in actions of that description, and the court sustained the objection and excluded the evidence. To which ruling the plaintiffs excepted. Little or no reliance was placed upon this exception by the counsel of the plaintiffs, and in view of the circumstances one or two remarks upon the subject will be sufficient. Suppose it could be admitted that counsel fees constituted a proper element for the consideration of the jury, in the estimation of damages in cases of this description; still the error of the court in excluding the evidence would furnish no ground to reverse the judgment, for the reason that the verdict was for the defendants. For all purposes connected with this investigation, it must be assumed, under the finding of the jury, that the plaintiffs were not entitled to any damages whatever; and if not, then the evidence excluded by the ruling of the court was entirely immaterial. But the evidence was properly rejected on the ground assumed by the presiding justice.

Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent-right. That point has been directly ruled by this court, and is no longer an open question. Jurors are required to find the actual damages incurred by the plaintiff at the time his suit was brought; and if, in the opinion by the court, the defendant has not acted in good faith, or has caused unnecessary expense and injury to the plaintiff, the court may render judgment for a larger sum, not exceeding three times the amount of the verdict. 5 Stat. at Large, page 123; *Day v. Woodworth*, 13 How., 372.

§ 3480. *Under the law requiring special notice by defendants concerning the defense that patentee is not the first inventor, such notice will be sufficient although given subsequent to the taking of depositions and without leave of court.*

To maintain the issue on their part the defendants offered three depositions,

each tending to prove that the plaintiffs were not the original and first inventors of the improvement described in their letters patent. Objection was seasonably made by the plaintiffs to the introduction of each of these depositions, on two grounds: 1. Because the first notice of special matter to be introduced at the trial did not accord with the proof offered as contained in these depositions. 2. Because the second notice of special matter to be thus introduced was served and filed without any order from the court, and, therefore, should be disregarded. Exceptions were duly taken to the respective rulings of the court in admitting each of these depositions; but as they all depend upon the same general considerations they will be considered together.

It is conceded by the defendant that the first notice was, to some extent, insufficient. On the other hand, it is admitted by the plaintiffs that the terms of the second notice were sufficiently comprehensive and specific to justify the rulings of the court in allowing the depositions to be read to the jury. They, however, insist upon the objection, taken at the trial, that it was served and filed without any order of the court, and that it was insufficient, because it was served and filed subsequently to the time when the depositions were taken and filed in court.

But neither of these objections can be sustained. All that the act of congress requires is that notice of the special matter to be offered in evidence at the trial shall be in writing, and be given to the plaintiff, or his attorney, more than thirty days before the trial. By the plain terms of the law it is a right conferred upon the defendant; and, of course, he may exercise it in the manner and upon the conditions therein pointed out, without any leave or order from the court. When the notice is properly drawn, and duly and seasonably served and filed in court as a part of the pleadings, nothing further is required to give the defendant the full and unrestricted benefit of the provision.

Such notice is required, in order to guard patentees from being surprised at the trial, by evidence of a nature which they could not be presumed to know or be prepared to meet, and thereby subject them either to delay or a loss of their cause. To prevent such consequences, the defendant is required to specify the names and places of residence of the persons on whose prior knowledge of the alleged improvement he relies, to disprove the novelty of the invention and the place or places where the same had been used. *Wilton v. Railroads*, 1 Wall. Jr., 195.

Compliance with this provision, on the part of the defendant, being a condition precedent to his right to introduce such special matter under the general issue, it necessarily follows that he may give the requisite notice without any leave or order from the court; and for the same reason, if he afterwards discovers that the first notice served is defective or not sufficiently comprehensive to admit his defense, he may give another, to remedy the defect or supply the deficiency, subject to the same condition that it must be in writing and be served more than thirty days before the trial.

Having given the notice as required by the act of congress, the defendant, at the trial, may proceed to prove the facts therein set forth by any legal and competent testimony. For that purpose he may call and examine witnesses upon the stand, or he may introduce any deposition which has been legally taken in the cause. Under those circumstances, depositions taken before the notice was served, as well as those taken afterward, are equally admissible, provided the statements of the deponents are applicable to the matters thus put in issue between the parties.

§ 3481. *Impeaching witness; conflict of decisions; necessary foundation for testifying as to witness' character.*

After the defense was closed, the plaintiffs offered evidence to impeach one of the witnesses, who had given material testimony for the defendants. When called, the impeaching witness stated that he knew the witness sought to be impeached, and knew other persons who were acquainted with the witness, and that they both resided in the city of Sacramento; whereupon, the counsel of the plaintiffs put the question, "What is the reputation of the witness for moral character?" To that question the counsel of the defendants objected, on the ground that the inquiry should be limited to the general reputation of the witness for truth and veracity, with the right to put the further inquiry whether the witness testifying would believe the other on his oath; and the court sustained the objection and rejected the testimony. No reasons were assigned by the court for the ruling; and, of course, the only point presented is whether the particular question propounded was properly excluded.

Courts of justice differ very widely whether the general reputation of the witness for truth and veracity is the true and sole criterion of his credit, or whether the inquiry may not properly be extended to his entire moral character and estimation in society. They also differ as to the right to inquire of the impeaching witness whether he would believe the other on his oath. All agree, however, that the first inquiry must be restricted either to the general reputation of the witness for truth and veracity, or to his general character; and that it cannot be extended to particular facts or transactions, for the reason that, while every man is supposed to be fully prepared to meet those general inquiries, it is not likely he would be equally so without notice to answer as to particular acts.

According to the views of Mr. Greenleaf, the inquiry in all cases should be restricted to the general reputation of the witness for truth and veracity; and he also expresses the opinion that the weight of authority in the American courts is against allowing the question to be put to the impeaching witness whether he would believe the other on his oath. In the last edition of his work on the Law of Evidence, he refers to several decided cases which appear to support these positions; and it must be admitted that some of these decisions, as well as others that have since been made to the same effect, are enforced by reasons drawn from the analogies of the law, to which it would be difficult to give any satisfactory answer. 1 Greenl. Ev., sec. 461; *Phillips v. Kingfield*, 19 Me., 375, per Shepley, J.; *Gass v. Stimpson*, 2 Sumn., 610 (EQUITY, §§ 2254-59); *Wood v. Mann*, 2 Sumn., 321 (§§ 4554-62, *infra*); *Craig v. State*, 5 Ohio St., 605; *Gilbert v. Sheldon*, 13 Barb., 623; *Jackson v. Lewis*, 13 Johns., 504; *United States v. Vansickle*, 2 McLean, 219 (§§ 3474-77, *supra*); *State v. Bruce*, 24 Me., 72; *Com. v. Morse*, 3 Pick., 196; *Gilchrist v. McKee*, 4 Watts, 380; *State v. Smith*, 7 Vt., 141; *Frye v. Bank of Illinois*, 11 Ill., 367; *Jones v. State*, 13 Tex., 168; *State v. Randolph*, 24 Conn., 363; *Uhl v. Com.*, 6 Gratt., 706; *Wike v. Lightner*, 11 S. & R., 338; *Kemmel v. Kemmel*, 3 S. & R., 338; *State v. Howard*, 9 N. H., 485; *Bucklin v. State*, 20 Ohio, 18; *Ford v. Ford*, 7 Humph., 92; *Thurman v. Virgin*, 18 B. Mon., 792; *Perkins v. Nobley*, 4 Ohio St., 668; *Bates v. Barber*, 4 Cush., 107.

On the other hand, a recent English writer on the law of evidence, of great repute, maintains that the inquiry in such cases properly involves the entire moral character of the witness whose credit is thus impeached, and his estimation in society; and that the opinion of the impeaching witness, as to whether

he is entitled to be believed on his oath, is also admissible to the jury. 2 Taylor, Ev., secs. 1082, 1083. That learned writer insists that the regular mode of examining into the character of the witness sought to be impeached is to ask the witness testifying whether he knows his general reputation; and if so, what that reputation is, and whether, from such knowledge, he would believe him upon his oath. In support of this mode of conducting the examination, he refers to several decided cases, both English and American, which appear to sustain the views of the writer. *Rex v. Watson*, 32 How. St. Tr., 496; *Mawson v. Hartsink*, 4 Esp., 104; *Rex v. Rockwood*, 13 How. St. Tr., 211; *Carpenter v. Wall*, 11 Ad. & El., 803; *Anonymous*, 1 Hill (S. C.), 259; *Hume v. Scott*, 3 A. K. Marsh., 262; *Day v. State*, 13 Mo., 422; 3 Am. Law Jour. (N. S.), 145.

Both Mr. Greenleaf and Mr. Taylor agree, however, that the impeaching witness must be able to state what is generally said of the other witness by those among whom he resides, and with whom he is chiefly conversant, and in effect admit, that, unless he can so speak, he is not qualified to testify upon the subject, for the reason that it is only what is generally said of the witness by his neighbors that constitutes his general reputation. To that extent they concur, and so, as a general remark, do the authorities which on the one side and the other support these respective theories; but beyond that, the views of these commentators, as well as the authorities, appear to be irreconcilable.

In referring to this conflict of opinion among text-writers and judicial decisions, we have not done so because there is anything presented in this record that makes it necessary to choose between them, or even renders it proper that we should attempt at the present time to lay down any general rule upon the subject. On the contrary, our main purpose in doing so is to bring the particular question exhibited in the bill of exceptions to the test of both theories, in order to ascertain whether, under either rule of practice, it ought to have been allowed. Under the first mode of conducting the examination, it is admitted that it was properly rejected, and we think it was equally improper, supposing the other rule of practice to be correct. Whenever a witness is called to impeach the credit of another, he must know what is generally said of the witness whose credit is impeached by those among whom the last-named witness resides, in order that he may be able to answer the inquiry either as to his general character in the broader sense, or as to his general reputation for truth and veracity. He is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the witness has been derived, nor, indeed, is he allowed to do so, but he must speak from his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant; and any question that does not call for such knowledge is an improper one, and ought to be rejected. No case has been cited authorizing such a question, or even furnishing an example where it was put, and our researches in that direction have not been attended with any better success. For these reasons, we think the question was properly excluded. Some further attempts were made by the plaintiffs to impeach this witness, and with that view they called another witness, who testified that he knew the one sought to be impeached and had had business transactions with him during the years 1852-53 in the city where they resided. On being asked by the counsel of the plaintiffs what was the reputation of the witness for truth and veracity, he replied that he had no means of knowing what it was, not having had any dealings

with him since those transactions; thereupon the same counsel repeated the question, limiting it to that period.

Objection was made to that question by the counsel of the defendants on the ground that the period named in the question was too remote, and the court sustained the objection and excluded the question. To this ruling the plaintiffs excepted. Such testimony undoubtedly may properly be excluded by the court when it applies to a period of time so remote from the transaction involved in the controversy as thereby to become entirely unsatisfactory and immaterial; and as the law cannot fix that period of limitation it must necessarily be left to the discretion of the court. Considering that the witness had already stated that he was not able to answer the question, we do not think that the discretion of the court in this case was unreasonably exercised. None of the exceptions can be sustained, and the judgment of the circuit court is therefore affirmed, with costs.

KNODE v. WILLIAMSON.

(17 Wallace, 586-589. 1873.)

ERROR to U. S. Circuit Court, District of West Virginia.

STATEMENT OF FACTS.—This was a suit in trespass. Plaintiff offered the depositions of Chapline, Biddle, Jamieson and others, which the court excluded. Defendant offered the deposition of Ellis, which the court admitted, to all which plaintiff excepted. Judgment was for the defendant.

§ 3482. *A notice to take depositions on a day stated, to be adjourned from day to day if necessary, is a good notice.*

Opinion by MR. JUSTICE STRONG.

We think the district court erred in excluding the deposition of Chapline. It had been taken in the cause in pursuance of notice that, together with the depositions of other witnesses, it would be taken on the 11th day of September, 1869. The notice also informed the defendant that taking of the depositions would be adjourned from day to day until they were completed. So long as such adjournments were in fact made, he was, therefore, informed of the times when he might attend for cross-examination. On the day first designated he did attend, with his counsel, and some depositions were taken. But all the witnesses not having been examined, the taking was adjourned until the next day; when it was again adjourned until the next succeeding day; and so on from day to day, until September 18th, when the deposition of Mr. Chapline was taken in the absence of both the defendant and his counsel. All the adjournments, however, were from day to day, and consequently it was the duty of the defendant to take notice that depositions might be taken on any day to which an adjournment was made.

§ 3483. *To impeach the credibility of a witness the proper question is as to the "general reputation for truth" of the witness whom it is sought to impeach.*

We think also the court erred in rejecting the depositions of Biddle, Jamieson and others, mentioned in the bill of exceptions. They were offered to impeach the character or reputation of Thomas Noakes, a witness examined on behalf of the defendant. They had been taken regularly, and the only objection urged against their admissibility is, that the witnesses were asked if they knew the general "reputation" of Noakes for truth; instead of being asked whether they knew his general "character." The question was precisely what it should have been. It is true that in many cases it has been said the regular

mode of examining is to inquire whether the witness knows the general character of the person whom it is intended to impeach, but in all such cases the word character is used as synonymous with reputation. What is wanted is the common opinion, that in which there is general concurrence; in other words, general reputation or character attributed. That is presumed to be indicative of actual character, and hence it is regarded as of importance when the credibility of a witness is in question.

§ 3484. *A notice to take deposition in the "city" of Guilford is not good for a deposition taken in the "town" of Guilford.*

The only remaining assignment of error relates to the admission of the deposition of Ellis. It had been taken under a commission sent to the state of Maine, in another case between the same parties, in which the cause of action was the same as in the present case, but it had not been used in the trial of that other case. It also appeared that the witness was beyond the district, and a resident of another state, when his deposition was offered. But there was a material defect in the notice given to the plaintiff of the time and place of taking, which was not waived by any attendance before the commissioner. The notice was without date, addressed to the attorney of the plaintiff, informing him that the deposition would be taken on the 12th of September (year not mentioned), at the office of Henry Hudson, in the city of Guilford, state of Maine, between certain hours, and that if from any cause the taking of the deposition should not be commenced on that day, or, if commenced, should not be concluded, the taking thereof would be adjourned and continued from day to day, or from time to time, at the same place, and between the same hours, until completed. No other notice, either of the commission or of the time and place of taking the deposition, appears to have been given. It was taken, not in the city of Guilford but in the *town* of Guilford, on the 12th day of September, 1867. Whether the town or township of Guilford is the same as the city of Guilford does not appear. But a party who attempts to use the deposition of an absent witness must show that he has given his adversary an opportunity to cross-examine by a notice that is definite and certain, unless the failure to give such notice has been waived. Such was not the notice given in this case, and the deposition was, therefore, erroneously received in evidence. Judgment reversed, and a new trial awarded.

CONRAD v. GRIFFEY.

(16 Howard, 38-47. 1853.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is a writ of error to the circuit court of the United States for the eastern district of Louisiana. This action was brought to recover the balance of \$3,781.58 claimed to be due under a contract to furnish, deliver and set up on the plantation of the defendant, in the parish of Baton Rouge, a steam-engine and sugar-mill boilers, wheels, cane-carriers, and all other things necessary for a sugar-mill; all which articles were duly delivered. The defendant, in his answer, set up several matters in defense.

The error alleged arises on the rejection of evidence offered by the defendant on the trial before the jury and which appears in the bill of exceptions. The plaintiff read in evidence the deposition of Leonard N. Nutz, taken under a commission on the 28th of June, 1852, and filed the 9th of July succeeding. The defendant then offered in evidence a letter of the witness dated at New

Albany on the 3d April, 1846, with an affidavit annexed by him of the same date addressed to the plaintiff Griffey. As preliminary proof to the introduction of said letter, the defendant adduced the bill of exceptions signed upon a former trial of this cause and filed on the 23d of February, 1849, showing that the letter had been produced by the plaintiff in the former trial and read by his counsel in evidence as the letter of Nutz in support of a former deposition made by him. And the said letter and affidavit were offered by the defendant to contradict and discredit the deposition of the witness taken the 28th June, 1852; but upon objection of counsel for the plaintiff that the witness had not been cross-examined in reference to the writing of said letter, or allowed an opportunity of explaining the same, it was rejected.

At the former trial the letter was offered in evidence by the plaintiff in the circuit court to corroborate what Nutz, the witness, at that time had sworn to; and the letter was admitted to be read for that purpose by the court. On a writ of error this court held that the circuit court erred in admitting the letter as evidence and on that ground reversed the judgment. *Conrad v. Griffey*, 11 How., 492 (§§ 3487-88, *infra*).

§ 3485. *A witness cannot be impeached by proof of contradictory statements, unless he be asked on cross-examination whether he made such statements to the persons by whom the proof is expected to be given.*

The rule is well settled in England that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given. In the Queen's Case, 2 Brod. & Bing., 312; *Angus v. Smith*, 1 Moody & M., 473; 3 Starkie's Ev., 1740, 1753, 1754; *Carpenter v. Wall*, 11 Ad. & Ell., 803. This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the statements referred to and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

This rule is generally established in this country as in England. *Doe v. Reagan*, 5 Blackf., 217; *Franklin Bank v. Steam Nav. Co.*, 11 Gill & J., 28; *Palmer v. Haight*, 2 Barb. Sup. Ct., 210, 213; 1 McLean, 540; 2 id., 325; 4 id., 378, 381; *Jenkins v. Eldredge*, 3 Story, 181, 284; *Kimball v. Davis*, 19 Wend., 437; 25 id., 259. "The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible if objected to. The only way for the party to avail himself of such declarations is to sue out a second commission." "Such evidence is always inadmissible until the witness whose testimony is thus sought to be impeached has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

§ 3486. — *and the rule applies whether the declarations be oral or written.*

This rule equally applies whether the declaration of the witness, supposed to contradict his testimony, be written or verbal. 3 Starkie's Ev., 1741. A written statement or deposition is as susceptible of explanation as verbal statements. A different rule prevails in Massachusetts and the state of Maine.

The letter appears to have been written six years before the deposition was taken which the letter was offered to discredit. This shows the necessity and

propriety of the rule. It is not probable that, after the lapse of so many years, the letter was in the mind of the witness when his deposition was sworn to. But, independently of the lapse of time, the rule of evidence is a salutary one, and cannot be dispensed with in the courts of the United States. There was no error in the rejection of the letter, under the circumstances, by the circuit court; its judgment is therefore affirmed, with costs.

CONRAD *v.* GRIFFEY.

(11 Howard, 480-492. 1850.,

ERROR to U. S. Circuit Court, District of Louisiana.

Opinion by MR. JUSTICE WOODBURY.

STATEMENT OF FACTS.—In this case there had been four bills of exception filed in the court below, but only one of them by Conrad, the plaintiff in error. We shall, therefore, proceed to dispose of that alone.

It objected to the receipt in evidence of declarations, made by a witness for the original plaintiff, under the following circumstances: Griffey brought a suit against Conrad for building a mill for him to grind sugar-cane; and, among other defenses set up by the latter was that of weakness and insufficiency in the work and materials furnished. To repel this defense, Griffey put in the deposition of Nutz, who was an engineer, and aided and superintended the erection of the mill, and who testified to the goodness of both the work and materials.

§ 3487. *A witness whose credit is impeached by proof of statements inconsistent with his testimony cannot be sustained by proof of his subsequent statements consistent with it.*

With a view to contradict and impeach him in what he thus swore, Conrad proved that this witness, soon after the completion of the mill, had given a different account, and especially of the cause of the breaking of some of the machinery, considering it to have happened from the badness of the materials. Griffey then offered to prove that the witness had since given the same statement, as to the goodness of the work and materials, which was now in his deposition. But Conrad objected to the admissibility of such evidence, and the court below overruled his exception and allowed the evidence to go to the jury.

After due consideration, our opinion is that this ruling was erroneous. The practice on this subject seems to differ much in different states, and has occasionally changed in the same state. It is sometimes modified, also, as applied to different classes of cases and witnesses. Thus, in some places, as in New York, such evidence is, as a general rule, now treated as inadmissible. *Robertson v. Caw*, 3 Barb., 410; *Robb v. Hackley*, 23 Wend., 50; *Dudley v. Bolles*, 24 Wend., 465. So in Vermont. *Gibbs v. Linsley*, 13 Verm., 208. Though at one time in New York it was allowed, and particularly in certain criminal cases. *The People v. Vane*, 12 Wend., 78; *Jackson v. Etz*, 5 Cowen, 320.

But in some other states this kind of evidence has been deemed competent. As in Massachusetts, in a criminal case, where an accomplice was a witness. *Commonwealth v. Bosworth*, 22 Pick., 397. And in Maryland, if the statements were prior in point of time. *Cooke v. Curtis*, 6 Har. & J., 93. In Pennsylvania, also, such statements have been admitted, without reference to their priority; as in *Packer v. Gonsalus*, 1 Serg. & R., 536; *Henderson v. Jones*, 10 id., 322. So in Indiana. *Coffin v. Anderson*, 4 Blackf., 398, 399.

And in some other states, which need not be repeated, a similar practice appears to prevail. But in other places, as in England, such evidence, though at one time considered competent, and especially in criminal cases (Gilb. Ev., 135; McNally's Ev., 378, 381; Bull. N. P., 294; Lutterrell v. Reynell, 1 Mod., 282), is now even there excluded. See Parker's Case, 3 Doug., 242; 10 Pet., 440; 1 Phil. Ev., 2 and 3, and 230, note; 1 Starkie's Ev., 187 and note; 23 Wend., 55; 2 Phil. Ev., 445; Brazier's Case, 1 East, P. C., 444; 2 Starkie, N. P., 242.

While the rule was otherwise in England, some of the state decisions already cited were expressly grounded on the rule there (see 10 Serg. & R., 332), and others on cases adopting that rule. 4 Blackf., 398. But since the rule became changed in England, or from being doubtful became well established against the introduction of such testimony, the practice in some states, as in New York and Vermont, has been settled so as to correspond; and in this court, also, it has taken the same direction.

In this court it has been held that such evidence is not admissible, if the statements were made subsequent to the contradictions proved on the other side. *Ellicott v. Pearl*, 10 Pet., 412, 438 (§§ 2013-23, *supra*). That was a case from Kentucky. Yet the decision does not appear to have been made to rest on the peculiar laws or practice of that state; but on general principles, and the course pursued of late years in England.

In our judicial system, perhaps the decision should not rest on any local rule, though a different principle seems involved in *McNiel v. Holbrook*, 12 Pet., 85, where the rule of evidence was changed by a state statute. *Clark v. Sohler*, 1 Woodb. & M., 368. But if it should so rest, we are not aware that in Louisiana, where this case was tried, the practice differs from what appears to be required by sound general principles, independent of any local peculiarities.

So far as regards principle, one proper test of the admissibility of such statements is, that they must be made at least under circumstances when no moral influence existed to color or misrepresent them. 1 Greenl. Ev., § 469; 2 Pothier on Oblig., 289; 1 Stark. Ev., 148; 1 Phil. Ev., 308. But when they are made subsequent to other statements of a different character, as here, it is possible, if not probable, that the inducement to make them is for the very purpose of counteracting those first uttered. 10 Pet., 440. This impairs their force and credibility, when, if made before the others, they might tend to sustain the subsequent evidence corresponding with them. 23 Wend., 52; 2 Phil. Ev., 446; 1 Greenl. Ev., § 469.

When made in either way, they are admissible only to sustain the credit of the witness impugned, and not as *per se* proof of the facts stated; and hence if made under oath, as here, but not in legal form as a deposition between these parties, they are none the more admissible except, if prior in date, they might help to sustain the witness' credit. 10 Pet., 412; *King v. Eriswell*, 3 D. & E., 721. In this case, then, not having been made prior in time, they do not appear on principle or precedent to be competent.

§ 3488. *When defendant's true name appears in the pleadings and contract, an error in the name as stated in the judgment is immaterial.*

Another question has been presented, arising on the record, which is not included in any of the exceptions. It is that the judgment runs against "Daniel Frederick Conrad," when the writ, pleadings and contract speak only of "Frederick D. Conrad." But the judgment is for the plaintiff against "Dan-

iel Frederick Conrad, the defendant." And the name prefixed as defendant in the judgment may well be rejected as surplusage, after verdict and judgment, when the true name had been well described in the writ and pleadings. The statute of jeofails clearly cures any such defect where, as here, it can well be understood who was meant by "the defendant." 1 Stats. at Large, 91; 1 Bac. Abr., Amendment, B; 1 Pet., 23.

Let the judgment below, however, be on the first ground reversed.

HOWLAND v. CONWAY.

(District Court for New York: Abbott's Admiralty, 281-290. 1848.)

STATEMENT OF FACTS.—This was a suit by some of the crew of the ship Elisha Denniston for extra wages as damages for being put on short allowance. The action was against the master of the vessel *in personam*. At the hearing, the libelants read depositions of several of the crew to the effect that the bread given them was bad. Respondent proved by a custom-house officer that the same sailors, at the time of their discharge at the end of the voyage, said the bread was good.

Opinion by BETTS, J.

This was one of three suits brought by several of the crew of the ship Elisha Denniston against her master, for short allowance of bread on a voyage from New York to New Orleans, Mobile, Liverpool, and back to New York. The gravamen of the action is that the bread was wormy, dusty and filled with cobwebs, and was not suitable or wholesome for food.

Two of the libelants and four others of the crew, all being colored men, and examined upon deposition, testified strongly to the badness of the bread, and their statements support the allegations of the libel. It is, however, proved by the custom-house officer, who had charge of the ship on her return to this port, that these latter four seamen distinctly declared that the bread supplied to the crew on the voyage was good, and that there was no ground of complaint in regard to it. The bread which was left over of the ship's stores after the voyage was ended was carefully examined by bakers in this port, and they found it to be then sound and good, equal to the best quality of bread, except pilot bread, furnished to merchant vessels at this port, and to be greatly superior to that supplied to English vessels in English ports. These facts, if considered in connection with the testimony showing statements made by the witnesses for the libelants in contradiction of their testimony, displace all foundation for any claim for wages by way of damages for short allowance. For it appears that the ship had an ample supply of suitable bread on board; twelve or fourteen barrels were taken from her after the voyage ended, and the quality is proved to have been then marketable and fair.

The libel must accordingly be dismissed on the demand for damages on the ground of short allowance; and as the other two suits were to depend on the decision of this, the same decree must be entered in them also. The other question raised, whether the wages due to the libelants under the shipping agreement have been fully paid or not, is not properly before me upon this hearing.

§ 3489. *The course of the admiralty courts is not to charge costs upon sailors when they establish probable cause for instituting suits for redress.*

The only point really requiring any consideration is the award of costs to be made. I consider that a color for the claim of extra wages is afforded, as it

appears that the master ordered the bread to be baked over at Liverpool. This, as the evidence on the part of the master himself shows, is the usual course in case bread is wormy or mouldy; and it is reasonably to be inferred that the expense and trouble of rebaking the bread would not have been incurred in this regard, if it had been, during the whole voyage, pure and wholesome. It is shown in the proofs that the best and finest bread will occasionally breed worms, and require purifying by rebaking. As the ship had an abundant supply of bread, the officers ought to have taken pains to select that which was not so affected, and to have avoided serving out vitiated provisions. It is sufficiently evident, upon the whole case, although the important points in the charges and proofs of the libelants are refuted and discredited, that the complaint is not wholly groundless or malicious; for, in addition to these facts, several of the men swear that the mate was told the state of the bread, and that it was shown to him, yet his evidence is not put in by the respondent. It may be that the wormy bread was given out from inattention; but it was the master's duty to see that none but fresh provisions were used. The course of admiralty courts is not to charge costs upon sailors when they establish probable cause for instituting suits for redress; and I shall accordingly award no costs against them in these cases.

And if the witnesses not interested in the suits were, upon sound and safe principles of law, entitled to credit in these cases, I should allow the libelants summary costs against the master, upon the ground that although technically he could not be held chargeable for *short allowance*, yet his conduct in permitting bad bread to be given out to the men should be regarded as blamable and wrongful.

§ 3490. *In admiralty the credibility of a witness may be impeached by proving his declarations made out of court, and contradictory to his testimony, without a previous examination in respect to such declarations.*

But deliberate declarations of these witnesses, made in direct conflict with their testimony, are proved against them; and their evidence, under such circumstances, will not, in law, justify a judgment in conformity to it, unless it be corroborated and supported by other proofs.

It was insisted that this evidence of contradictory declarations of the witnesses was to be disregarded, because the witnesses were not previously cross-examined in reference to such statements. And this view is sustained by the rule of evidence on this point, laid down in the Queen's Case (2 Brod. & B., 315; S. C., 6 Eng. C. L. R., 129). In that case certain questions of evidence arising out of the proceedings against Queen Caroline were put to the judges of England by the house of lords. One of those questions was, whether, according to the practice and usage of the courts below, and according to law, when a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, . . . it would be competent to the party accused to examine witnesses in his defense to prove such declarations, without first calling back such witness examined in chief, to be examined or cross-examined as to the fact whether he ever made such declarations. The judges were unanimously of opinion that, "according to the usage and practice of the courts below, and accordingly to law as administered in those courts, the proposed proof cannot be adduced without a previous cross-examination of the witness as to the matter thereof." Chief Justice Abbott, in delivering the opinion of the judges, speaks as follows: "The legitimate object of the proposed proof is to discredit the witness. Now,

the usual practice of the courts below, and a practice to which we are not aware of any exception, is this: if it be intended to bring the credit of a witness into question, by proof of anything he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there be, as the particular circumstances of the transaction may happen to furnish, and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declarations imputed to him, the adverse party has an opportunity afterward of contending that the matter of the declaration or speech is such that he is not to be bound by the answer of the witness, but may contradict and falsify it; and if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the court is of opinion that he cannot be compelled to answer, the adverse party has in this instance, also, his subsequent opportunity of the matter which is received, if by law it ought to be received. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to; and it is, in our opinion, of great importance that this opportunity should be thus afforded, not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost; for a witness who has been examined, and has no reason to suppose his further attendance requisite, often departs the court, and may not be found or brought back till the trial be at an end. So that if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness, or to the party producing him, great injustice might be done, and in our opinion might not unfrequently be done both to the witness and to the party; and this not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant; and one of the great objects in the course of proceeding established in our courts is the prevention of surprise, as far as practicable, upon any person who may appear therein."

The same rule was laid down on the authority of the Queen's Case, but with greater precision, in *Angus v. Smith*, 1 Mood. & M., 473; S. C., 22 Eng. C. L. R., 360. Chief Justice Tindal there says: "I understand the rule to be, that before you can contradict a witness by showing he has at some other time said something inconsistent with his present evidence, you must ask him as to the time, place and person involved in the supposed contradiction. It is not enough to ask him the general question, whether he has ever said so and so, because it may frequently happen that upon the general question he may not remember having so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said."

I am aware that, since the decision of the Queen's Case, many of the state courts in this country have adopted the practice thus indicated.

Thus, in *Davis v. Kimball*, 19 Wend., 438, the supreme court of the state of New York follows the ruling of the Queen's Case and of *Angus v. Smith*, ap-

plying it to the special case of a witness examined upon commission by interrogatories and cross-interrogatories, whose deposition was sought to be impeached by proof of counter statements made by the witness out of court. And the court answer the objection raised, that in the case of depositions taken under a commission there is no opportunity to call the attention of the witness to the inconsistent declarations, by remarking that there is no reason for a distinction between this and the case where the discovery of the evidence occurred after the cross-examination was ended, and the witness had left court and could not be brought back—a case which all the judges in the Queen's Case refused to make an exception;—and by the further suggestion that there is an additional reason for the application of the rule in the case of depositions, as otherwise a strong temptation would exist to tamper with witnesses to pervert or manufacture conversations after the execution of the commission, and when explanation would be impossible. *Id.*, 441.

So, also, Mr. Justice McLean in the United States circuit court adopts the same rule of evidence as the one prevailing in Ohio, and as therefore obligatory upon the courts of the United States sitting within that state. *McKinney v. Neil*, 1 McLean, 547. But it would seem to be the usage of the court upon that circuit to regard the practice of the local courts as governing that of the federal courts there held. And see remarks of Story, J., in *Beers v. Haughton*, 9 Pet., 362.

The circuit court in this district, however, upon mature consideration, declined to adopt the rule of the Queen's Case, considering the subject to be merely matter of practice resting in the discretion of the several courts. It was so treated by the judges, who assigned their reasons, in the house of lords, for the rule. The argument in its support was not based on common law principles of evidence. This view of the subject seemed to us also to be consonant to authority. *Phill. on Ev.*, ch. 8, 230; 2 *Cow. & H. Notes*, 773; *Tucker v. Welsh*, 17 Mass., 166. We regarded the rule which we considered to have prevailed in England and in this state, prior to the Queen's Case, to be recommended by considerations of higher weight than those adduced in support of the rule declared in the Queen's Case; but which was not directly sanctioned by the New York supreme court, previous to 1838. It is clear, from the decision in 1836 (*The People v. Moore*, 15 Wend., 419), that at the date of that decision the courts of this state had not adopted the rule of the Queen's Case, which had been promulgated as early as 1820; nor was that rule observed in the early practice of the English courts. 1 *Phill. on Ev.*, ed. 1820, 212; *Peake's Ev.*, 89; 1 *Starkie on Ev.*, 1st ed., 1451; 2 *Esp.*, 601; *Hawk. P. C.*, B. 2, ch. 46, § 14; 1 *McNally on Ev.*, 378. Nor had it prevailed, at least to any great extent, either among the courts of the several states of the United States, anterior to the Queen's Case (1 *Hayw., N. C. R.*, 437; *Tucker v. Welsh*, 17 Mass., 166; 4 *Pick.*, 441; 1 *Serg. & R.*, 526; 2 *Esp. N. P.*, ed. 1811, 540; *Baker v. Arnold*, 3 *Cai.*, 279; *The People v. Vane*, 12 Wend., 79; 8 *Greenl.*, 42); or among the courts of the United States. 1 *Wash.*, 413; *Gilp.*, 616; 1 *Pet. C. C.*, 203. We discerned nothing in the reasons governing the Queen's Case to induce us to change the practice heretofore adopted in the circuit court and in this court, to conform to that decision. It seemed to us that the more sound and consistent course was to require the party whose witness was impeached by proof of his contradictory statements, to assume the burden of producing the witness again to explain his own declarations. The case of *Judson v. Blanchard*, 4 Conn., 557, is an authority allowing that

to be done. The testimony of the witness in court may be the occasion of recalling to the memory of others what he had said elsewhere; and thus contradictory statements may often, as we considered, come, for the first time, to the knowledge of the party interested to produce them, after the examination and the cross-examination of the witnesses had closed, and very probably after he was out of the recall of such party, and thus even life be saved against the testimony of unscrupulous and perverse witnesses.

These considerations, with others, satisfied the court that the old and familiar practice in this respect was to be preferred to that established by the Queen's Case, as a means for unmasking fictitious evidence, and protecting property, life and character exposed to peril by the oaths of reckless witnesses. This rule is more emphatically important in respect to evidence given under commissions or by deposition, than to that given orally in open court. We accordingly have held that the credibility of a witness may be impeached by proving his declarations made out of court, and contradictory to his testimony, without a previous examination.

I am accordingly of opinion that the depositions offered by the libelants, in support of their libel, may be impugned by evidence of the contradictory declarations made by the witness not on oath, and that upon the whole evidence the equity preponderates in favor of the respondent, upon the question of his liability to the libelants for costs. The libel must therefore be dismissed, without costs, unless, upon the report of the commissioner, a balance of wages earned under the shipping articles shall be found due to the libelants.

Decree accordingly.

§ 3491. **Impeaching own witness.**—It is not competent for a party to impeach his own witness, whose deposition he has taken in the cause, except by substantiating by other witnesses any material facts which that witness has misstated. *Phettiplace v. Sayles*, 4 Mason, 312.

§ 3492. A party cannot contradict his own witness by evidence of his former inconsistent declarations, but he may prove, by other witnesses, facts which are inconsistent with the testimony of his witness. *Ellicott v. Pearl*, 10 Pet., 440 (§§ 2013-23).

§ 3493. **Contradictory statements.**—Evidence of declarations made by a witness contradictory to what he has sworn to in court should be received with jealousy and caution. *Stevens v. Vancleve*, 4 Wash., 262.

§ 3494. What a witness said or published at another time may be properly admitted to test or impeach his credibility, but not as evidence of the facts narrated, unless it is otherwise legal evidence. *Hand v. The Elvira*, Gilp., 60.

§ 3495. Testimony of the admissions of a witness of his own false swearing on former occasions, and that he considered the manner of swearing witnesses in the United States as not binding, is generally not worthy of regard as impeaching his testimony. *Luco v. United States*, 23 How., 515.

§ 3496. In an action on a policy of marine insurance on a vessel captured by the enemy, the invoice stated in the record of condemnation as one of the papers found on board at the time of capture, and the answer of the mate to the standing interrogatories, were admitted in evidence in behalf of the defendants for the purpose of discrediting the mate. *Azuria v. Insurance Co. of Penn.*,* 3 Wash., 177.

§ 3497. In this suit, which was one on a policy of insurance on goods shipped on board a vessel, the protests of some of the crew, taken at a foreign port, were permitted to be read in evidence for the purpose of discrediting their testimony as given in certain depositions. *Winthrop v. Union Insurance Co.*, 2 Wash., 7.

§ 3498. The statement of the master of a vessel before the receiver of wrecks in London is admissible to contradict his testimony given in a trial for collision, and to show that he has made statements of the circumstances of the collision conflicting with his testimony given upon the trial. *Bunge v. Steamship Utopia*, 1 Fed. R., 892.

§ 3499. In an action for damages caused by a collision, the hasty assertions of witnesses, made immediately after the collision, are of little weight to discredit their testimony given in the cause. *The Steamboat New Jersey, Olc.*, 415.

§ 3500. If evidence offered by counsel for the purpose of discrediting the witnesses of the

opposite party obviously cannot have this effect, in any degree, the court may overrule it. *Evans v. Eaton*, Pet. C. C., 322.

§ 3501. **Foundation for impeaching testimony.**—Evidence will not be admitted to contradict a witness where he has not been interrogated as to the matter. *Many v. Jagger*, 1 Blatch., 373.

§ 3502. To impeach a witness by showing that he has made a statement materially different from the facts sworn to by him, a foundation must be laid by questioning the witness as to such statement. *United States v. Dickinson*, 2 McL., 325.

§ 3503. To impeach the testimony of a witness by proving contradictory statements, it is necessary first to call his attention to the previous statements by fixing the time, place and circumstances. Where this foundation is not laid, a former affidavit made in the case by the witness cannot be admitted for the purpose of showing that it contained statements contradictory to his present testimony. *Dayton v. Wyoming National Bank*,* 1 Wyom. T'y, 263.

§ 3504. A deposition cannot be read to impeach the statements of a witness by proving certain conversations of the witness respecting the transaction, unless the witness is first questioned as to the conversations. *Chapin v. Siger*, 4 McL., 378.

§ 3505. In order to show a contradiction between the testimony of a witness at a former trial of the same cause and his present testimony, his testimony at the former trial may be proved without first asking him whether he testified so and so. *United States v. White*, 5 Cr. C. C., 457.

§ 3506. The court in this case, while professing their adherence to the rule that a witness cannot be impeached by proving that he has made contradictory statements unless he has been examined as to such statements, admitted such proof without such examination, following a ruling which had been made by the state courts. *McKinney v. Neil*, 1 McL., 540.

§ 3507. **Evidence to corroborate witness.**—A party cannot offer to support the testimony of his witness, who has been impeached by proof of former contradictory declarations, by proving declarations of the witness corroborating his statements in court. But if the other side offer to prove that the testimony is recently fabricated, evidence of former declarations may be put in. *Ellicott v. Pearl*, 10 Pet., 439 (§§ 2013-23); 1 McL., 206.

§ 3508. If one of the parties reads a part of a deposition, in order to prove that the witness who gave it contradicted what he now states upon his examination in court, the other side may refer to the whole deposition, to support the consistency of the witness. *Harrison v. Rowan*, 3 Wash., 580.

§ 3509. The testimony corroborating an infamous witness should be confined to those matters which, whether in themselves material to conviction or not, are seen to be well calculated to strengthen and confirm the truth of his story. *United States v. Biebusch*, 1 McC., 46 (§§ 2601-6).

§ 3510. **As to collateral matter.**—A witness cannot be asked as to a mere collateral fact, having no relevancy to the issue, in order to draw from him an answer, which may, by other evidence, be shown to be incorrect, and thereby discredit him. *Odiorne v. Winkley*, 2 Gall., 51.

§ 3511. When a witness is cross-examined upon collateral matter, it is not competent for the party thus cross-examining the witness to bring other witnesses to contradict him on such collateral matter in order to discredit his testimony. *United States v. White*, 5 Cr. C. C., 38.

§ 3512. If a witness, in a deposition or cross-interrogatories, states, as facts, circumstances not pertinent to the cause, what he said in another cause where the facts were pertinent is not admissible to discredit him. *Lamalere v. Caze*,* 1 Wash., 413.

§ 3513. Where counsel, on the cross-examination, calls out from the witness collateral facts which tend to create a distrust of his integrity, fidelity or truth, it is competent for the adverse party to ask of the witness an explanation which may show that the facts thus elicited are in truth wholly consistent with his integrity, fidelity and truth, although circumstances foreign to the principal issue may thus be proved, and which, but for such previous cross-examination, it would not be permitted to prove. *United States v. 18 Barrels of High Wines*, 8 Blatch., 475.

§ 3514. If a witness has been impeached by proof that in some things not connected with the main facts of the case he has sworn falsely, the jury will be justified in discarding his evidence unless he is corroborated by other evidence; but if corroborated, facts as to which he is sustained should not be rejected by the jury. *Robinson v. Gallier*,* 2 Woods, 178.

§ 3515. On the trial of an indictment, under section 5485, Revised Statutes, against an agent for a pension claimant, for withholding from the pensioner the pension allowed, W., a witness for the defendant, upon inquiry by the prosecution, denied making a request of a third person, in the presence of the pensioner, to persuade the pensioner not to proceed in the prosecution of the defendant, stating that it would "jug her (the pensioner) just as well as the rest of us." A contradiction of this denial of W. was held admissible, although the fact was a collateral one, because, if true, the fact tended to show a bias on the part of W., and a desire on his

part to save the defendant from prosecution, and went to his credibility. The inquiry, and his denial, could not make the fact any the less admissible. *United States v. Schindler*, 18 Blatch., 227.

§ 3516. *Mental condition.*—Upon the suggestion that a witness whose affidavit had been taken in support of a motion for a new trial was an idiot, the court required that she should be brought into court and examined by the judges. But the court refused to call and examine another witness whose affidavit in support of the motion was not impeached. *United States v. Lloyd*, 4 Cr. C. C., 472.

§ 3517. *As to character of witness.*—Cross-examination is a more satisfactory test of the truth of parol testimony than evidence of the character of the witnesses. *Luco v. United States*, 23 How., 515.

§ 3518. General character for truth may be given in evidence where proof has been given of contradictory statements made by the witness. *United States v. Cole*, 5 McL., 513.

§ 3519. That a witness has been contradicted does not render evidence of his general good character competent, where his general character has not been impeached. *Ray v. Donnell*, 4 McL., 504.

§ 3520. Evidence to impeach the credibility of a witness by showing that he was intemperate was overruled as not going to the general reputation. *Schultz v. Moore*, 1 McL., 520.

§ 3521. Evidence of the general bad character of a witness cannot be given to affect his credibility. *United States v. White*, 5 Cr. C. C., 38.

§ 3522. A person who was a juror in a former trial of the same cause is not a competent witness to prove the general reputation for truthfulness of a witness from testimony given respecting such witness on that trial. *United States v. White*, 5 Cr. C. C., 457.

§ 3523. The only question as to the character of a witness proper to be asked is, "Are you acquainted with the general reputation of the witness as to veracity; and from your knowledge of that general reputation would you believe him upon oath?" *United States v. White*, 5 Cr. C. C., 38.

§ 3524. When a witness is called to impeach the veracity of a witness, and has been asked what the reputation of the witness is, and he says that it is not good, and that he has heard several people say so, it is not competent, on cross-examination, to ask him who those people are. *Patriotic Bank v. Coote*,* 3 Cr. C. C., 170.

§ 3525. The usual course to discredit a witness is to ask what his general reputation for truth is—whether it is good or whether it is bad. *Gass v. Stinson*, 2 Sumn., 605.

§ 3526. The character of a witness cannot be impeached by showing her to be lewd. The question must be restricted to her general character for veracity. *United States v. Dickinson*, 2 McL., 325.

§ 3527. Impeaching evidence must be confined to general reputation for truth and veracity; it is not competent to prove that the witness is a common prostitute. *United States v. Masters*,* 4 Cr. C. C., 479.

§ 3528. *Occupation.*—The simple fact that a person is a negro minstrel will not discredit his evidence. *Robinson v. Gallier*,* 2 Woods, 178.

XXVIII. PRODUCTION ON NOTICE.

SUMMARY—*If secondary evidence is vague, presumption against party who refuses to produce the original, § 3529.*

§ 3529. The legal effect of refusing to produce books and papers after notice is only to admit secondary evidence of their contents. If that evidence is vague and uncertain, every presumption is made against the party who refuses to produce the books and papers in regard to particulars, but the mere fact of non-production does not authorize a presumption that the books, if produced, would prove facts which the party giving the notice asserts they would prove. *Hanson v. Eustace*, §§ 3530-31.

[NOTES.—See 3532-3562.]

HANSON v. EUSTACE.

(2 Howard, 653-711. 1844.)

ERROR to U. S. Circuit Court, Eastern District of Pennsylvania.

Opinion by MR. JUSTICE WAYNE.

STATEMENT OF FACTS.—The defendants in this case having failed to produce on the trial of it certain books of original entry, day-books, etc., of the late

firm of R. and I. Phillips, which had been called for by a regular notice, the court permitted the plaintiff to give secondary evidence of their contents. The object of the plaintiff in introducing the secondary evidence was to prove that the legal title to the Sixth street property was in R. and I. Phillips, the defendants having previously introduced a deed to that property from R. J. Herring and wife, dated the 9th June, 1832, to Robert Phillips.

The partners of the firm of R. & I. Phillips were Robert Phillips and Isaac Phillips. That firm, however, was dissolved by the death of Robert Phillips, in 1833. The survivor then took into partnership Joseph L. Moss, and the new firm traded under the style of the original firm of R. and I. Phillips.

The court, in reference to the refusal of the defendants to produce the books, and to the secondary evidence which had been given of their contents in respect to the Sixth street property, charged the jury that, "in an ordinary case, the jury must decide, from the evidence before them, what facts have been proved; but in this case there is one feature which is rather unusual and to which it is necessary to call your special attention, as a matter which has an important bearing on some of its prominent points. Timely notice was given by the plaintiff's counsel to the counsel of the assignors and assignees, to produce at the trial the books of R. and I. Phillips; no objection was made to the competency of the notice; they were called for, but were not produced till the day after the evidence was closed, and at the moment when the court had called on the plaintiff's counsel to address the jury. No reason was assigned for their non-production, save the reference to the illness of Mr. Moss; but Mr. Phillips was in court; notice was given to Mr. Hanson, though none was necessary, as the books could not be presumed to be in his possession. That they could have been produced before the evidence on both sides was closed can scarcely be doubted, when so many were produced afterwards. Their production, then, was no compliance with the notice; the plaintiff could not, without leave of the court, have referred to them; he was not bound to ask it, and had a right to proceed as if they had not been produced.

"Mr. Hanson had a right to call for the books; claiming by an adverse title, he might have moved the court for an order to produce them, but he made no effort to procure them; we say so, because there was no evidence that he did in any way endeavor to have them produced, although the court, in their opinion on the motion for a nonsuit, plainly intimated the effect of their non-production.

"There has, therefore, been no satisfactory or reasonable ground assigned for their having been kept back, and the plaintiff has a fair case for calling on you to presume whatever the law will authorize you to presume as to the contents of the books. On this subject the fifteenth section of the judiciary act has made this provision: 'That all the said courts of the United States shall have power, in the trial of actions at law, and on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts, respectively, on

motion as aforesaid, to give judgment against him or her by default.' This enables courts of law to apply the same rules and principles, where papers or books are withheld, as have been adopted by courts of equity, which are these, in our opinion, as long since expressed in *Askew v. Odenheimer*, 1 Bald., 388, 389."

"It must not, then, be supposed that the only effect of the suppression or keeping back books and papers is to admit secondary evidence of their contents, or that the jury are confined, in presuming their contents, to what is proved to have been contained in them; a jury may presume as largely as a chancellor may do, when he acts on his conscience, as a jury does, and ought to do, and on the same principles.

"Mr. Bridges states that he believes there is an entry on the books, of the transfer from Herring to Robert and Isaac Phillips, but don't know how the transfer was made. It is in proof, by the clerks of Robert and Isaac Phillips, that an account was open on their books with the Sixth street lot; that the money of the firm was applied to the payment of the consideration money to Herring; one of the persons who erected the new building says he was paid by the notes and checks of the firm; a tenant proves that Joseph L. Moss rented it in the name of the firm, who furnished it to the amount of \$1,000; and the tax-collectors prove the payment of taxes by the firm. In opposition to this evidence, the defendants offer nothing; the books of the firm are suppressed, when they could and ought to have been produced; and the sole reliance in support of the title of Robert Phillips is the deed from Herring. If you believe the witnesses, Robert Phillips never was the sole and real owner of this property on the first purchase; and if you think the facts stated are true, you may and ought to presume, that, if the books had been produced, they would have shown that the payment of the whole purchase money, and the whole expense of the improvements made on the lot, were paid by the firm; that it formed an item of their joint estate, and was so considered by the partners. You may also, and ought to, presume, that the production of the books would have been favorable to the plaintiffs, and unfavorable to the defendants, in any other aspect as bearing on the ownership of this property. On such evidence we would, as a court of equity, hold that there was such a clear equitable title in the firm, that Robert Phillips, or his heirs, were bound, on every principle of justice, conscience, and equity, to make a conveyance so as to make that title a legal one. And when it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property, that the grantees had accepted the conveyance, and sold the property under the assignment; that the purchaser from them had accepted a deed reciting theirs, and no other title; we cannot hesitate, as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips, or his heirs, has been made, as they were bound in equity and good conscience to make.

"Legal presumptions do not depend on any defined state of things; time is always an important, and sometimes a necessary, ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important, according to the weight of the other circumstances in evidence in the case. Taking, then, all in connection, and in the total absence of all proof of any adverse claim by Robert Phillips, or his heirs, from 1832, every circumstance is in favor of the presumption of a conveyance; and we can perceive little, if any, weight in the only circumstance set up to rebut it, which is the proceedings in the orphans' court. You will give them what consequence

you may think they may deserve, when you look to the time and the circumstances under which they were commenced, carried on, and completed by a sale for \$22,500, which counsel admit was not paid, and also admit that the sole object was to extinguish the mere spark of legal right remaining in Robert Phillips or his heirs, and not because he or they had any beneficial interest in the property. If there was lawful ground for presuming the existence of a conveyance from him, or them, before November, 1837, we should think that anything accruing afterwards was entitled to no weight in rebutting such presumption; and were we in the jury-box, we would think it operated the other way. It was for the interest of the assignees and assenting creditors to consider the conveyance as not made; for if it had been made previously, a non-assenting creditor to the assignment might take it under a judgment, as was done by the plaintiff, and thereby hold it, if the assignment did not pass the title; whereas, by taking the deed as not made, the orphans' court sale would vest the title in the assignors, and leave no legal right on which a judgment against Joseph L. Moss and Isaac Phillips could attach. As, however, this is a matter entirely for your consideration, we leave it to your decision, with this principle of law for your guide: that on a question whether a conveyance shall be presumed or not, the jury are to look less to the direct evidence of the fact, than to the reasons and policy of the law in authorizing them to infer that it was made, if the party who was in possession of the legal title was bound in equity to convey to the real, true, equitable owner. This legal presumption is not founded on the belief alone that the fact existed, but much more on those principles which enforce justice and honesty between man and man, and tend to the security of possessions which have remained uninterested and undisturbed. Should your opinion be in conformity with ours on this point, you will presume that there was a deed from Robert Phillips or his heirs, competent to vest the title to the Sixth street lot in the firm of Robert and Isaac Phillips; that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

It appears, then, that the court made the refusal of the defendants to produce the books the secondary evidence of their contents, and other evidence in the cause the basis upon which it gave the foregoing instructions to the jury. The defendants excepted to them. The inquiries, therefore, arising are, had a case been made, which authorized the court, as a matter of law, to give an opinion to the jury, that the facts proved would justify the presumption of a deed; and, if not, were the instructions given in terms which left the jury to make the inference from the evidence alone, unaffected by considerations which it is not the province of a jury to indulge, that the legal title to the Sixth street property was in the late firm of R. and I. Phillips?

This property may be the partnership estate of the original firm of R. and I. Phillips, without the legal title being in the copartnership or in either of the partners. A deed was in evidence that the legal title had been made to Robert Phillips. The plaintiff wished to show that Robert Phillips had conveyed it, before he died, to the firm, or that there were circumstances in the case which raised the presumption that he had done so. No evidence was given to show that Robert Phillips had made such a conveyance. On the contrary, as the case stood, the proof was that R. J. Herring and wife had conveyed the Sixth street property to Robert Phillips, by deed dated the 9th June, 1832. The deed was in evidence. The plaintiff then proceeded to give secondary

evidence of the contents of the books, which the defendants had refused to produce. That secondary evidence, as it is stated in the instruction, is, that "Mr. Bridges states that he believes there is an entry on the books of the transfer from Herring to Robert and Isaac Phillips, but don't know how that transfer was made. It is in proof, by the clerks of Robert and Isaac Phillips, that an account was open on their books with the Sixth street lot; that the money of the firm was applied to the payment of the consideration money to Herring. One of the persons who erected the new building says he was paid by the notes and checks of the firm; a tenant proves that Joseph L. Moss rented it in the name of the firm, who furnished it to the amount of \$1,000; and the tax-collectors prove the payment of the taxes by the firm." Such is the proof, and the only proof in the cause, to show that the legal title to the Sixth street property was in the late firm of R. and I. Phillips. It may justify the inferences in the court's instructions, that Robert Phillips never was the sole and real owner of this property on the first purchase; that, if the books had been produced, it would have been shown that the consideration money for the lot was paid by the firm; that all the improvements were paid for by the money of the firm; that it formed a part of their joint estate; that they so considered it, and that Robert Phillips was bound in equity and good conscience to make a title to the firm; but the evidence is certainly deficient in those particulars which, according to the established law, will permit the presumption of a deed by a jury, as a matter of direction from the court.

§ 3530. *The court cannot instruct a jury to presume a grant or deed of land unless time or length of possession is shown, which, either of itself or with other circumstances, raises the presumption.*

Before a court can instruct a jury to presume a grant or deed for land, time or length of possession must be shown, which, of itself, in certain cases, and in other cases, in connection with circumstances, will induce the presumption of a grant as a matter of law, or as a legal effect from evidence, which the jury is instructed to make, if in its consideration of the evidence the jury believe it to be true. Or when the presumption in fact as to a legal title is founded upon the principle of *omnia rite esse acta*. Supposing, then, that the court did not intend to instruct the jury that the legal effect of the evidence was to raise the presumption of a deed, we will now inquire what effect the refusal to produce books and papers, under a notice, has upon the point which a party supposes they would prove.

§ 3531. *Refusal to produce books on notice; secondary evidence; rule stated.*

The refusal to produce books, under a notice, lays the foundation for the introduction of secondary evidence. It affords neither presumptive nor *prima facie* evidence of the fact sought to be proved by them. A party cannot infer from the refusal to produce books which have been called for, that, if produced, they would establish the fact which he alleges they would prove. The party in such a case may give secondary evidence of the contents of such books or papers; and if such secondary evidence is vague, imperfect, and uncertain as to dates, sums, boundaries, etc., every intendment and presumption as to such particulars shall be against the party who might remove all doubt by producing the higher evidence. *Life & Fire Insurance Co. N. Y. v. Mech. Fire Insurance Co.*, 7 Wend., 33, 34.

All inferences shall be taken from the inferior evidence most strongly against the party refusing to produce; but the refusal itself raises no presumption of suspicion or imputation to the discredit of the party; except in a case

of spoliation or equivalent suppression. There, the rule is that *omnia præsumuntur contra spoliatores*. In other words, with the exception just mentioned, the refusal to produce books or papers upon notice is not an independent element, from which anything can be inferred as to the point which is sought to be proved by the books or papers. Nor can any views of policy, growing out of the refusal, be associated with the secondary evidence to enlarge the province of the jury to infer or presume the existence of the fact to which that evidence relates. For considerations of policy, being the source, origin and support of artificial presumptions, having no application to conclusions as to actual matter of fact, the finding of a jury in conformity with such considerations, and not according to their actual conviction of the truth, resolves itself into a rule or presumption of law.

Apply these principles to the instruction, and we find that the court, under a notice at common law to produce books and papers, and the refusal to produce them, without any other foundation having been laid to permit secondary evidence to be given of the existence of a deed which had not been specifically called for, and the destruction or loss of which had not been alleged, permitted the plaintiff to give secondary evidence that a deed had been made, and, upon his failure to do so, instructed the jury that it "must not be supposed that the only effect of the suppression or keeping back books and papers is to admit secondary evidence of their contents, or that the jury are confined, in presuming their contents, to what is proved to have been contained in them. A jury may presume, as largely as a chancellor may do, when he acts on his conscience, as a jury does and ought to do, and on the same principles." And further, after reciting the evidence which the court thought led to its conclusion, the court says: "Upon such evidence we would, as a court of equity, hold that there was such a clear equitable title in the firm, that Robert Phillips or his heirs were bound on every principle of justice, conscience and equity to make a conveyance, so as to make the title a legal one." To which the court adds: "When it appears that the members of the new firm had conveyed it in trust for creditors, as their joint property, that the grantees had accepted the conveyance and sold the property under the assignment, that the purchaser from them had accepted a deed reciting theirs and no other title, we cannot hesitate, as judges in a court of law, in instructing you that you may presume that such a conveyance from Robert Phillips or his heirs has been made as they were bound in equity and good conscience to make." "Legal presumptions do not depend on any defined state of things; time is always an important, and sometimes a necessary, ingredient in the chain of circumstances on which the presumption of a conveyance is made; it is more or less important according to the weight of the other circumstances in evidence in the case. Taking, then, all in connection, and, in the total absence of all proof of any adverse claim by Robert Phillips or his heirs, from 1832, every circumstance is in favor of the presumption of a conveyance." And the instruction finally concludes with this direction: "As, however, this is a matter entirely for your consideration, we leave it to your decision with this principle of law for your guide: that on a question whether a conveyance shall be presumed or not, the jury are to look less to the direct evidence of the fact than to the reasons and policy of the law, in authorizing them to infer that it was made, if the party who was in possession of the legal title was bound in equity to convey to the real, true and equitable owner. This legal presumption is not founded on the belief, alone, that the fact existed, but much more on those principles which enforce justice

and honesty between man and man, and tend to the security of possessions which have remained undisturbed. Should your opinion be in conformity with ours on this point, you will presume that there was a deed from Robert Phillips or his heirs competent to vest the title to the Sixth street lot in the firm of Robert and Isaac Phillips, that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs."

Supposing, then, the term legal presumption to have been used in its known professional sense, it is obvious that the court did not mean it to be one that was absolute and conclusive, but one of law and fact. If the latter, we have already said such a presumption did not arise under the evidence, and the conclusion must be that the instruction did not leave the jury to presume, from the evidence alone, that a conveyance had been made of the Sixth street property by Robert Phillips, which vested the legal title to it in the late firm of R. and I. Phillips. We think the exception taken to these instructions must be sustained, and direct the judgment to be reversed.

In the consideration of this case the court has not forgotten that there were many other points in the cause which were argued with great learning and ability. The court, however, abstains from noticing them, and directs that its opinion should be exclusively confined to the instructions which have been considered.

§ 3532. **In general.**—When a writing, material to a criminal case, is in the possession of the defendant, notice to produce it must be served on him before the prosecution can give evidence of its contents by parol. *United States v. Winchester*,* 2 McL., 135.

§ 3533. Evidence of defendant's acknowledgment of the receipt of goods mentioned in an account is not admissible without notice to produce the account. *Nicholls v. Warfield*,* 2 Cr. C. C., 290.

§ 3534. The books being in court, the party may be called upon to produce them after the jury are sworn. *Banks v. Miller*,* 1 Cr. C. C., 543.

§ 3535. A notary public was not allowed to give parol evidence of the contents of his letter to the defendant, who was the indorser of a note, without previous notice to the defendant to produce the original letter. *Bank of Washington v. Kurtz*, 2 Cr. C. C., 110.

§ 3536. It is doubtful whether a production of papers can be obtained by the *de bene esse* examination of a witness out of court. *Ex parte Peck*,* 3 Blatch., 114.

§ 3537. Though a witness whose deposition is being taken *de bene esse*, under R. S. of U. S., § 863, may be compelled to produce all books and papers in his possession which would be material and competent evidence on the trial of the action, yet he cannot be compelled to produce such books and papers to be used merely to refresh his recollection. *United States v. Tilden*,* 10 Ben., 566.

§ 3538. A party producing a record is not obliged to read the whole of it; the opposite party may read it if he desires. *Davis v. Forrest*,* 2 Cr. C. C., 23.

§ 3539. Where, in a criminal case, the defendant asks for a subpoena *duces tecum* directed to a consul, it is the right and duty of the court to require the defendant to show that the document is not an official paper protected by law from examination and seizure. *In re Dillon*, 7 Saw., 561.

§ 3540. A party cannot object to a requisition made on him to produce his ledger because it contains transactions anterior to the entries in question. *Harding v. Handy*, 11 Wheat., 103.

§ 3541. It is the duty of the person to whom a subpoena *duces tecum* is directed to make reasonable search for the papers or documents he is required to produce. *United States v. Babcock*,* 3 Dill., 566.

§ 3542. A notice to the defendant to produce, at the trial, all letters, papers and books in his possession, relating to moneys received by him under the award of the commissioners under a certain treaty, is sufficiently specific. *Vasse v. Mifflin*, 4 Wash., 519.

§ 3543. Where a subpoena *duces tecum* is directed to a person not a party, the papers to be produced are required to be stated or specified only with that degree of certainty which is practicable considering all the circumstances of the case, so that the witness may know what is wanted of him, and have the papers on the trial so that they can be used if the court shall

then determine that they are competent and relevant testimony. *United States v. Babcock*,* 3 Dill., 566.

§ 3544. Notice to produce does not render paper competent.—A document, produced by the adverse party on notice, is not evidence for the party asking its production, unless in its nature it is evidence. Its mere production by the adverse party does not make it so. *Rhoades v. Selin*,* 4 Wash., 719.

§ 3545. A party is not entitled to read a paper in evidence because he has produced it on notice from the other party. *Smith v. Coleman*,* 2 Cr. C. C., 237.

§ 3546. An instrument produced on notice from the opposite party is not thereby made evidence unless otherwise competent. Thus a will so produced cannot be read in evidence unless proved according to law. *Hylton v. Brown*, 1 Wash., 343.

§ 3547. If the defendants, after giving notice to the plaintiffs to produce certain correspondence between the plaintiffs and their supercargoes, decline to read any part of it, the plaintiffs cannot read it. *Willings v. Consequa*, Pet. C. C., 301.

§ 3548. If a party giving notice to produce letters waives the reading of them in evidence, they are not made evidence by the notice. *Blight v. Ashley*, Pet. C. C., 15.

§ 3549. Inspection — Right of — Effect of.—If the party calling for the production of books inspects them, he makes them evidence for the other side. *Wallar v. Stewart*, 4 Cr. C. C., 532; *Wilkes v. Elliot*, 5 Cr. C. C., 611.

§ 3550. Where one party gives notice to another to produce papers, he has no right to inspect them until he declares his intention to read them in evidence. *Jordan v. Wilkins*,* 2 Wash., 484.

§ 3551. Books of the plaintiff may be read in evidence when they have been called for and inspected by the defendant. *Coote v. Bank of United States*, 3 Cr. C. C., 50.

§ 3552. Section 868 of the New York Code of Civil Procedure applies to foreign corporations keeping books within the state. A corporation formed under the laws of Illinois, and having its general office in Chicago, had a branch office in New York under the charge of the secretary of the company. By a by-law of the company the secretary was required to keep safely all documents and papers which should come into his possession. There was a custom to send the New York books, when out of use, to Chicago, into the charge of officers over whom the secretary had no control. It was held that such books were not "in the custody" of the secretary within the above section so that he could be compelled to produce them by a subpoena *duces tecum*. *United States v. Tilden*, 18 Alb. L. J., 416.

§ 3553. Upon an indictment against a defendant for practicing in the medical art and receiving payment for his services, without obtaining a license from the board of medical examiners, and without the production of a diploma, the court will not compel a witness to produce the medicine prescribed by the defendant, the ingredients being immaterial. *United States v. Williams*, 5 Cr. C. C., 62.

§ 3554. The subpoena *duces tecum* is only properly used to compel a witness to bring books or documentary evidence of some sort to the trial. It cannot be used to compel a witness to bring his property, *e. g.*, patent patterns for a stove, into court. *In re Shepard*,* 18 Blatch., 225.

§ 3555. Notice to produce a letter covers the envelope of the letter, especially where the notice describes the letter as inclosed in an envelope. *United States v. Duff*, 19 Blatch., 9.

§ 3556. Where the plaintiffs have called upon the claimants to produce a certain invoice, the latter cannot require the plaintiffs to say whether they will take it with or without a letter which is attached thereto and which the plaintiffs have never seen. The invoice must be produced without including the letter in the order. *United States v. Twenty-five Cases of Cloth*, 1 Crabbe, 356.

§ 3557. Where plaintiff and defendant each held part of a charter-party, the court refused to require plaintiff to produce his part without previous notice. *Sampson v. Johnson*,* 2 Cr. C. C., 107.

§ 3558. In *assumpsit* for bread sold and delivered, the plaintiff had given notice to the defendant to produce the counterpart of his tallies, the plaintiff, a baker, having used tallies to keep the account with his customers. The court was of opinion, if the plaintiff would lay a foundation for his call upon the defendant by an affidavit that such tallies were kept by the defendant, and if the defendant would not produce them, nor make an oath that he did not have them, the plaintiff might produce them in evidence. *Travers v. Appler*, 2 Cr. C. C., 234.

§ 3559. If, on the notice of the opposite party, one produces what he claims to be the original instrument called for by the notice, and offers to verify it by his affidavit, the party giving the notice cannot in the first instance introduce a copy which he insists is different from the one produced on his notice. *Stitt v. Huidekopers*, 17 Wall., 384.

§ 3560. It is unimportant that, where books have been produced on the notice of the opposite party, the party producing them has been allowed to examine a witness who stated that he

had examined the books, then in court and lying before him, and could find in them no entry of a certain note and check which were the subject of controversy. *Coote v. Bank of United States*, 3 Cr. C. C., 95.

§ 3561. A notice to the defendants, at the trial, to produce a letter written to them, is not reasonable, and they will not be required to produce it, unless it is in their possession or that of their counsel. *Chapin v. Siger*, 4 McL., 378.

§ 3562. Letters testamentary can be used only within the jurisdiction in which they were issued; but after trial commenced, plaintiff cannot be called upon to produce his letters. *Chaplin v. Tilley*,* 3 Day (Conn.), 303.

XXIX. WITNESSES.

[As to Fees of Witnesses, see FEES. As to Process for Witnesses, see WRITS.]

1. In General.

SUMMARY — *Subpœna of United States courts; testimony must be taken by deposition, when,* § 3563. — *Attachment for contempt,* § 3564.

§ 3563. A form of subpœna used by the United States circuit court for ten years is valid, although formally different from that in use in the state courts. A witness who lives out of the state, and more than one hundred miles from the place of trial, cannot be summoned to testify in the federal courts, but his testimony must be obtained by deposition. *Russell v. Ashley*, §§ 3565-70.

§ 3564. The federal courts have power in civil and criminal cases to compel the attendance of witnesses by attachment for contempt. This process will issue upon the return of the officer who certifies that he summoned the witness, and the record of the court showing the non-attendance of the witness. If the witness lives out of the district of the court, but within one hundred miles from the place of trial, the process should be directed to the marshal of the district where the witness lives. *Voss v. Luke*, §§ 3571-74.

[NOTES.— See §§ 3575-3595.]

RUSSELL v. ASHLEY.

(Circuit Court for Arkansas: Hempstead, 546-550. 1847.)

Opinion by the COURT.

STATEMENT OF FACTS.— The defendant objects to the costs taxed against him upon the subpœnas, and the service thereof upon witnesses in the case, upon the ground that the subpœnas are void on their face, being directed to the marshal instead of to the witnesses themselves. By the act of congress of May 19, 1828 (4 Stat., 278), to regulate the processes in the courts of the United States, and made applicable to Arkansas by the act of August 1, 1842 (5 Stat., 499), it is enacted in substance that the forms of mesne and final process, except the style, shall be the same in the courts of the United States as in the highest state courts of original and general jurisdiction; subject, however, to such alterations and additions, from time to time, as the courts of the United States shall, in their discretion, deem expedient.

§ 3565. *Forms of subpœnas.*

The forms of subpœnas, as well as every other process, then, must conform to those used in the circuit courts of this state, unless this court has deemed it expedient, under the power vested in it by congress, to alter the same.

§ 3566. *Subpœna, to whom directed.*

A subpœna for a witness, by the laws of this state, is to be directed to the person to be summoned, and not to an officer commanding him to summon the witness. Rev. Stat., 774. The subpœnas which have issued from this court, since its first organization, have uniformly been directed to the marshal of the district and not to the witnesses themselves. Although this form of subpœna

has not been prescribed by an express rule of this court, yet it has received its sanction ever since its creation, and the legality of this form has never been called in question until the present time. The power of this court to adopt the form of a subpoena cannot be disputed, for it is expressly conferred by act of congress. The question then is, Has this court adopted this form? Uniform practice in the use of this form, from the origin of the court to the present time, would seem to be sufficient to establish the fact that the present form of the subpoena had been adopted.

§ 3567. *Uniform practice valid as a rule of court.*

Uniform practice, acquiesced in by the bar, and never contested by any one for a period of ten years, as firmly establishes that practice and makes it the act of the court, as if it had been prescribed by the written rules of the court. The subpoenas were not void. But the variance between the subpoena provided by the state law, and that used in this court, is in form only. They are substantially the same. In each of them the witness is commanded to appear at court and testify, and each may be served by an officer of the court or by a private person, the latter making oath to the service. They are, in fact, precisely the same, except in form. But even if they were substantially different, it is clear that the court has the power to alter the form of the writ; and the court in effect has exercised that power in the manner alluded to.

§ 3568. *Testimony of witness, residing more than one hundred miles from place of trial must be secured by deposition, and the costs of his attendance in court to testify orally cannot be allowed.*

The defendant objects to the item in the taxation of costs against him for the subpoena and its service on William F. Moore, a witness who resided more than one hundred miles from this place, and whose deposition the plaintiff had taken before the service of the subpoena on him. This objection is well taken. The deposition of a witness residing more than one hundred miles from the place of trial is to be taken, not *de bene esse*, but in chief, and he cannot charge the defendant with the costs of taking his deposition, and also the costs of summoning him as a witness. Having used the deposition, he cannot charge the defendant with having him summoned to appear and give evidence orally in court. This item is disallowed.

He also objects to the costs incident to suing out two commissions for the purpose of taking Moore's deposition. This objection is also well founded. I can perceive no necessity for more than one commission. These costs are disallowed. He also objects to all the costs incident to the taking the rejected deposition of Moore, including the fees of the clerk of this court. I deem this objection well taken, and these costs are disallowed as against the defendant. The certificate of the justice of the peace of the costs of taking depositions before him is to be regarded so far only as it states legal items of costs incurred before him. All beyond that is disallowed. Let the costs be retaxed in accordance with this opinion.

Ordered accordingly.

ON MOTION FOR RECONSIDERATION.

Opinion by JOHNSON, J.

Upon reconsidering the opinion previously given in this case, I am satisfied I erred in stating "that the deposition of a witness, residing more than one hundred miles from the place of trial, is taken, not *de bene esse*, but in chief." In a suit at common law, the deposition of a witness so residing is

taken *de bene esse*, or conditionally; the only condition, however, being, that the witness shall remove to a place less than one hundred miles to the place of trial, before the deposition is offered to be read; and, unless this shall be shown by the party objecting, the deposition may be read at the trial, without the service of a subpoena upon the witness.

§ 3569. *Witness residing more than one hundred miles distant is beyond power of a subpoena.*

Indeed, a witness residing more than one hundred miles from the place of trial is beyond the coercive power of a subpoena. The party may take his deposition, but cannot compel him to attend at court and give oral testimony. This had been expressly held by the supreme court of the United States in the case of *The Patapsco Ins. Co. v. Southgate*, 5 Pet., 615. The party desiring his testimony has no right to issue a subpoena to coerce his attendance, and if he does he must pay the costs incident thereto, and not throw them upon the other party. One other principle stated in the former opinion requires explanation. It relates to the costs of taking depositions.

§ 3570. *Items of costs of deposition must be certified.*

It is the duty of the person before whom depositions are taken to state and certify each item of costs before him, that the court may see that the charges are such as the law allows, and that the services have been performed.

In this case, the justice before whom the depositions were taken has not sent up a statement of the items of costs before him, but has certified them as follows: "Justice's fees, \$3.17; constable's, \$2.18; witnesses', \$2.50." This certificate is inadmissible to prove the amount of costs incurred before him. He should have stated the items of costs, and transmitted the evidence of the services rendered, that this court might see that the charges were legal, and such as the law allows. This certificate, however, is evidence that he claimed the fees allowed him by law. It is proper, then, to look at the services rendered by the justice to ascertain the amount of fees to which he was entitled; and in doing so, it appears he was entitled to the sum of \$3.17 for taking the five depositions. Rev. Stat., 395.

It is contended that the fees to the constable of \$2.18, and to the witnesses of fifty cents each, ought to be allowed. There is no proof that the constable rendered any service; nor is there any proof that the witnesses were summoned to testify before the justice, and that they claimed to be paid therefor, except the statement of the justice, of \$2.18 as constable's fees and \$2.50 as witnesses' fees. This is not sufficient. He should have certified the items of the services performed by the constable, and that the witnesses were summoned before him to testify, and that they claimed to be paid for their attendance.

Governed by the principles stated in this opinion, and looking into the taxation of the costs, I find that the defendant has been illegally taxed with costs, to the amount of \$18.46, which he has paid upon the execution against him. The plaintiff must refund and pay to the defendant that sum, together with the costs of the motion for a retaxation.

Ordered accordingly.

VOSS *v.* LUKE.

(Circuit Court for the District of Columbia: 1 Cranch, C. C., 331-338. 1806.)

STATEMENT OF FACTS.—Application for an attachment for witnesses in Virginia who reside out of the district of the court but within one hundred miles from Alexandria, and have been subpoenaed but fail to attend the trial.

Opinion by CRANCH, J.

The questions arising in this case are: 1. Can the court issue an attachment of contempt, in any case, against a witness in a civil cause, for not attending according to summons? 2. If so, upon what evidence of contempt will the court issue it? 3. Can the court issue an attachment against a witness in a civil cause who resides out of the district but within one hundred miles from the place of trial? 4. If so, to what officer shall it be directed?

§ 3571. *A circuit court can issue an attachment against a witness disobeying a summons to attend the court.*

1st. There seems to be no reason to doubt the power of the court to grant an attachment of contempt against a witness for not attending according to summons. The disobedience of any lawful command of a court of record is, at common law, a contempt of the authority of the court; and for all such contempts the common law process is an attachment. The common law, being part of the law of Virginia, became part of the laws declared by the act of congress of the 27th of February, 1801 [2 Stat. at Large, 103], to be in force in this country. Hence, whatever powers are, by the common law, incident to a court of record, may be exercised by this court, unless restrained by statute; but so far from being restrained by statute, the power of punishing contempts, and particularly that of a witness refusing to attend according to summons, is recognized by the statutes of Virginia and of the United States. By the judiciary act of 1789 [1 Stat. at Large, 73], it is enacted that "all the courts of the United States shall have power to punish, by fine and imprisonment, at the discretion of the said courts, all contempts of authority, in any cause or hearing before the same;" and in the fourteenth section of the same act (p. 81), the power is given to issue all writs "necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." An attachment is a writ agreeable to the principles and usages of law, and is necessary for the exercise of their jurisdiction as to contempts. It is also necessary in another point of view. The court cannot exercise its jurisdiction in common cases unless the testimony of witnesses can be had either by deposition or *viva voce*. If the witness in any cause is within one hundred miles of the place of trial, he cannot be compelled to give his deposition; and his deposition, if taken, cannot be used; and if his personal attendance cannot be had, the court cannot exercise its jurisdiction in that cause, and his personal attendance cannot be had but by an attachment. An attachment, therefore, is a writ necessary for the exercise of the jurisdiction of the court in the trial of causes, as well as in the punishment of contempts. By the act of congress of the 13th of February, 1801 [2 Stat. at Large, 89], which was in force on the 27th of February, 1801, one judge of the circuit court was authorized to hold a court for certain purposes, and to direct subpoenas for witnesses to attend the same, and the requisite process on the non-attendance of witnesses and jurors, and to award and issue process, and order commitment for contempts. And by the act of February 27, 1801, this court and its judges have the same powers which were given to the circuit courts by the act of February 13, 1801.

But it has been said, in argument, that the act of Virginia of November 29, 1792 (§ 4, p. 278), having imposed a penalty of \$16 upon a witness failing to attend, and having given the party injured a right to sue the witness for damages, contains an implied prohibition of any other remedy or process to compel his attendance. But the seventh section of the same act recognizes a compul-

sory process different from a subpoena. The words are, "any subpoena or process to require or compel the attendance of any witness may be served or executed in the district, county or corporation where the said witness shall be found." This clause, as we understand it, ought to be construed *reddendo singula singulis*, so as to read thus: "Any subpoena to require, or process to compel, the attendance of any witness, may be served or executed (that is, the subpoena to require may be served, or the process to compel may be executed) in the district, etc., where the witness may be found." Here, then, is a direct recognition, by the law of Virginia, of a "process" "to compel" the attendance of a witness, and which is to be "executed" on the witness wherever he may be found. The act of Virginia, section 4, is evidently intended to be a copy, substantially, of the twelfth section of the Stat. of 5 Eliz., ch. 9, which, in England, has never been construed so as to deprive the courts of the power of proceeding against a witness by attachment.

§ 3572. *An attachment will be issued upon the return of the officer that summoned the witness and proof of non-attendance.*

Taking it, therefore, as established that this court has power to issue an attachment of contempt against a witness for disobedience to a summons, it is to be considered, second, upon what evidence of contempt will the court issue it? It is laid down by Bacon (1 Ab., 180), that it may be awarded upon a bare suggestion; *a fortiori*, therefore, it may be issued upon the return of a sworn officer, who certifies that he has summoned the witness; and upon the record of the court, which certifies that, being called, the witness failed to attend according to the summons. And this is the usual practice of the courts in Maryland. What the practice has been in Virginia we are not informed. In New York it is not usual to grant an attachment in the first instance (*Jackson v. Mann*, 2 N. Y. T. R., 92); and in England, it seems that the court has usually required an affidavit, and seldom grants an attachment without a previous rule to show cause. But in England the motion for an attachment is not made at *nisi prius*, but in the court at Westminster Hall; and the object is not to obtain the attendance of the witness, but to punish him for his contempt. In this country it is used as the means of compelling an actual attendance on the trial, so as to prevent a continuance of the cause to a subsequent term. If the witness, when brought in, clears the contempt on oath, he is discharged without fine. The return of the officer, and the non-attendance of the witness, are certainly *prima facie* evidence of a contempt of the process of the court; and the remedy by attachment is found to be productive of very little inconvenience, and that is far overbalanced by the promptness of the remedy. The affidavit of a party could be very little more satisfactory to the court than the return of the subpoena. We are therefore of opinion that the practice heretofore adopted by the court is proper.

§ 3573. *This court can issue an attachment for contempt against a witness living outside the district but within a hundred miles of the place of trial.*

But the great question is, thirdly, can the court issue an attachment, in a civil cause, against a witness who resides out of the district but within one hundred miles of the place of trial? The constitution of the United States (eighth amendment) declares that, in criminal prosecutions, the accused shall have *compulsory* process for his witnesses. What is *compulsory process*? Not a summons alone. No other compulsory process for witnesses is, or has been, known by the laws of England, or of this country, than an attachment of contempt. It is true, in criminal prosecutions, the government bind their wit-

nesses over by recognizance; and, if they do not attend, their recognizances are forfeited; but this is not compulsory process; a man may choose to forfeit his recognizance rather than attend. On criminal prosecution, therefore, we take it for granted that the accused would have a right to attachment for his witnesses; and as, in such cases, depositions cannot be used, the attachment must, of course, run through the United States, because the constitution has guarantied to him this right.

By the act of congress of March 2, 1793 [1 Stat. at Large, 333], subpoenas in criminal cases may run from one district into any other; and in civil cases also to the extent of one hundred miles from the place of trial. Why should congress give the power to send subpoenas without giving the power of enforcing them? It would be a mere waste of time, and a means of bringing the authority of the court into contempt. Congress seems to have taken it for granted that it was sufficient to give the court the right to require the attendance of the witness, and that the usual and necessary power of all courts to compel obedience to their lawful orders, by attachment, was sufficient to enforce the subpoena. So far as a court has jurisdiction lawfully to command, it seems to follow that it has jurisdiction to cause its command to be respected. As it regards the attendance of witnesses in criminal cases, each court of the United States has jurisdiction over the whole United States; and, in civil cases, to the extent of one hundred miles. That such was the understanding of the legislature is evident from the provisions of the acts of congress. The judiciary act of 1789 [1 Stat. at Large, 73] authorizes the taking of the deposition of a witness who lives more than one hundred miles from the place of trial, "or who is about to go out of the district, and to a greater distance than as aforesaid." Why take his deposition if he lives more than one hundred miles from the place of trial? Because you cannot compel his attendance. Why not take his deposition if he is within one hundred miles? Because you may compel his attendance at the trial. Why not take his deposition if he is about to go out of the district, but not one hundred miles from the place of trial? Because you may compel his attendance. Why permit his deposition to be read if he has gone out of the United States, but not one hundred miles from the place of trial? Because you cannot compel his attendance. The same act declares that "any person may be compelled to appear and depose as aforesaid" (that is, any person who lives more than one hundred miles from the place of trial; or is about to go out of the district and more than one hundred miles from the place of trial, may be compelled to appear and depose). How compelled? "In the same manner," says the act, "as to appear and testify in court;" that is, as the same persons might be compelled to appear and testify in court, if they were within one hundred miles of the place of trial, although they should be out of the district; for you cannot take the deposition of a witness who is about to go out of the district, unless he is about to go more than one hundred miles from the place of trial; and if you do take his deposition, you cannot use it, says the same act, unless it shall appear to the satisfaction of the court that the witness is dead, or gone out of (not the district, but) the United States, or to a greater distance than as aforesaid from the place where the court is sitting. If this act of congress neither authorizes the court to compel the attendance of a witness who is out of the district, but within one hundred miles of the place of trial, nor allows his deposition to be read in evidence, the testimony of such witness may be entirely lost. But by not allowing his deposition to be read, it is evident that congress intended to give the court power

to compel his attendance. It has been said, in argument, that the power to issue a summons does not imply the power to send an attachment.

The expressions of the act of congress are that "subpœnas may run into any other district," etc. The words "may run" will perhaps bear a more comprehensive meaning than words containing a simple power to issue a summons to another district. But in either case, we think the authority to command the attendance of a witness necessarily implies a power to enforce that command. The means of enforcing it is an attachment, which is a common law weapon given to every court of record, and without which it would soon sink into disgrace and contempt. As far as the authority of the court extends, so far is that authority to be protected by the punishment of its contempt. It has been said that the contempt is an offense committed in another district, and therefore cannot be punished in this. But although committed out of the district, it was still within the jurisdiction of the court *quoad hoc*. As to the commanding and compelling the attendance of witnesses, the jurisdiction of the court extends to the distance of one hundred miles from the place of trial. It has been contended, also, that the court has no power to send criminal process out of the district; and, in support of this proposition, the first judiciary act of the United States [1 Stat. at Large, 73] has been cited; which provides that, if an offender be found in a district other than that in which he is to be tried, he can only be arrested by a warrant issued by some authority within the district where he is found; and that the judge of that district shall issue, and the marshal shall execute, a warrant for the removal of the offender to the district where the trial is to be had.

This objection may receive the same answer as the last, namely, that in the one case the court has jurisdiction, and in the other it has not. In the case of a criminal, this court is not authorized by law to command the offender, in another district, to attend the court in this. No jurisdiction, *quoad hoc*, is given.

It has also been objected that no officer is bound to execute it, because the marshal of the district of Virginia is only bound to execute process within his district; and the marshal of the District of Columbia, within his district only; so that neither marshal has power fully to execute it. The answer to this objection is, that, if the court has the power of compelling the attendance of the witness, its process is lawful. The act of congress, it is true, is peremptory that he shall execute throughout his district, etc., but it does not forbid him to finish an execution out of it; and his oath binds him to execute and return all lawful precepts to him directed, whether in or out of his district. For these reasons, we have no doubt that this court has the power of compelling, by attachment, the attendance of witnesses who live within one hundred miles of the place of trial, although out of the District of Columbia.

§ 3574. *An attachment for contempt against a disobedient witness, living outside the district, should be directed to the marshal of the district where he lives.*

The next question is: 4th. To what officer shall the attachment be directed? Undoubtedly to the marshal of the district in which the witness lives. It is declared by the judiciary act of 1789, section 27 [1 Stat. at Large, 73] to be his duty "to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States;" and he is bound by his oath not only to execute all lawful precepts directed to him, but also to make true returns, and that without any restriction as to the district from which such precepts are to issue, or to which they are to be returned. If, then, it is law-

ful for this court to issue subpoena, commanding the marshal of the district of Virginia to summon a witness who lives in that district to attend the court in this, it is a lawful precept to him directed, under the authority of the United States, and he is bound to execute and return it. So, if this court has the power of compelling the attendance of such witness by attachment, the writ of attachment is equally a lawful precept to him directed, under the authority of the United States, and he is equally bound to execute and return it. The whole question is finally resolved into that of the power of the court to compel the attendance of the witness; for, if the court has that power, the process is lawful; and if lawful, the marshal is bound to execute and return it.

Upon the whole, therefore, we are satisfied that this court has the power to send an attachment into the district of Virginia, for the purpose of compelling the attendance of a witness, provided it appears by affidavit that the witness lives within one hundred miles of the place of trial; and we think the return of the marshal upon the subpoena, and the record of the default of the witness, and the affidavit as to residence, sufficient *prima facie* evidence of a contempt upon which to issue the attachment. See, also, the case of *Wellford v. Miller*, in Alexandria, July term, 1808 [1 Cr. C. C., 485].

§ 3575. **Summoning and attendance.**—A witness summoned by a justice of the peace of the county of Washington, D. C., to testify in a case of a small debt, failed to attend, and the justice, under the Maryland act of 1791, chapter 68, section 8, issued an attachment for him returnable to the circuit court. The court imposed a fine of twenty shillings, holding that the punishment could not be extended beyond that prescribed by the act. *Ex parte Gorman*, 4 Cr. C. C., 572.

§ 3576. A witness may be summoned if within one hundred miles of the place of trial, though his residence be out of the district. But the subpoena runs throughout the district the same as any other writ. *Dreskill v. Parrish*, 5 McL., 213; S. C., 5 McL., 241.

§ 3577. The court was of opinion that a witness residing more than one hundred miles from the place of trial could not be compelled to attend, and refused a subpoena directing him to go before a magistrate in the town where he resided and testify. *Henry v. Ricketts*, 1 Cr. C. C., 580.

§ 3578. An indorsement of acceptance by a witness, on a subpoena which has never been placed in the hands of the marshal or his deputy, is not a service. And if the witness attends he does so voluntarily. It seems that such a service would not authorize an attachment against the witness for non-attendance. *Dreskill v. Parrish*, 5 McL., 213; S. C., 5 McL., 241.

§ 3579. The circuit court of the District of Columbia cannot, in a criminal case, compel by attachment the attendance of a witness residing in Virginia. *Ex parte Pleasants*, 4 Cr. C. C., 314.

§ 3580. The court ordered an attachment for a witness residing in Maryland, who had not attended according to summons. *Somerville v. French*, 1 Cr. C. C., 474.

§ 3581. When a party is attached for disobeying a subpoena to appear before a commissioner for examination *de bene esse*, the question of the authority of the commissioner and the regularity of the proceedings before him is properly brought before the court by affidavit. *Ex parte Humphrey*,* 2 Blatch., 228.

§ 3582. An attachment for a witness cannot be served in the court room. *Davis v. Sherron*, 1 Cr. C. C., 287.

§ 3583. The issuing an attachment to compel the attendance of a witness who has disobeyed a subpoena is in the discretion of the court. In a case where the witness resided more than one hundred miles from the place of trial, by the post routes, but less than one hundred miles by a usually traveled route, and it was shown that his attendance with his account books would entail serious loss to his business, and his testimony could be taken as well by deposition, the attachment was refused. *Ex parte Beebees*,* 2 Wall. Jr., 128.

§ 3584. An attachment for not attending court as a witness must not be served in the corridor adjoining and being the common entry to the court room. *United States v. Scholfield*, 1 Cr. C. C., 130.

§ 3585. A subscribing witness may be compelled to attend the court to prove a deed. *Irwin v. Dunlap*, 1 Cr. C. C., 552.

§ 3586. A party has the right to the attendance of a material witness, if it can be procured, although his deposition be on file. *Anderson v. Moe*, 1 Abb., 299.

§ 3587. A witness summoned to attend a civil trial is not liable to attachment for contempt in failing to attend, unless his traveling fees and one day's attendance fee are tendered him when he is summoned. *In re Thomas*,* 1 Dill., 420.

§ 3588. A witness subpoenaed at the place of trial, on the day on which he is required to attend in court, is not entitled to a travel fee. *Steamboat Sunnyside*, 5 Ben., 162.

§ 3589. In criminal cases, a witness who is summoned must attend whether his fees are tendered him when summoned, or not. If he cannot pay his expenses, the government must supply the money. *United States v. Durling*,* 4 Biss., 509.

§ 3590. Traveling fees to a witness are allowable only to the extent a subpoena will run; that is, for any distance within the district; but for not exceeding one hundred miles from the place of trial, unless the distance is wholly within the district. *Anonymous*, 5 Blatch., 134.

§ 3591. Witnesses were allowed their fees although the summons was served by a private person—such person making affidavit that he read the summons to the witnesses, and that he believed they attended in consequence of such summons. *Power v. Semmes*, 1 Cr. C. C., 247.

§ 3592. *Under the rule.*—The court, at the motion of defendant, ordered that sundry witnesses on the part of the United States should be taken out of court during the examination of others, but refused to order them to be kept separate from each other. *United States v. White*, 5 Cr. C. C., 38.

§ 3593. If one of the witnesses ordered out of court remains in court, his testimony will be rejected; but witnesses will not be sent out after they have been examined. *United States v. Woods*,* 4 Cr. C. C., 484.

§ 3594. *Recognized.*—A party committed as a witness on behalf of the United States discharged on his own recognizance, on making affidavit of his being in a critical state of health, and in want of proper accommodations, and that he is a permanent resident and established in business in a city in another state. *United States v. Lloyd*,* 4 Blatch., 427.

§ 3595. In criminal cases, when the prosecuting officer is doubtful whether witnesses will attend a trial, he should compel them to recognize for their appearance, and if they fail to recognize, he should imprison them till the trial. *United States v. Durling*,* 4 Biss., 509.

2. Competency.

SUMMARY—The statute, § 3596.—*Religious belief*, § 3597.—*Accomplices*, § 3598.—*Effect of state laws; effect of section 858, Revised Statutes*, § 3599; *applies in suits by and against the government*, § 3600; *parties may be compelled to testify*, § 3601; *suits by administrators*, §§ 3602-3605; *informer may testify; effect of the act as to right of parties to testify*, § 3606.—*In the court of claims and the District of Columbia*, §§ 3607-3609.

§ 3596. In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried. *Provided*, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty. *Revised Statutes*, § 858.

§ 3597. A witness who believes in the existence of a God and that all offenses are punished in this life, not the next, is a competent witness. The better practice to prove the atheism of a witness is to call other persons who have heard his declarations on the subject. If, however, the witness is questioned on this subject and answers without objection, the evidence will be received. *United States v. Kennedy*, §§ 3610-11.

§ 3598. An accomplice is a competent witness, but generally his testimony should be corroborated by other testimony in some material point, tending to prove the offense charged. *United States v. Troax*, §§ 3612-13.

§ 3599. State laws as to the competency of witnesses have no force in the federal courts when acts of congress exist on the subject. The provisions of section 858, *United States Revised Statutes*, govern the admissibility of parties interested in an action, and exclude such witnesses only in actions against administrators, executors and guardians as to transactions with or statements by the deceased. This act excludes, in federal courts, the provision of the Nevada statute providing that if one party to a transaction is dead the other cannot testify as to it. *Rice v. Martin*, §§ 3614-17.

§ 3600. The United States government is bound by the provisions of the acts of March 3, 1865, and July 2, 1864, as to the competency of witnesses, and in a civil suit by or against the

United States government the other party is a competent witness. *Green v. United States*, §§ 3618-19.

§ 3601. Under section 858, Revised Statutes, relating to witnesses in federal courts, parties to a suit are not only competent to testify in their own behalf, but may be compelled to testify on the side of the adverse party. *Texas v. Chiles*, §§ 3620-21.

§ 3602. The provisions of section 858, Revised Statutes, do not prevent a party to a suit from testifying in his own behalf if the other party has given a deposition in his own behalf, and then died, the suit being continued by his administrator under statutory provisions. *Mumm v. Owens*, § 3622.

§ 3603. Under the statute of July 2, 1864, in relation to witnesses in federal courts, a party is allowed to testify against an executor, etc., if called by the adverse party. The adverse party in such cases is the party against whom the testimony is used. A co-defendant in a suit in equity cannot, by calling the plaintiff, admit his testimony against the co-defendant. *Eslava v. Mazange*, §§ 3623-27.

§ 3604. Under the statutes of July 2, 1864, and March 3, 1865, relating to witnesses in federal courts, a plaintiff in a suit in equity cannot give his deposition in relation to transactions had with the person whose administrator the defendant is. An *ex parte* order from the court that such deposition be taken does not bring the witness within the exception of the statute allowing the party to testify in such cases if called by the court. *Ibid.*

§ 3605. Under section 858 of the United States Revised Statutes, one interested in the issue of a suit, but not party to the record, is competent to testify against an executor, as to conversations with the deceased. Only actual parties to the record are excluded, and it makes no difference what state statutes on this subject provide, since they are rules for the federal courts only when congress has not legislated on the subject. *Potter v. National Bank*, §§ 3628-31.

§ 3606. In the federal courts parties to a civil suit are competent witnesses by section 858, Revised Statutes. A proceeding in admiralty to condemn property for a violation of the revenue laws is a civil suit. By 13 Stat. at Large, 442, § 2, and 14 id., 146, § 9, an informer may testify although interested in recovering the fine, and if he testifies, the claimant may. These special statutes are not necessarily inconsistent with the general law, and do not limit the right of parties in such cases to testify, whether the adverse party does or not. *United States v. 10,000 Cigars*, §§ 3632-34.

§ 3607. Under section 1079 of the United States Revised Statutes, no claimant in the court of claims, or any person under whom he claims, can be a witness to support the claim; but by section 1080, the United States can make the claimant a witness. Neither of these sections hinders the United States from calling as witness one who is directly interested against the claimant, although a judgment in favor of the United States may establish the right of the witness to the same claim. *Bradley v. United States*, § 3635.

§ 3608. By common law, a party to a suit is a competent witness to prove the contents of a lost package. Section 1079 of the Revised Statutes restores the common law rules as to the competency of parties as witnesses in suits in the court of claims, which had been abrogated by section 858, Revised Statutes. *United States v. Clark*, §§ 3636-40.

§ 3609. Sections 876 and 877, Revised Statutes, provide that in the District of Columbia parties to a case are, with certain exceptions, competent witnesses. Section 858 provides that in federal courts generally, parties are competent, except that in actions against executors, etc., neither party shall testify to transactions or conversations with the deceased. The history of the legislation shows that this exception is intended to be in force in the District of Columbia, and it will be held to be virtually incorporated as an exception in the statute relating specially to the District. *Page v. Burnstine*, §§ 3641-43.

[NOTES.— See §§ 3644-3954.]

UNITED STATES v. KENNEDY.

(Circuit Court for Illinois: 3 McLean, 175-177. 1843.)

Opinion by the COURT.

STATEMENT OF FACTS.— This action is brought against the defendants for trespass upon the public lands. The jury being impaneled, William H. Adams was called as a witness; and being asked whether he believed in the existence of a God, and in a future state of rewards and punishments, answered that he believed in a God, and that all offenses were punished in this life, and not in the next.

§ 3610. *A witness who believes in the existence of a God, and that offenses are punished in this life, is competent.*

The witness having answered the question without objection, it will be received. But it may be proper to remark that the modern practice is not to interrogate the witness as to his religious belief. Formerly the witness was examined on this point, either before or after he was sworn. But it is now proved by witnesses who may have learned the views of the witness on this subject from his own declarations. And this seems to be more reasonable and more conformable to the spirit of our institutions.

However highly the witness may appreciate character, and however strongly he may detest the crime of perjury, from the infamy attached to it, still the law requires a higher obligation to operate upon the conscience of the witness. He must believe in a superintending providence who punishes crime. This presupposes a belief in a future state. The authorities are divided on the point whether, if the rewards and punishments, according to the belief of the witness, are to be inflicted in this life, he is competent. *Commonwealth v. Bachelor*, 4 Am. Jurist, 81. In *Hunscom v. Hunscom*, 15 Mass., 184, the court held that mere disbelief in a future existence went only to the credibility. *Contra*, *Atwood v. Welton*, 7 Conn., 66.

In the case of *Omichund v. Barker*, Willes, 545; S. C., 1 Atk., 21, where the subject was largely discussed, it was held that the belief of a God, and that he will reward and punish us according to our deserts, is essential; but whether the rewards and punishments are limited to this life, or the next, is not material. At least this view is sustained by the weight of authority. The individual who believes that a bad act will be punished in this life, and a good one rewarded, by God, cannot be said to act free from that moral influence of hope and fear which the law contemplates as the best security against punishment. This influence will operate more strongly when referred to the future than the present life. And it would seem, as stated in some of the authorities, that a disbelief in a state of future rewards and punishments should go to the credibility of the witness, and not to his competency. 1 Greenl. Ev., secs. 368, 369 and 370.

The witness was sworn, and also D. Kinsey, who proved that the defendants, at different times and for a series of years, were in the practice of cutting timber on the public land, and using it for their own purposes. It was made to appear that the pre-emption law of 1838 embraced the case of the defendant Clyburn, but he took no step during the continuance of the law to perfect his title. He is, therefore, liable to an action of trespass after the expiration of the pre-emption law.

§ 3611. *Under a declaration laying trespass from a certain date to the time of bringing the action, the court held that a single trespass might be proved anterior to time laid, but not divers trespasses; that divers trespasses might be proved within the time laid.*

The declaration laid the trespass from 1st of October to the time of bringing the action. And the court held that a single trespass might be proved anterior to the time laid, but not divers. That divers trespasses might be proved within the time laid.

UNITED STATES v. TROAX.

(Circuit Court for Ohio: 3 McLean, 224-226. 1843.)

Opinion by the COURT.

STATEMENT OF FACTS.— This is an indictment for stealing a letter from the mail, containing money. The principal witness against the defendant was the carrier of the mail, who admitted that he was an accomplice, and received a part of the money taken from the letter. The carrier of the mail, it being a horse mail, being young and inexperienced, was influenced, as he stated, to participate in the act through the persuasion of the defendant.

§ 3612. *The value and credibility of an accomplice as a witness.*

The court instructed the jury that an accomplice is a competent witness, and that the jury must judge of his credibility. Such a witness always comes before the court and jury under the most unfavorable circumstances. By his own admission, he participated in the offense which he charges, and is called to establish against the defendant. And this charge is made by him generally, if not always, under a hope that by making it he may escape punishment. Such a motive is supposed to influence the witness so strongly as to take from his statements the credit which they might otherwise be entitled to. And in addition to this, the fact of having committed the same offense goes to impeach his credibility. From these considerations, a conviction is rarely founded alone upon the testimony of an accomplice.

§ 3613. *Accomplice should be corroborated.*

But if an accomplice be corroborated in some material circumstances, a jury will the more readily believe his other statements. The corroboration must be of some material part of his relation; that which goes to prove directly or indirectly the offense charged, and not an immaterial fact. An accomplice may impress the jury with more or less respect, from his appearance and the manner of his relation. If, from the circumstance of his youth and inexperience, and the superior capacity and experience of the defendant, it is probable that the witness has been unduly influenced by the defendant, the greater credit will be given to the witness. This remark is made with reference to the present case.

The principal witness in this case is corroborated in several important particulars. There is no doubt that the offense charged was committed; and it does appear, from the facts proved, that the defendant might have committed the act as charged. And beyond this, from the conduct of the defendant, his conversations at different times, and with different persons, and especially his great anxiety to induce the witness to leave the state, and his acts in reference to this object, go to create a probability that he had some agency in violating the mail. Circumstances are proved which, if they do not establish the defendant's guilt, independently of the statement of the accomplice, create a strong ground of suspicion against him. And these circumstances remain unexplained. Upon the whole, gentlemen, you must bring your minds to a conclusion in this, as in other cases, as to the guilt or innocence of the defendant. Before you convict, you must be satisfied of his guilt, beyond a reasonable doubt. Not that you are to acquit on the ground that he may possibly be innocent, for a jury in such a case cannot act upon possibilities. If you believe him guilty, you will say so.

RICE v. MARTIN.

(Circuit Court for Nevada: 7 Sawyer, 337-348. 1881.)

Opinion by HILLYER, J.

STATEMENT OF FACTS.—The plaintiff claims to have been a partner of B. B. Norton in his life-time, in a brand of cattle known as the figure 2 cattle, and in a ranch known as the Duck Flat ranch. The main question is whether he was so or not. Incidental to this is a question of statutory construction, involving the law of Nevada, and section 858 of the Revised Statutes of the United States. The question is whether Rice is a competent witness as to transactions between himself and Norton—Norton being dead. Section 377 of the practice act of Nevada abolishes all disqualifications of a witness “by reason of his interest in the event of the action or proceeding as a party thereto or otherwise” (Comp. Laws, sec. 1438); and section 379, as amended, provides that “no person shall be allowed to testify *under the provisions of section 377* when the other party to the transaction is dead.” Statutes 1879, p. 49.

§ 3614. *Under section 858, Revised Statutes, no witness can be excluded for interest unless the opposite party is executor, administrator or guardian.*

Section 858 of the Revised Statutes of the United States enacts that “in the courts of the United States no witness shall be excluded . . . in any civil action because he is a party to, or interested in, the issue tried. . . . In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States.” These are the provisions of law in force, and the defendants object to the testimony of Rice on the ground that Norton, the other party to the transaction, is dead. At common law a witness was disqualified who was either a party to the action or interested in the event of the suit. Section 377 removed that disqualification. Under that section every person directly interested in the suit as a party or otherwise is competent. The object of the section was to enlarge the competency of witnesses—to increase the number of cases in which a witness could testify,—and it had that effect. Then follows the limitation in section 379, “no person shall be allowed to testify *under the provisions of section 377*.” . . .

The only persons rendered competent by section 377 were, for our purposes, persons who before had been disqualified by reason of interest in the event of the action or proceeding. It must be some person rendered competent by section 377, not so before, upon whom the restriction in section 379 must be placed. In other words, the witness disqualified by section 379 must be some person who had an interest in the event of the action.

It could not have been the intention of the legislature to narrow the competency of witnesses where, before the adoption of section 377, they had been competent; the reference to that section in section 379 forbids that idea. “Party to the transaction” must, therefore, be referred to a person who has some interest in the event of the action as a party thereto or otherwise. And section 379 must be read as if the language were, “when the other party [being a person who has an interest in the event of the action or proceeding as a party thereto or otherwise] to the transaction is dead.” But by section 858 of the Revised Statutes of the United States, no person is to be excluded because he is a party to or interested in the issue tried, with but one proviso, viz.: “That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against

the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

§ 3615. *State laws as to evidence do not apply as rules of decision when provision has been made applicable to the contingency by the constitution or laws of the United States.*

This proviso does not embrace this case. The state statutes are to be rules of decision only in cases where the constitution, treaties and statutes of the United States do not otherwise provide. When they do otherwise provide, the state laws cease to be of force. To illustrate by so much as fits this case: No witness is to be excluded because he is a party to the issue. This is broad enough to cover every case in which a party is offered as a witness, and the objection is on the ground of interest, as I have endeavored to show it must be in this case. When we look for any exception, we find that there is none except in cases in which the suit is brought by an administrator, executor, or guardian, which is not this case, there being no administrator, executor, or guardian, as a party in the case. It seems to me that in reading section 858, counsel for the defendants has taken the exception in the proviso for the rule. "In the courts of the United States no witness shall be excluded because he is a party." This is the rule with this proviso: Provided, that in actions by or against executors, administrators, or guardians, neither party shall be allowed to testify against the other; and so the court held in *Potter v. Bank*, 26 Int. Rev. Rec., 403. "We have seen," says the court in *Potter v. Bank*, "that the existing statutes of the United States do otherwise provide, in that they forbid the exclusion of a witness upon the ground that he is a party to, or interested in, the issue in any civil action whatever pending in a federal court, except in a certain class of actions which do not embrace the one now before us."

In *Lucas v. Brooks*, 18 Wall., 436-453, the court says: "Undoubtedly the act of congress has cut up by the roots all objections to the competency of a witness on account of interest. But the objection to a wife's testifying on behalf of her husband is not and never has been that she has any interest in the issue to which he is a party. It rests solely on public policy. To that the statute has no application." In this latter case the deposition of the wife was refused, and in *Packet Company v. Clough*, 20 Wall., 528, 537 (§§ 86-89, *supra*), it was received because the statute of Wisconsin made the wife a competent witness. Thus showing that the supreme court do not regard the law of congress as in any way affecting the competency of married women, but leaves that to rest where it did before.

Both matters rest alike on public policy—neither on interest. When the laws of the United States speak, they are controlling. Says the court in the latter case: "Now, the competency of parties as witnesses in the federal courts depends on the act of congress in that behalf passed in 1864, amended in 1865, and codified in the Revised Statutes, section 858. It is not derived from the statute of Ohio, and is not subject to the conditions and qualifications imposed thereby. The only qualifications which congress deemed necessary are expressed in the act of congress; and the admission in evidence of previous communications to counsel is not one of them." This is very strong, and fully warrants us in admitting the testimony of the plaintiff, Rice, in this case.

§ 3616. *Circumstances under which no partnership existed.*

Coming now to the facts, there is nothing in the testimony of any of the plaintiff's witnesses, or in Norton's letter, inconsistent with the theory of the

defendants, that the purchase of the cattle and ranch was, in fact, negotiated by and through Rice on joint account, but was given up for lack of funds to carry out the bargain. All agree that the final delivery did not take place until June 5, 1875. At that date Rice says he was half satisfied that Norton denied his interest; yet he never, according to his own story, had any distinct understanding with Norton in his life-time. After his death he comes forward to claim a half interest in the ranch, cattle and increase.

In legal contemplation to be *half* satisfied is to be put on inquiry, and to know definitely, one way or the other. Rice, therefore, knew that Norton denied his interest in June, 1875. Rice says, at page 52 of his testimony, "From the summer of 1875 until Norton's death Norton and I transacted the business of partnership as follows: we consulted," etc.; which means, if anything, that Norton recognized him as having an interest; yet farther on, at page 82 *et seq.*, he confesses that he was completely shut out from any management of the alleged partnership property, and half believed that Norton denied his rights as early as June, 1875. When the defendants assert that Rice gave up the contract because he had not enough money to perform it, he has no trouble in showing, by himself and other witnesses, that he had a large amount (between twenty and thirty thousand dollars' worth) of property; when, on the other hand, he is asked to explain why he did not move in this matter during Norton's life-time, and at least have a perfect understanding with him, he says he was too poor to bring a suit and do justice to his creditors; that being half satisfied Norton denied, or would deny, his interest if he approached him on the subject, he never said anything to him.

For a third reason or excuse for his laches he says, at page 56, "Mr. Norton always held out to me that he would soon be able to settle accounts," *i. e.*, partnership accounts. If he believed that Norton denied his partnership interest, as he must, he could not have had any genuine belief that he would settle.

One Albert Shuler testifies that at the time Rice bought into the Tommy Smith place and cattle he made arrangements with him to furnish unbroken cows to run a dairy, on the strength of which he rented a dairy-house and fenced a calf-pen; and his failure to furnish the cows as agreed was a great disappointment and loss.

When this is compared with those portions of the testimony of Rice in which he seeks to convey the idea that he did not know positively that Norton denied his interest in the cattle, it will appear very strange that he should have subjected himself to such loss and disappointment to his friend without so much as asking Norton for cows enough to start Shuler's dairy. But it is plain from all the testimony of Rice that he was well enough satisfied that Norton did not regard him as his partner, at least after June 5, 1875.

If at that date the plaintiff had been ready to comply with his part of the partnership agreement, and Norton refused, plaintiff would have had his action then for a breach of that agreement. Instead of suing then, he waits four years and sees Martin and Clark taking an interest with Norton during all that time. In addition, Dwelly takes an interest, and after the intervenors have loaned Norton \$7,000 and taken these figure 2 cattle as security, and after Norton is dead, he sues for his half interest in the ranch, cattle and increase.

No sufficient reason is given for this delay and for all these unnecessary complications of interests. The duty of the plaintiff on the 5th day of June, 1875, was plain. When he mistrusted that Norton was denying his interest in

the partnership, he should have had an understanding with him at once. Had he broached the subject to Norton at that time, he would have learned that Norton did deny his interest, and that he had a right of action against him for a breach of his partnership agreement, in which, if he proved the breach, he could have recovered such damages as could have been proved at that time. But it seems inequitable to permit him to lie by for four years, all the time under a belief that he was not recognized as a partner by Norton, until time has obscured every fact with doubt and Norton is dead. *Elmendorf v. Taylor*, 10 Wheat., 168; 6 Pet., 66.

To the case as made by Rice a full defense has been proved. It is not denied that Rice, the plaintiff, negotiated the trade as related by Smith in his deposition. But the claim is that in January, 1875, he withdrew from the arrangement and gave up the cattle to Norton, with the understanding that if he could arrange his money matters so as to be able to bear his share of the cost, he should be taken back; but that he never was able to do so. In support of this they show by Smith, the owner of the cattle, that after Rice had negotiated for the cattle, in the fall of 1874, he came to his place with Norton and Martin in January, 1875, and that Norton took him aside and told him that Rice was in trouble about some sheep, and that he (Norton) would take the cattle in his own name with the consent of Rice; and that after this he considered Rice was not in the trade. Nor, except as to some cattle paid for in 1874, does it appear that Rice ever had anything to do with the cattle or ranch after January, 1875. His conduct, at this time, is all in corroboration of the truth of Smith's statement. And thence on until June 2, 1879, when he serves his notice on defendants, claiming a half interest, he does nothing which indicates that he is a joint owner, or believed he was. He does not act like an owner. It is not probable that Norton would take the occasion, when Rice was there, to tell Smith what he did unless Rice had in fact given his consent. It may be readily inferred from the deposition of Smith that Norton, Rice and Martin came to Smith's ranch for the purpose of getting the consent of Smith, to the withdrawal of Rice, and that what was said by Norton to Smith was but a continuance of some former conversation. This testimony of Smith's, touching any conversation with Norton out of the hearing of Rice, is objected to, but it would be admissible upon the point whether Rice did or did not assent to Norton's taking the cattle, as a circumstance tending to show that he did assent. But be this as it may, Rice's conduct at the time of the final delivery is a confirmation of the truth of the testimony that he had given up his interest in the property. His inquiry of Smith whether Norton had said anything to him about taking him back, and his yielding possession and control of everything to Norton and Martin and Clark, and asserting no claim, are all circumstances hard to explain on any theory of ownership in Rice.

Mr. Dwelly may be interested in this suit, but it is not easy to see how. Rice, as a partner of Norton, it would seem, can have no remedy for Norton's dealings with the partnership property, except against him, in the absence of fraud or collusion. Dwelly's testimony, corroborated by the other circumstances, and by the testimony of Welsh, ought to outweigh that of Rice. Dwelly testifies that Rice did tell him, in his butcher-shop at Reno, that he had been obliged to give up the Tom Smith trade. Welsh testifies that he told him the same thing, but could get the cattle back if he could get money to work with. The defendants have answered the criticisms of plaintiff on the testimony of Dwelly, and have explained perfectly why he testified more fully

when he testified for the defendants than when he testified for the intervenors. The testimony was taken for the intervenors September 8, 1880; for the plaintiff from January 5 to 8, 1881; and for the defendants, from January 21 to 26, 1881.

The bill must be dismissed, with costs to defendants; the intervenors to have the relief prayed.

Opinion by SAWYER, J.

The question as to the competency of Rice's testimony being an important one, I desire to add some observations to those made by my associate.

Rice is a party to the suit; and, also, to the transaction in issue alleged to have been had between him and Norton in the life-time of the latter, under whom the opposite parties claim title. For the purposes of the decision, I shall assume, without deciding the point, that the opposite parties to Rice, being successors in interest to Norton, who is deceased, are "representatives of a deceased person," within the meaning of the statute of Nevada, as amended in 1879. Stat. Nev. 1879, 49. The question, then, is, whether the statutes of the United States have an express direct provision upon which the competency of Rice depends, or whether the case falls within those provisions of the United States statutes which make the competency depend upon the statute of Nevada upon the subject. The testimony was incompetent at common law, because Rice is a party to the suit, and interested in the controversy.

If his testimony is competent, then, it is because some statute of the United States makes it so directly by some express provision applicable to the case, or, indirectly, by making the competency depend upon some statute of Nevada rendering it competent. If the competency is referred to the statute of Nevada, and governed by that, then, upon the assumption stated, the testimony is inadmissible, under the section referred to—the opposite party being the "representative of a deceased person." Section 858 of the Revised Statutes of the United States, applicable to the case, reads as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: *Provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

The competency of Rice's testimony depends upon the construction of the words, "in all other respects," etc., of the last clause, in its relation to the rest of the section. Do they refer to the proviso immediately preceding, or to the main provision of the section, as limited by the proviso? Although the statute has been in some instances unconsciously changed in the revision, this was unintentional, as the revisers were required to express in the revision in a concise form the statutes as they before stood; and they, doubtless, in all cases contemplated carrying out the intention as expressed in the statute authorizing the revision.

§ 3617. *Rule for construction of the Revised Statutes.*

Where there is any ground for doubt as to the meaning of a provision of

the Revised Statutes, an examination of the statutes as they stood before the revision will often render the meaning clear. In all cases where the revision will bear a construction in harmony with the statutes as they before stood, that construction should be adopted. The first act passed by congress touching this question was that of 1862, which is as follows: "The laws of the state in which the court shall be held shall be the rule of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity and admiralty." 12 Stat., 588, 589.

This left the whole question to be determined by the state statute, and under this statute, on the assumption stated, Rice's testimony would be clearly inadmissible under the amended statute of Nevada before cited, Rice being a party, and "the opposite party" being the "representative of a deceased person," etc. The next statute of the United States touching the question is found as an incongruous appendage to section 3 of an appropriation act of 1864, and reads as follows: "Provided that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or interested in the issue tried." 13 Stat., 351.

This is broad in its terms, and without exception in the case of any party in interest. Clearly, under this provision, Rice could not be excluded. This provision limits the operation of the provisions of the act of 1862. So that the two sections taken together would read as follows: "The laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States, in trials at common law, in equity and admiralty," "provided, that in the courts of the United States there *shall be no exclusion* of any witness . . . in civil actions because he is a party to or interested in the issue tried." Under the statute as it thus stood, the laws of Nevada excluding a party, where the opposite party is the representative of a deceased person, is not adopted, and such party is a competent witness under the direct provision of the act of congress. The next act of congress was that of 1865, which provides, "that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

This was but a limitation put upon the sweeping provision of the act of 1864, last cited, which admitted parties under all circumstances to testify, and the limitation only embraces the case of "executors, administrators or guardians." It does not reach "the representatives of a deceased person." Hence as to such party the statute as it before stood remains unchanged, so that on adding this further proviso to the statute as it before stood, Rice is still a competent witness. Thus the statute stood at the date of the revision when all these three statutes were carried into section 858 of the Revised Statutes. Instead of placing the first act adopting the state law first in the section, it was placed last, next following the proviso, but without any intention of changing the meaning, so that the principal clause in section 858 of the Revised Statutes and its proviso is merely a limitation upon the act of congress first passed, as stated, adopting the laws as to competency of witnesses expressed in a little different form in the last clause of said section.

Under this direct provision of the United States statute, therefore, the tes-

timony of Rice is admissible. From the foregoing it will be seen that the general rule in civil actions now, as before the revision, is that the laws of the state as to the competency of witnesses, govern, except that the state laws excluding witnesses on account of color, and laws affecting the competency of parties in interest to the issue to be tried, are inapplicable. The competency of such witnesses depends wholly upon the direct provisions of the United States statutes.

Upon the facts and other points discussed, and as to the decree ordered, I also concur with the district judge.

GREEN v. UNITED STATES.

(9 Wallace, 655-658. 1869.)

ERROR to U. S. Circuit Court, Southern District of Ohio.

STATEMENT OF FACTS.—The question in this case is whether the act of congress of July 2, 1864, and the amendatory act of March 3, 1865, on the competency of witnesses, apply in suits in which the United States is a party, so as to make a party to the suit a competent witness as against the United States.

§ 3618. *The provisions of the act of July 2, 1864, and the act of March 3, 1865, amendatory thereof, concerning witnesses in the federal courts, apply to civil actions in which the United States is a party.*

Opinion by MR. JUSTICE BRADLEY.

We see no reason why these acts should not be applied to trials in which the United States are a party, as well as those between private persons. The express exception of executors, administrators and guardians would seem, by necessary inference, to leave all other suitors under the operation of the law.

§ 3619. *The federal government is bound by statutes laying down general rules of procedure, in civil actions, though not specially named therein. (a)*

It is urged that the government is not bound by a law unless expressly named. We do not see why this rule of construction should apply to acts of legislation which lay down general rules of procedure in civil actions. The very fact that it is confined to *civil* actions would seem to show that congress intended it to apply to actions in which the government is a party, as well as those between private persons. For the United States is a necessary party in all criminal actions, which are excluded *ex vi termini*; and if it had been the intent to exclude all other actions in which the government is a party, it would have been more natural and more accurate to have expressly confined the law to actions in which the government is not a party, instead of confining it to *civil* actions. It would then have corresponded precisely with such intent. Expressed as it is, the intent seems to embrace, instead of excluding, civil actions in which the government is a party. Nothing adverse to this view can be gathered from the exceptions made in the amendment passed in

(a) In a criminal prosecution, where the defendant claimed the right to testify under a statute of Kansas, the court held as follows: "Crimes against the United States are wholly withdrawn from the domain of *state* legislation. They are created solely by congress, and congress has provided for their prosecution and the mode of procedure. Under section 34 of the judiciary act, as construed by the supreme court (*United States v. Reid*, 12 How., 361), and under the act of July 6, 1862 (12 Stats. at Large, 588), and of July 2, 1864 (13 id., 351), it is clear that the right of a defendant, in a criminal case, to testify in his own favor does not exist. On the contrary, the language used manifests an evident intention on the part of congress to exclude such evidence." *United States v. Hawthorne*, 1 Dill., 422.

1865. These exceptions only relate to evidence of transactions with, or statements by, a deceased party (who cannot testify), or by a party under guardianship. In this case no transactions with, or statements of, the agents of the United States were attempted to be proved by the defendants who were called as witnesses; nothing but conversations between the defendants themselves. We think the witnesses were competent under the act, and that the court erred in rejecting them.

For this reason the judgment must be reversed and a new trial awarded. The court, however, deem it proper to say that they have grave doubts whether the facts set up in the special pleas, and offered to be proved by the witnesses, constitute a valid defense to the action. But as this point was not discussed by counsel, we refrain from expressing any opinion upon it.

TEXAS v. CHILES.

(21 Wallace, 488-492. 1874.)

STATEMENT OF FACTS.—The question in this case was whether the defendant could be compelled to appear and give his deposition on behalf of the complainant, the suit being a suit in equity. See § 858, R. S.

§ 3620. *An adverse party may be compelled to testify as a witness.*

Opinion by MR. JUSTICE SWAYNE.

It was a rule in equity of long standing that the complainant could examine the defendant as a witness, upon interrogatories, and that one defendant might examine another, but they could not examine the complainant without his consent, and the right to examine a defendant was attended with serious restrictions and embarrassment. 1 Smith's Ch. Pr., 343; 1 Greenl. Ev., § 361; Eckford v. De Kay, 6 Paige, 565; Ashton v. Parker, 14 Simons, 632; 2 Daniell's Ch. Pr. (Perkins' ed., 1865), p. 885, note. A bill of discovery was a dilatory and expensive measure. 2 Story's Eq., §§ 1483, 1489. It was also less effectual than the examination of the defendant as a witness.

In trials at law the system of exclusion was more rigid. The general rule of the common law was that no party to the record could be a witness for or against himself, or for or against any other party to the suit. 1 Greenleaf on Ev., §§ 329, 330. This doctrine was attacked by Bentham in his work on Evidence, published in 1828, with great force of reasoning. He maintained that "in the character of *competency* no objections ought to be allowed." Vol. 1, p. 3. His views produced a deep impression in England, and became the subject of earnest discussion there. Subsequently they bore fruit. In "the county courts act," passed by parliament in 1846, it was declared that "on the hearing or trial of any action, or on any other proceeding under this act, the parties thereto, their wives, and all other persons, may be examined either on behalf of the plaintiff or defendant upon oath or solemn affirmation." This was a great alteration in the law from what it was before. After it had been tested for six years in the county courts and its wisdom approved, the rule was, in 1851, by a measure known as "Lord Brougham's act," with a few exceptions not necessary to be stated, made applicable in all legal proceedings elsewhere. An able writer says: "Every eminent lawyer in Westminster Hall will readily admit that it has been productive of highly beneficial results." He adds: "In courts of law it has not only enabled very many honest persons to establish just claims which, under the old system of exclusion, could never have been brought to trial with any hope of success, but it has

deterred at least an equal number of dishonest men from attempting on the one hand to enforce a dishonest demand, and on the other to set up a fictitious defense." The common law commissioners, in their report upon the subject, said: "According to the concurrent testimony of the bench, the profession and the public, the new law is found to work admirably, and to contribute in an eminent degree to the administration of justice." 2 Taylor on Ev., § 1218.

The innovation, it is believed, has been adopted in some form in most, if not in all, the states and territories of our Union. 1 Greenl. on Ev., § 329. It is eminently remedial, and the language in which it is couched should be construed accordingly. A doubt has been suggested whether the enactment before us does not give merely a privilege to each party which may be availed of or not as a matter of choice, without conferring the right upon either to compel the other to testify.

This view is too narrow and cannot be maintained. The first sentence forbids, in the courts of the United States, exclusion in any case on account of color, and in civil actions on account of interest or being a party. If either party offers to testify and is excluded by reason of being a party, there is certainly a clear infraction of the statute, both as to its language and meaning. If either party calls the other, and the party called is excluded upon this ground, is not the infraction equally clear? The language applies as well to one case as to the other. Both are alike within its terms and meaning. We see no ground for a distinction. A doubt, the converse of the one suggested, might with equal propriety be insisted upon. Such a proposition would have the same foundation, and might be sustained by an argument, *mutatis mutandis*, in the same terms. The same doubt and the same reasoning would apply as to colored witnesses. All such doubts rest upon an assumption unwarranted by anything in the statute. The case is one where the language is so clear and comprehensive that there is no room for construction, and the duty of the court is simply to give it effect according to the plain import of the words. There should be no construction where there is nothing to construe. *United States v. Wiltberger*, 5 Wheat., 76.

§ 3621. *Remedial statutes are to be liberally construed.*

But if there were doubt on the subject, the statute being remedial in its character, the doubt should be resolved in a liberal spirit in order to obviate as far as possible the existing evils. To permit parties to testify, and to limit the statute to this, would deprive it of half its efficacy, and that much the most beneficial part. Where the testimony of one party is important to the other, there is, of course, unwillingness to give it. The narrow construction suggested would leave to the party needing the evidence in such cases no choice but to forego it, or fall back upon a bill of discovery. It is hardly credible that congress, in departing from the long-established restriction as to parties to the record, intended to stop short of giving the full measure of relief. We can see no reason for such a limitation. The purpose of the act in making the parties competent was, except as to those named in the proviso, to put them upon a footing of equality with other witnesses, all to be admissible to testify for themselves and compellable to testify for the others. This conclusion is supported by all the considerations applicable to the subject.

Order made.

MUMM v. OWENS.

(Circuit Court for Iowa: 2 Dillon, 475-477. 1873.)

Opinion by DILLON, J.

STATEMENT OF FACTS.—This action was brought by Johnson in his life-time, for personal injuries to himself, caused by the alleged negligence of the defendant, and pending the action he died, and his administrator was substituted as the party plaintiff, and he seeks to recover for the same injuries for which the action was commenced by Johnson. Under the statute of the state, the action survives, as will be seen by the case of *Shafer v. Grimes*, 23 Ia., 550. It is to be noticed that this is not an action by the administrator, under the statute of the state, to recover damages for the death of Johnson; but it is the original action, brought by Johnson, which did not abate by his death, but, under the statute, survived to his administrator. Johnson, before his death, was examined as a witness in his own behalf, and his examination was reduced to writing, in the form of a deposition, and this deposition has been read in evidence by the plaintiff.

§ 3622. *Where an action was brought, and after plaintiff had given his deposition he died, the defendant was allowed to be examined as a witness for himself, the suit having survived to the administrator by statutory provision.*

Now, is the defendant, under these circumstances, precluded from testifying to the matters covered by Johnson's evidence, as contained in the deposition read to the jury? Under the act of congress of July 2, 1864 (13 Stats. at Large, 351, sec. 3), and of March 3, 1865 (*id.*, 533, sec. 1), it is my opinion that the defendant should be allowed to testify, if the plaintiff insists upon keeping the testimony of his intestate before the jury.

The first act above cited makes parties competent witnesses in all civil cases; and the second act does not pronounce an absolute disqualification against the living party when the adverse party is an administrator, but enacts that he "shall not be allowed to testify against the other as to any transaction with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party, or required to testify thereto by the court." In this case the intestate has testified and his testimony is before the jury; to exclude the defendant from giving his version of the same transaction would be manifestly unfair, and in contravention of the purpose and spirit of the legislation of congress.

Evidence admitted.

ESLAVA v. MAZANGE.

(Circuit Court for Alabama: 1 Woods, 623-627. 1871.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—The bill is filed in this case to subject certain property, conveyed by the complainant to Ovid Mazange many years since, to a parol trust, in favor of the complainant, on which, as he alleges, the conveyance was made. The Bank of Mobile is made a defendant because it has an execution against Eslava which has been levied on the property in question. On filing the bill and before issuing the subpoena, the complainant obtained an order to examine himself and his wife as to any transactions with or statements by Ovid Mazange, deceased, upon interrogatories to be served on the parties to the suit, or upon notice to them, before some commissioner of the

United States. The rule suggests that Eslava and his wife are aged and infirm, and reside in New Orleans.

As soon as issue was joined in the cause, the defendants gave notice to the complainant that they desired the testimony in the case should be taken orally, under the sixty-seventh rule of the court, and soon after filed written objections to taking the testimony of the plaintiff and his wife on the grounds, amongst others, that the complainant was not a competent witness in the case (Mazange being dead), and that the wife could not be a witness for her husband. The complainant's counsel, nevertheless, after this, proceeded to file and serve interrogatories with a view to examine the complainant and his wife on commission. The defendants filed cross-interrogatories under protest. The examination having been taken and the depositions returned, the defendants at the last term moved to suppress the same. The motion, not being disposed of, is now repeated. One ground of the motion is, that the complainant and his wife are not competent witnesses in the case.

§ 3623. *Provisions and construction of the act of July 6, 1864, regulating evidence in federal courts, and the modifying act of March 3, 1865.*

In general, the competency of witnesses in the United States courts in civil cases is governed by the law of the state in which the court is held. Such was the rule enacted by the statute of July 6, 1862 (12 Stat., 588). But congress has specially regulated the subject now before the court. By the act of July 2, 1864 (13 Stat., 351), it was declared, amongst other things, that there should be no exclusion of any witness in the federal courts because he was a party to, or interested in, the issue tried. This act was modified by that of March 3, 1865 (13 Stat., 533), by which it was enacted that in actions by or against executors, administrators or guardians, neither party should be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. This act is a recognition of the glaring injustice it would involve, to permit one party to propound himself as a witness in his own behalf as to a transaction between him and a deceased person, who can no longer give his version of the affair. If the law were to allow a man to wait until his antagonist were dead, and then to sue his heirs, and put himself upon the witness-stand and give his version of the affair, with no one to contradict or qualify his testimony, it would be as gross a prostitution of the forms of law, as to allow a man to be *judge* in his own cause.

Every honest mind revolts against it. There may be special cases, it is true, in which the court can see that no injustice would be done by calling on a party to testify, even though his adversary be deceased. But it is useless to attempt to anticipate such cases. When they arise it will be for the court, and not the party himself, to suggest that he be called. Or, if he make the suggestion, the other party ought at least to be heard upon it.

§ 3624. *An ex parte order of court obtained by a party, that he be allowed to testify against the administrator of his antagonist, will not authorize him to testify as a witness called by the court.*

It is claimed in this case that the court has made an order to take the testimony. But how was it made? It was an *ex parte* order taken before the defendants were subpoenaed to appear in the cause. When the statute authorizes such testimony to be taken if "required by the court," it does not refer to such a requirement or order as that which was made in this case. If an *ex*

parte order can be got in this way, the statute would be practically abrogated. The reservation of power in the court to *require* the evidence to be taken was made in order to provide for such extreme and special cases as might arise, in which it would be a great hardship not to take it. The court will exercise this power with great care and caution.

§ 3625. *An unsuitable case to relax the rule excluding the testimony of a party against a deceased opposite party.*

This case is one in which it would be eminently improper to allow the evidence. The complainant seeks to set up a parol trust in property conveyed away by him over twenty years ago, and possessed by the grantee and his assigns ever since. It would be most dangerous to allow a party to prove his own case under such circumstances, after his grantee was dead. Whether it is provable at all is another question, not now before the court. But no man's property would be safe under such a rule of evidence. Of course, the wife is incompetent to testify for or against her husband.

§ 3626. *Who is the opposite party.*

The fact that the Bank of Mobile has filed a cross-bill in the case can make no difference. The order to examine the parties is taken on behalf of the complainant, not on behalf of the bank, and, if it were taken on behalf of the bank, it would not help the case. The bank is not the "opposite party" referred to in the act who is authorized to call the plaintiff as a witness. The "opposite" party meant is that party against whom the evidence is sought to be used. The interests of the complainant and of the bank in the matter are the same. The testimony is clearly incompetent and must be disallowed, and the depositions suppressed.

It is urged that the witnesses were old and infirm, and, therefore, that the order to take their testimony was strictly regular under the seventieth rule in equity. That rule was not originally intended for the examination of a party; and it may be questioned whether, under any circumstances, it ought to be extended to the case of a party propounding himself as a witness. But it certainly cannot legalize testimony taken as the plaintiff's has been taken in this case.

§ 3627. *How order taken upon motion or ex parte may be discharged.*

It may also be urged that the order for taking the testimony must stand until it is regularly discharged. It is undoubtedly the general rule that, after the close of the term in which an order is made, it must stand until it is regularly discharged. But orders obtained upon motion may be discharged upon motion; and *a fortiori*, orders obtained *ex parte* may be thus discharged which have never been assented to, but always resisted by the other party; and a motion to suppress depositions fairly brings up the regularity of an *ex parte* order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never done anything to waive the objection. From an examination of the minutes and files in this case, I am satisfied that the defendants have taken every opportunity fairly in their power to express their opposition to the testimony of these parties, as well as to the taking of it by deposition.

The motion to suppress the depositions will be granted; but, as they were taken under an order of the court, though an irregular order, the cause will be continued until the next term, and the time for taking testimony enlarged until the rule day in September, to enable the complainant to take other testimony in the cause, with like liberty to the defendants.

POTTER v. NATIONAL BANK.

(12 Otto, 163-167. 1880.)

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—This is a writ of error from a judgment rendered in the circuit court of the United States for the northern district of Illinois in favor of the Third National Bank of Chicago, Illinois, against Orrin W. Potter, executor of E. B. Ward. Upon the trial before the jury one William Sturgess, not a party to the action, was introduced as a witness in behalf of the bank. In the course of his examination he was allowed, against the objection of the defendant, to testify as to a conversation had by him with Ward, touching some of the matters involved in the present controversy. The objection to his testifying was placed upon the ground that Ward was dead and that he, the witness, was interested in the issues to be tried. The action of the circuit court in permitting the witness to disclose that conversation is the subject of one of the assignments of error.

By section 858 of the Revised Statutes it is declared that “in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; *provided*, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.”

The first clause of this section is, substantially, in the words of the proviso of the third section of the act of July 2, 1864, making appropriations for sundry civil expenses of the government. 13 Stat., 351. The second clause is in the words of the proviso of the act of March 3, 1865, amending the third section of the act of July 2, 1864 (*id.*, 533), while the last clause is founded upon the act of July 16, 1862. 12 *id.*, 588.

§ 3628. *Under Revised Statutes, section 858, a person interested in the issue, but not a party to the suit, is a competent witness against an executor to testify to conversations with the deceased.*

The existing statute (R. S., sec. 858) seems too plain to require construction. The first clause of that section shows that there were in the mind of congress two classes of witnesses—those who were parties to the issue, that is, parties to the record; and those interested in the issue to be tried, that is, those who, although not parties to the record, held such relations to the issue that they would lose or gain by the direct legal operation and effect of the judgment. A witness may be interested in the issue without being a party thereto—a distinction which seems to have been recognized in all the statutes to which reference has been made. But whether a party to or only interested in the issue, the witness is not to be excluded in the courts of the United States upon either ground, except that in actions in which judgment may be rendered for or against an executor, administrator or guardian, no party to the action can testify against the other as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. The proviso of section 858 excludes

only one of the classes described in its first clause — those who are, technically, parties to the issue to be tried,—and we are not at liberty to suppose that congress intended the word “party,” as used in that proviso, to include both those who, according to the established rules of pleading and evidence, are parties to the issue, and those who, not being parties, have an interest in the result of that issue.

§ 3629. *The statutes of a state are not a rule of evidence for federal courts in cases in which the statutes of the United States otherwise provide.*

It is, however, contended by the learned counsel for the plaintiff in error, that, by the laws of Illinois, Sturgess was an incompetent witness as to the matters embraced in his conversation with Ward, and that the circuit court was bound to follow those laws as interpreted by the highest court of the state. It is quite true that the thirty-fourth section of the judiciary act of 1789 — preserved, *totidem verbis*, in section 721 of the present revision of the statutes — has been construed as requiring the federal courts, in all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the states in which such courts respectively sit. *Vance v. Campbell*, 1 Black, 427; *Wright v. Bales*, 2 id., 535; *M’Niel v. Holbrook*, 12 Pet., 84; *Sims v. Hundley*, 6 How., 1; *Ryan v. Bindley*, 1 Wall., 66 (APPEALS, §§ 555–56). But that section of the act of 1789, as does section 721 of the Revised Statutes, expressly excepts from its operation cases “where the constitution, treaties or statutes of the United States otherwise provide.” We have seen that the existing statutes of the United States do “otherwise provide,” in that they forbid the exclusion of a witness upon the ground that he is a party to, or interested in, the issue, in any civil action whatever pending in a federal court, except in a certain class of actions, which do not embrace the one now before us. “In all other respects,” that is, in all cases not provided for by the statutes of the United States, the laws of the state, in which the federal court sits, constitute rules of decision as to the competency of witnesses in all actions at common law, in equity, or in admiralty. It is clear, therefore, that the laws of Illinois can have no bearing upon a case which, as here, is embraced, or has been provided for, by the federal statute.

§ 3630. *An instruction to the jury which does not prejudice a party cannot be assigned by him for error.*

But little need be said concerning the remaining assignments of error. The one which relates to the action of the court in permitting the bank to show that, in due course of its business, notices of protest would have been forwarded by mail to Ward, had they been received from the notary, would have deserved consideration, but for the fact, which appears from the bill of exceptions, that the jury were informed by the court, in its charge, that if the liability of Ward, as indorser, depended solely upon this point, they would be instructed that the proof of such notice was insufficient. We cannot see, therefore, that this evidence, even if improperly admitted, injuriously affected the plaintiff in error.

The objection to the admission in evidence of the letter of Parsons, cashier, to Smith, dated December 11, 1873, was properly overruled. No objection was made by plaintiff in error to the admission of the letters and telegrams of prior dates. The particular letter, to the reading of which objection was interposed, constituted a part of the transactions described in the letters and telegrams of previous dates, and was properly admitted, in further explanation of those transactions.

§ 3631. *Particularity of stating exceptions.*

The only other assignments of error, of sufficient importance to require notice, relate to those parts of the charge to the jury to which exception was taken by the plaintiff in error. In each sentence or paragraph of the charge to which exception was especially taken, the court informed the jury that the evidence tended to show certain facts which are detailed in the charge. The point is made here that the evidence did not tend to show any such state of facts as the charge of the court implied. But counsel overlook, or fail to give proper force to, the circumstance that the bill of exceptions, not purporting to contain all the evidence adduced before the jury, itself states that there was evidence tending to show the facts set forth in the charge. If, upon the whole evidence, the plaintiff in error was entitled to a peremptory instruction in his behalf, and the court had refused, when asked to give such an instruction, its action could not be reviewed here, except upon a bill of exceptions containing all the evidence. And so if there was no evidence, or not sufficient evidence, tending to show the facts recited in the charge. If he desired the court to give any particular propositions of law to the jury, so much of the evidence as is necessary to show their pertinency ought to be set forth in the bill of exceptions. But no propositions of law were submitted by him to the court to be given to the jury. We do not perceive that the charge is in conflict with the evidence, so far as it is detailed in the bill of exceptions.

Under all the circumstances, this court must assume that there was evidence tending to show the facts set out in the charge to the jury. And so construing the bill of exceptions, we do not perceive that any error of law was committed, and the judgment is therefore affirmed.

UNITED STATES *v.* TEN THOUSAND CIGARS.

(Circuit Court for Iowa: 1 Woolworth, 123-127. 1867.)

Opinion by MILLER, J.

STATEMENT OF FACTS.—This is a writ of error to the district court. The property which is the subject of this controversy was seized for a violation of the internal revenue laws. Robeson Brothers filed their claim as the owners of the property, denying its liability to condemnation. In the course of the trial the claimants offered themselves as witnesses in their own behalf, and were admitted against the objection of the district attorney. The ruling of the district court upon this objection is alleged for error, and presents the question for our determination here.

§ 3632. *No witness is incompetent in any civil cause in the federal courts by reason of interest.*

The proviso to the third section of the act of July 2, 1864 (13 Stats. at Large, 351), declares “that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried.”

§ 3633. *The phrase civil actions, when opposed to criminal prosecutions, includes actions at law, suits in equity, admiralty, and other judicial controversies.*

This enactment was intended to effect in the federal courts the same change in the law of evidence as had been made by many of the states, namely, to admit the testimony of witnesses previously incompetent on account of interest or of being parties to the suit. The phrase “civil actions” includes actions

at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties or such parties and the government. It is used here in contradistinction to prosecutions for crime. The suit before us is a civil action within the meaning of the statute. It is prosecuted according to the usual course in admiralty. It is an inquiry into a right of property. The provision cited, therefore, will allow these claimants to testify, unless it has been repealed or modified by some other act of congress.

§ 3634. *No act will be held to be repealed by implication unless the implication is irresistible.*

The second section of the act of February 28, 1865 (13 Stats. at Large, 442), enacts that "any officer or other person entitled to or interested in a part or share of any fine, penalty or forfeiture incurred under this or any other law of the United States, may be examined as a witness in any of the proceedings for the recovery of such fine, penalty or forfeiture by either of the parties thereto, and such examination shall not deprive such witness of his or her share or interest in such fine, penalty or forfeiture." And by the ninth section of the act of July 13, 1866 (14 Stats. at Large, 146), it is provided "that whenever, in any civil action for a penalty, the informer may be a witness for the prosecution, the party against whom such penalty is claimed may be and shall be admitted as a witness on his own behalf."

These two acts confer upon a claimant, in this special class of cases, competency to testify. It is urged that because they are directed to such cases specially they should be held to operate as a limitation upon the previous general provision of the statute—that is, that they work its repeal *pro tanto*. Of course, if it were not for the general enactment, the claimant would be incompetent, except in the particular event mentioned in the special statute for that case. The common law rule would in all other cases obtain. To avoid the general statute, and continue the common law rule as operative, we must hold that the later provision repealed the earlier by implication. It is well settled that no repeal by implication will be allowed, unless it be a necessary and irresistible implication. The statutes must be so inconsistent that, if the later stands, the former must thereby fall. Such is not the case with those before us. The act of 1866 provides that a certain class of persons may be witnesses in a given contingency. The act of 1864 says that such persons shall be witnesses without regard to such contingency. They are not necessarily in conflict.

The truth seems to be that the provision of the act of 1866 was introduced to remove the supposed advantage given to the informer by the act of 1865, in ignorance or forgetfulness of the more general enactment of 1864. It is very improbable that congress intended to repeal or limit the effect of that act by others looking in the same direction. I am, therefore, of opinion that the act of 1864 authorized the introduction of the claimant in this case as a witness in his own behalf, although the prosecutor was not sworn; that it is not repealed or modified by the subsequent acts referred to. The judgment of the district court is affirmed.

BRADLEY *v.* UNITED STATES.

(14 Otto, 442, 443. 1881.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—In this suit the United States examined witnesses directly interested against Bradley, who excepted to the admission of the evidence.

§ 3635. *A rule of evidence. Interested witness, when competent.*

Opinion by WAITE, C. J.

Section 1079 of the Revised Statutes provides that no claimant suing the United States in the court of claims, nor any person from or through whom such claimant derives his alleged title, claim or right, nor any person interested in any such title, claim or right, shall be a competent witness in supporting the same, but under section 1080 the United States may make a claimant a witness.

We agree with the court below that this does not prevent the United States from using as a witness to defeat the claim one whose interest is adverse to the claimant, and that, too, when a judgment in favor of the United States may have the effect of establishing the right of the witness to the same claim. The objections urged against the competency of the witness, under the provisions of section 858 of the Revised Statutes, are disposed of by *Potter v. National Bank*, 102 U. S., 163 (§§ 3628–31, *supra*).

Judgment affirmed.

UNITED STATES *v.* CLARK.

(6 Otto, 37–50. 1877.)

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—This is an appeal from the court of claims, and very few cases involving no larger sum of money have given us more trouble. It was before us at the last term, and is reported. 94 U. S., 73. Upon an examination of the record, after the case had been submitted to us, it was discovered that on an essential fact in issue the court of claims had made no finding, but had sent us the evidence on that point. The judgment was therefore reversed, on the ground that there was no sufficient finding of the facts on which to render a judgment, and the cause was remitted to that court for further proceedings. The court of claims has now found, with sufficient distinctness, the existence of the fact required; but it still sends to us, with the record, the evidence on which it so found. It is this which produces the embarrassment, as we shall presently see.

The suit is brought by Clark, under the act of May 9, 1866 (14 Stat., 44; Rev. Stat., secs. 1059, 1062), which authorizes the court of claims to hear and determine the claim of any disbursing officer for relief from responsibility on account of capture or other loss of funds while in the line of his duty, and for which such officer was and is held responsible; and, in case the loss has been found to be without fault or negligence on the part of such officer, to make a decree setting forth the amount thereof, which shall be allowed as a credit by the accounting officers of the treasury in the settlement of his accounts.

The court of claims finds that the claimant lost by robbery, while in the line of his duty as assistant pay-master in the army, at Franklin, Texas, on the 6th day of April, 1865, a package of government funds; that the package was in his official safe at his quarters, and the loss was without fault or neglect

on his part. The fifth finding of the court, and the one which was made to supply the defect found in the case when it was here before, is as follows: "The package of government funds which the claimant lost by robbery, as above stated, contained the sum of \$15,979.87."

If this were all, there would be no difficulty in holding that these findings sufficiently established all that is necessary to support the decree in favor of the claimant for a credit of that sum in his account with the government. But the court of claims has mingled with, and made a part of its finding of facts, and sent here as part of the record, the proceedings of a court-martial which tried and convicted Thomas Boylan and Louis Morales of committing the robbery by which the money was lost. It sufficiently appears that the only evidence on which the court of claims made its fifth finding, namely, the amount of the money which was in the government package so lost, was the record of the court-martial, and that claimant there testified to the amount of the loss. Also, that he was of good character, personally and officially; had always kept regular and exact account of the funds in his official custody; made due returns in regard to them, and properly accounted therefor. And that he immediately reported to his superior officer that the funds in that safe were \$15,979.87, which was the amount of the loss appearing in his official reports, and charged against him as a deficiency on the final revision and settlement of his accounts by the accounting officers of the treasury.

§ 3636. *If there be in the record of the court of claims no sufficient evidence to support its finding, the judgment must be reversed.*

It is clear that upon this testimony alone the court of claims fixed the sum lost by claimant. We are asked by the counsel for the government to hold that it is not competent evidence to establish that fact. It is manifest that, before we can do this, we must also hold that, where that court has found in due form, and presented to us one of those ultimate facts which it is required to find, and which is necessary to its judgment, and has at the same time presented as part of its finding all the evidence on which that fact was found, we can look at both findings to see whether that evidence was competent proof of that fact. This is precisely what was done in *Moore v. United States*, 91 U. S., 270 (§§ 2191-92, *supra*).

Counsel for the United States insist that a party in the court of claims has a right to bring before this court for review any and every ruling of the court of claims upon the admission or the rejection of evidence, and also its weight and effect upon the case. The question thus presented is one of much perplexity, and involves the right to a bill of exceptions in a court which sits without a jury, where the evidence is all in writing, and whose judgments we have, by our rules, sought to make final as to all the facts in the case.

We do not propose here to enter this field of inquiry further than this case requires. And we think it does require us not to weigh the evidence, nor to decide whether the court below was bound to note the exception prayed by counsel, or even to include in their findings the matters of evidence we have above stated. But we are of opinion that, when that court has presented as part of their findings what they show to be all the testimony on which they base one of the essential, ultimate facts, which they have also found, and on which their judgment rests, we must, if that testimony is not competent evidence of that fact, reverse the judgment for that reason. For here is, in the very findings of the court made to support its judgment, the evidence that in law that judgment is wrong. And this not on the weight or balance of

testimony, nor on any partial view of whether a particular piece of testimony is admissible, but whether, upon the whole of the testimony as presented by the court itself, there is any evidence to support its verdict; that is, its finding of the ultimate fact in question.

§ 3637. *A record of a court-martial is incompetent to prove facts in the court of claims.*

Entering upon the inquiry whether there is here any evidence on which the court could have found the amount of the loss by the robbery, it seems too plain for argument that the record of the court-martial is wholly incompetent. 1. Clark was no party to that proceeding, and is not, therefore, bound by its findings; and, by a well-known rule, there is no mutuality, and therefore it cannot bind the United States. 2. The amount of the robbery was in no way an essential issue in the trial of the robbers. 3. And it may well be doubted whether a criminal proceeding in a military court can be used to establish any collateral fact in a civil proceeding in another court. Nor can the evidence of a witness in that case be competent to establish a fact in another case without some reason, such as his death or insanity since it was given. We will recur to this point presently.

Was the good character of the claimant, the regularity of his accounts, and the prompt report of the loss and its amount, competent evidence to establish that amount? The only thing in all this which could have any tendency to prove the sum lost is the report of its loss. This is but the testimony of the party claimant, and testimony not under oath. If he is incompetent as a witness, this less direct mode of testifying must also be excluded. If he is competent, and had been introduced on the stand, this fact might be used as corroborative evidence. But while he is alive and competent, it must be excluded as primary or independent evidence; because there is better evidence in the sworn statement of the party himself, produced on the stand and subject to cross-examination.

§ 3638. *At common law the owner of a lost package is competent to prove its contents, and for that purpose only.*

It is obvious, however, that the court or the counsel were laboring under the conviction that claimant was not a competent witness, and were struggling to find other evidence of a fact which was known to him alone. In this we think they were mistaken, and that for the purpose of proving the contents of the stolen package, and for that purpose alone, he was competent.

We are of opinion that, by the rules of evidence derived from the common law, as it is understood in the United States, whenever it becomes important to ascertain the contents of a box, trunk or package which has been lost or destroyed, under circumstances that make some one liable in a court of justice for the loss, and the loss and the liability are established by other testimony, the owner or party interested in the loss, though he may be a party to the suit, is a competent witness to prove the contents so lost or destroyed. 1 Greenl. Ev., §§ 348-350, and notes.

This is one of those exceptions to the rigorous rule of the common law excluding parties and persons having an interest in the result of the suit from becoming witnesses in their own behalf, which has been engrafted upon that system. It is founded in the necessity of permitting the only party who knows the matter to be proved to testify, in order to prevent an absolute failure of justice, where his right to relief has been established by other evidence. We are aware that there is a conflict of authority on this point, but we believe

the preponderance is in favor of the proposition we have stated; and looking at it as a matter of principle, in the light of the progress of legislation and judicial decision, in the direction of more liberal rules of evidence, we have no hesitation in adopting it, in the absence of legislation by congress on the subject.

But there is legislation by congress, and it is doubtless to be attributed to this that Mr. Clark was not called to prove the contents of the lost package. Section 858 of the Revised Statutes, originally enacted July 2, 1864, declares that "in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried." This was a complete abolition of the rule of exclusion under the common law in all the courts of the United States, and under it the claimant would have been competent to prove not only the contents of a lost package, but every other fact necessary to establish his claim or title to the relief sought by the suit.

§ 3639. *The act of congress of June 25, 1868 (Rev. Stat., sec. 1079), did not abrogate the common law rule that an owner of a lost package was a competent party to prove its contents.*

Four years later, however, congress became dissatisfied with this departure from the old rule of evidence as it applied to suits in the court of claims, and by the act of June 25, 1868 (Rev. Stat., sec. 1079), intended to restore it. It is there enacted that "no claimant, nor any person from or through whom any such claimant derives his title, claim or right against the United States, nor any person interested in any such title, claim or right, shall be a competent witness in the court of claims in supporting the same; and no testimony given by such claimant or person shall be used, except as provided in the next section." The next section provides for the examination of such parties at the instance of the government counsel.

It can hardly be supposed that congress intended to do more in this last statute than to restore the common law rule of exclusion as it stood before the passage of the act of 1864. There is nothing in the language of the act of 1868, nor in the purpose to be subserved, which required more; and in this respect the later act was limited to the court of claims, leaving the more progressive rule of 1864 to its full operation in all other courts. The peculiar form of expression of the act of 1868, so far from militating against this view, rather tends to confirm it. The parties are excluded from being witnesses in support of the title, claim or right asserted in the suit, and no testimony given by them — that is, no testimony given elsewhere on those points — shall be used. But it is not inconsistent with this view, that, if the title or right of the claimant to relief is established by other evidence, he may be competent to prove, as under the common law rule, the contents of the package in regard to which his right, title and claim to relief has already been established. We are of opinion, therefore, that for this purpose the claimant was a competent witness, and that his testimony was the best to be had, since the court finds that he kept no clerk or assistant who might know the necessary facts.

It follows, that, since there was no competent evidence before the court of claims, as shown by their own finding, of the contents or amount of the lost package, their finding on that subject was erroneous, and the case must be returned for a new trial. But as all the other facts necessary to a judgment have been found, and are without error in the finding, the new trial or hearing will be limited to the question of the contents of the lost package.

§ 3640. *Where a suit is brought in the court of claims upon a claim that is in substance a defense against a demand that might be made by the United States, the statute of limitations of the court of claims does not apply.*

As the case has now been twice before us, and as counsel for the United States has insisted on a plea of the statute of limitations, we must dispose of that now. "Every claim against the United States, cognizable in the court of claims, shall be forever barred, unless the petition is filed . . . within six years after the claim first accrues." R. S., sec. 1069. The petition of plaintiff in this suit does not, in the just sense of the word, set forth a claim against the United States. It sets up a defense to a claim of the United States against the plaintiff. The court of claims finds that plaintiff is now sued in another court by the United States for the sum in controversy here.

The plaintiff asks, and by the very terms of the statute under which the court of claims acts can obtain, no judgment for money against the United States, nor fix any liability on the government to pay him anything. By a very curious provision, the court of claims is authorized to establish for him a defense to a claim, which claim the government can only establish judicially in some other court. If that court could entertain jurisdiction of this matter when offered as a defense, it is very clear that the statute of limitations would be no bar to such defense there. Why should it be here? We think it is a principle of general application, that so long as a party who has a cause of action delays to enforce it in a legal tribunal, so long will any legal defense to that action be protected from the bar of the lapse of time, provided it is not a cross-demand in the nature of an independent cause of action. But if we are mistaken in this, it is clear that, until the accounting officers of the treasury had refused to recognize the sum lost as a valid credit in the settlement of his accounts, there was no occasion to apply to the court of claims; and the statute, if applicable to this class of cases at all, did not begin to run until then. In the language of the statute, the officer is not held responsible for this amount until the accounting officers reject it as a credit, and it is only when he has been or is so held that he is authorized to sue in the court of claims to establish his defense. Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

MR. JUSTICE HARLAN dissented (JUSTICES CLIFFORD, SWAYNE and STRONG concurring), holding that the owner of a lost package is not a competent witness in the court of claims to prove its contents, and, also, on the question of limitations.

PAGE *v.* BURNSTINE.

(12 Otto, 664-672. 1880.)

Opinion by MR. JUSTICE HARLAN.

STATEMENT OF FACTS.—This is an appeal from a decree of the supreme court of the District of Columbia, dismissing a bill, filed by the personal representative of Robert C. Page, for the purpose of securing for the estate of the decedent the benefit of a policy upon his life for \$3,000, issued November 22, 1866, by the American Life Insurance Company of Philadelphia. The bill conceded that the defendant Burnstine had an interest in the policy to the extent of any loans of money by him to the assured, and prayed an account for the ascertainment of such sums. The defendant resisted the relief asked, upon the ground that, at the death of the assured, he was the absolute owner, by

assignment of the policy, and, as such, entitled to receive, to his own use, the entire sum which might be realized thereon. The amount due on the policy, \$2,676.33, was paid by the company into court, to abide the result of this suit. Among the depositions taken in the case was that of Burnstine. He testified in reference to the alleged loans by him to Page and the several assignments which he claims were executed to him by the assured.

§ 3641. *Under sections 858, 876 and 877, Revised Statutes, a party to a suit cannot, in the courts of the District of Columbia, testify against executors, guardians, etc., as to transactions or conversations with the deceased, unless called by the opposite side.*

The preliminary question for our consideration is whether Burnstine, on his own motion, can testify as a witness in the cause. The contention of the appellant is, that no party to an action, by or against a personal representative, can testify against his adversary as to any transaction with, or statement by, the deceased, unless called to testify thereto by the opposite party, or required to testify thereto by the court. R. S., sec. 858. This rule, it is claimed, applies to the courts of the District of Columbia, as fully as to the circuit and district courts of the United States. The contention of the appellee is, that his competency is to be determined by sections 876 and 877 of the Revised Statutes relating to the District of Columbia. These positions require careful consideration; and it is essential to a clear understanding of the question, thus presented, to ascertain the history of the several provisions now incorporated as well in the Revised Statutes of the United States as in the Revised Statutes relating to the District of Columbia, upon the subject of the competency of witnesses in courts of justice.

To the third section of an act, approved July 2, 1864, making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1865, a proviso is annexed, "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to, or interested in, the issue tried." 13 Stat., 351.

An act, approved on the same day, July 2, 1864, entitled "An act relating to the law of evidence in the District of Columbia," provides "that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice in the District of Columbia, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence within said District, the parties thereto, and the persons in whose behalf any such action or other proceeding may be brought or defended, and any and all persons interested in the same, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said action or other proceeding: *Provided*, that nothing herein contained shall render any person who is charged with any offense in any criminal proceeding competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, or in any proceeding instituted in consequence of adultery; nor shall any husband be compellable to disclose any communication made to him by his wife during the marriage,

nor shall any wife be compellable to disclose any communication made to her by her husband during the marriage.” 13 Stat., 374.

On the 3d of March, 1865, congress passed another act upon the subject of the competency of witnesses, entitled “An act to amend the third section of an act entitled ‘An act making appropriations for sundry civil expenses of the government for the year ending the 30th day of June, 1865, and for other purposes,’ so far as the same relates to witnesses in the courts of the United States.” The act declares that said third section of the appropriation act of July 2, 1864, “be, and the same hereby is, amended by adding thereto the following proviso: *Provided, further*, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court.” Id., 533.

There is still another act which has an important bearing upon the question before us. We allude to that portion of section 34 of the act of February 21, 1871, creating a government for the District of Columbia, which declares that “the constitution, and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States.” 16 id., 426. This provision was not affected by the subsequent displacement of the District government organized under that act. Thus stood the law up to the date when the two revisions—one the Revised Statutes of the United States, and the other the Revised Statutes relating to the District of Columbia—went into operation.

If it be true, as argued, that the supreme court of the District of Columbia, although organized under and by authority of the United States, and possessing the same powers and jurisdiction as the circuit courts of the United States (12 Stat., 763; Rev. Stat. Dist. Col., sec. 760), was not intended to be embraced by the proviso to the third section of the appropriation act of July 2, 1864, and if, as may be further argued, the act of March 3, 1865, being, in terms, amendatory only of that section, was not intended to modify the special act of the latter date relating to this District, it is, nevertheless, quite clear that, from and after the passage of the act of February 21, 1871, if not before, the act of March 3, 1865, became a part of the law of evidence in this District. The legal effect of the declaration that all the laws of the United States, not locally inapplicable, should have the same force and effect within this District as elsewhere within the United States, was to import into, or add to, the special act of July 2, 1864, relating to the law of evidence in the District, the exception created by the act of March 3, 1865, to the general statutory rule excluding parties as witnesses. This is manifestly so unless it be that a statute affecting the competency of parties as witnesses in actions by or against personal representatives or guardians in which judgment may be rendered for or against them is “locally inapplicable” to this District. But such a position cannot be maintained consistently with sound reason. The same considerations of public policy which would require the enforcement of such a statute as that of March 3, 1865, in the circuit and district courts of the United States, without regard to the laws of the respective states on the same subject, would suggest its application in the administration of justice in the courts of this District. Congress no doubt felt that the general rule permitting parties to testify on

their own motion put the representatives of deceased persons at a great disadvantage if those proceeding against them by suit could, on their own motion, testify as to transactions with, or statements by, the decedent. To remedy that evil the act of March 3, 1865, was passed, and it should not be held locally inapplicable to this District simply because it enlarges the exceptions to the general rule established by the special act of July 2, 1864.

§ 3642. *When a territorial legislature, under power of act of congress, enacts laws, general laws of congress on the same subject will not supersede them.*

These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the "courts of the United States" are locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the territories referred to, in the exercise of power expressly conferred by congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was, therefore, ruled that the territorial enactments regulating the practice and proceedings of territorial courts were not displaced or superseded by general statutes upon the same subject passed by congress in reference to "courts of the United States." *Clinton v. Englebrecht*, 13 Wall., 434; *Hornbuckle v. Toombs*, 18 id., 648; *Good v. Martin*, 95 U. S., 90 (BILLS AND NOTES, §§ 541-49). No such state of case exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us.

Such being the law when the Revised Statutes of the United States and the Revised Statutes relating to the District of Columbia went into operation (which was on the same day), we are to inquire whether congress by those revisions made, or intended to make, any change in the particular rule of evidence now under examination. We are of opinion that no alteration of the previous law was made or intended. The special act of July 2, 1864, relating to the law of evidence in this District is reproduced, *ipsissimis verbis*, in two paragraphs, constituting sections 876 and 877 of the District revision; the act of July 16, 1862 (12 Stat., 588, 589), the third section of the appropriation act of July 2, 1864, and the act of March 3, 1865, are consolidated into one paragraph, and, without the slightest material change of language, constitute section 858 of the Revised Statutes of the United States; and the provision already quoted from the act of February 21, 1871, is reproduced in section 93 of the District revision. If we consulted alone sections 876 and 877 of the Revised Statutes relating to the District, we should perhaps be constrained to hold that, in the courts of the District, *parties* could, upon their own motion, testify as well in actions by or against personal representatives as in any other action. But we cannot overlook the fact that, in the revisions, the language of the previous statutes has undergone no change whatever. We should not, therefore, permit the mere collocation or rearrangement of the previous statutes in the new revisions, adopted on the same day, to operate to change the law, and thereby defeat the will of congress. R. S. Dist. Col., sec. 1296; R. S., sec. 5600.

For these reasons, we are of opinion that Burnstine could not, on his own motion, testify as to any transaction with or statement by the decedent Page. His deposition as to such transactions and statements must be excluded from consideration.

§ 3643. *Where the evidence shows that the parties intended an assignment of a policy of life insurance as a security for a loan, the validity of such assignment as an absolute transfer will not be considered.*

Upon the merits of the case we waive any consideration of the question suggested in oral argument, as to whether Burnstine, consistently with public policy, could acquire by assignment any interest in the insurance upon the life of Page, beyond such amount as the latter actually owed him at the time of his death. No such question is raised in the pleadings, nor was it suggested or considered in the court below. We pass it by for the additional reason that its determination is unnecessary in the view which the court takes of this case.

The transactions between Page and Burnstine had their origin, it is conceded, in a loan of money by the latter to the former. To secure that loan an assignment was made of Page's interest in the policy to the extent of the sum borrowed. Each subsequent assignment shows upon its face a similar arrangement, until that of January 7, 1873, was executed. The latter assignment, by itself, imports an absolute transfer to Burnstine of all the right, title and interest of the assured in the policy, and to the payments made therefor, and all benefit and advantage to be derived therefrom. But the circumstances disclosed in the record indicate, with reasonable certainty, that the real and only object of the execution of the assignment of January 7, 1873, was to invest Burnstine with the entire control of the policy, to the end that, thereafter, the company might deal directly with him, and, upon the death of the assured, that he might be invested with full authority to receive the proceeds of the policy, and apply them in the repayment of such sum or sums as he had loaned to Page upon the security of the policy. In other words, the last assignment may be construed as simply appointing Burnstine, upon the death of the assured, to receive from the company such sum as would then be due on the policy, and, after reimbursing himself to the extent of his loans to Page, to pay the balance to the persons entitled thereto. A different construction of that instrument would place Burnstine in the position of being pecuniarily interested in the death of Page. Unless compelled to do so, we should not suppose that he had any desire or purpose to speculate upon the life of Page, or to do more than secure the repayment of the money actually loaned by him to the assured.

This construction of the assignment of January 7, 1873, is fortified by other evidence. Cross, the local agent at Washington of the insurance company, drew the assignment. In his deposition, taken by the defendant, he testifies that Page admitted, about December, 1871, his inability to keep up the premiums. Burnstine was advised of these facts. Cross thereupon recommended to him that, in order to save himself, he should secure an absolute assignment of the policy. Nothing was said by the parties, upon the occasion when the assignment was drawn, as to its consideration. If the intention had been, upon the part of Page, to make an unconditional sale, and upon the part of Burnstine to make an unconditional purchase of the policy, something would have been then said indicating such an intention. That portion of the evidence, which we are at liberty to consider, tends to show that Burnstine acted upon the advice of Cross, and took an absolute assignment, with the object of saving himself,—a result which can be accomplished by awarding to him, out of the proceeds of the policy, such sum as will reimburse him for the loans made to Page.

This conclusion is strengthened by the language employed by Burnstine in

his receipt of October 2, 1868. In that paper he acknowledges the receipt from Page of six orders, for \$50 each, upon the disbursing clerk in the post-office department, and agrees that in the event Page dies before the orders are paid, and he, Burnstine, should receive from the insurance company the whole or a part of the amount due on the policy, he "would make such a settlement with his [Page's] representatives as the case may require."

This obligation of Burnstine was not, in terms, withdrawn or canceled in any of the assignments thereafter executed, and the receipt of October 2, 1868, should not, therefore, be overlooked in ascertaining the real purpose the parties had in the assignment of January 7, 1873. Our conclusion is still further strengthened by the language in one of the conditions inserted in the policy (of which, it must be assumed, the parties were aware), to the effect that, "in case of the assignments of a policy, whether as security or otherwise, satisfactory proofs of the assignee's interest in the insured life must be furnished with the proofs of death." If the company, or Burnstine, understood that the latter, by the assignment of January 7, 1873, became entitled to the whole sum due on the policy at the death of the assured, without reference to the amount Burnstine had actually paid out, it would have been an idle ceremony for the latter to have furnished proofs of his interest in the assured life.

The decree must be reversed and the cause remanded with directions that an account be taken, as well of the sums actually loaned or paid by Burnstine to Page upon the policy as security for its repayment, as of all sums paid by him for the purpose of keeping the policy in force, and for such decree as may be in conformity to this opinion; and it is so ordered.

MR. JUSTICE BRADLEY dissented from so much of the opinion as holds that the act of congress, relating to the admission of parties to testify in the courts of the United States, applies to the courts of the District of Columbia.

§ 3644. **Husband and wife.**—The common law rule of evidence excluding the testimony of the wife for or against her husband rests solely upon public policy, and not on the ground of her interest in the issue to which he is a party, and is not abrogated by the act of congress of July 2, 1864, enacting that in civil cases in the courts of the United States there shall be no exclusion of any witness because he is a party to or interested in the issue tried. *Lucas v. Brooks*, 18 Wall., 436.

§ 3645. The exclusion of husband and wife as witnesses for each other in civil suits is not based solely on interest, but rests also upon principles of public policy; and a statute which only removes the ground of interest does not render them competent. *In re Jones*, 6 Biss., 68.

§ 3646. The wife of a party signing a note is not competent to charge another as a secret partner of her husband. *Bank of Alexandria v. Mandeville*, 1 Cr. C. C., 575.

§ 3647. On a motion to dismiss an action of ejectment on account of the death of the lessor of the plaintiff prior to the commencement of the suit, the wife of the plaintiff's lessor is an incompetent witness to prove that he is still alive. *Gilleland v. Martin*, 3 McL., 490.

§ 3648. Under a law admitting witnesses interested in the event of the suit, and declaring that "the husband can, in no case, be a witness for or against the wife, nor the wife for or against her husband, unless the contract or facts to be sworn to are in the exclusive knowledge of such husband or wife, as agent or otherwise, in which case but one can testify," in an action by the husband and wife for injuries sustained by the wife through the negligence of the defendant, it was held that they might both testify, each in behalf of himself or herself, and the fact that the testimony of the one might benefit the other ought not to exclude their testimony. *Sanders v. Reister*,* 1 Dak. T'y, 151.

§ 3649. If a witness is the second husband of a widow, he is incompetent in a suit which, if successful, would lessen the value of her first husband's estate, in which she is entitled to dower. *Reece v. Johnson*,* Hemp., 83.

§ 3650. Where a husband and wife are made parties defendant in a cause, and the wife is a mere formal party, the husband is not an incompetent witness because his wife is a party, since his testimony cannot be injurious to her. *Green v. Taylor*, 3 Hughes, 400.

§ 3651. The wife of one of several defendants is a competent witness only in behalf of the other defendants. *Risley v. L. B. & W. R'y Co.*,* 7 Biss., 408.

§ 3652. Where the wife of an accomplice had been introduced to corroborate the testimony of her husband, who was a witness for the government, an instruction that, so far as she testified to facts not testified to by her husband, her statements must rest upon her personal credibility, subject to any inconsistency in or contradiction of her story; and although she could not in law, as the wife of the accomplice, corroborate and strengthen his particular statements, she was a competent witness, if believed by the jury, to prove any independent facts not sworn to by her husband, and not conforming to any part of his acts, although those facts, if believed by the jury, fasten a guilty knowledge on the defendant, was held to be not erroneous on a motion for a new trial. *United States v. Horn*, 5 Blatch., 102.

§ 3653. Where two are jointly indicted for assault and battery, and plead severally, the wife of one cannot be a witness for the other, since her husband could not. *United States v. Wade*, 2 Cr. C. C., 680.

§ 3654. It being the law in Utah that a wife cannot be a witness for or against her husband, where, on an indictment for bigamy, the marriage with the second wife is admitted, and the only issue is the fact of the first marriage, the second wife is not a competent witness to prove this issue. Her competency as a witness in the case depends on the establishment of the first marriage, which fact shows her not to be the real wife. *Miles v. United States*, 13 Otto, 304.

§ 3655. When *prima facie* proof is given of the fact that a woman is the wife of one of the parties to a suit, she is incompetent as a witness to rebut this proof. If, however, it is rebutted *aliunde*, she then becomes a competent witness in the cause. *Rose v. Niles*,* Abb. Adm., 411.

§ 3656. The statutes of Utah territory excluding the wife from testifying for or against her husband, except when the action is between themselves, the court will reject a witness stated to be the second or plural wife of the plaintiff, and will not try the validity of the marriage, though the statute applies to the lawful wife and not the unlawful one. *Friel v. Wood*,* 1 Utah T'y, 160.

§ 3657. The wife may testify against her husband upon an indictment against him for assault and battery upon her. *United States v. Smallwood*, 5 Cr. C. C., 35.

§ 3658. Upon an indictment for stealing, the wife of the owner of the goods is not competent to testify for the United States, unless the husband releases his interest in the fine. *United States v. Shorter*, 1 Cr. C. C., 315.

§ 3659. A wife is a competent witness against her husband upon an indictment against him for assault and battery upon her. *United States v. Fitton*, 4 Cr. C. C., 658.

§ 3660. Where two persons are jointly indicted, and one is tried separately, the wife of the one not on trial is a competent witness. *United States v. Addatte*,* 6 Blatch., 76.

§ 3661. The wife is competent in such cases, unless an acquittal of one defendant works an acquittal of the other. *Ibid.*

§ 3662. The wife of an accomplice, where he has been examined as a witness for the prosecution, is a competent witness to prove any independent facts not testified to by her husband, and not forming a part of his acts, although those facts, if believed by the jury, fasten a guilty knowledge on the defendant. *United States v. Horn*, 5 Blatch., 102.

§ 3663. Colored persons.—According to the laws of Virginia, of December 7, 1792 (c. 103, § 5), a free colored man was not a competent witness against or for a white man. *Pipsico v. Bontz*, 3 Cr. C. C., 425.

§ 3664. Under the laws of Maryland, negroes and mulattoes, free or slave, are not competent witnesses in any case where a christian white person is concerned. But a christian Malay is not a "christian white person" within the act. *United States v. Dow*, Taney, 34.

§ 3665. Under the fifth section of the Virginia act of December 7, 1792, enacting that "no negro or mulatto shall be a witness, except in pleas of the commonwealth against negroes or mulattoes; or in civil pleas where negroes or mulattoes alone shall be parties," a colored man is not a competent witness against another colored man who is jointly indicted with white men for a riot, where the defendants have pleaded jointly, because the testimony, if given against one, must operate against all. *United States v. Birch*, 3 Cr. C. C., 180.

§ 3666. Under the Maryland act of 1717, free negroes and mulattoes, born of free colored women, are not competent witnesses against free negroes and mulattoes not in a state of servitude by law. *United States v. Beddo*, 4 Cr. C. C., 664.

§ 3667. Upon an indictment in the District of Columbia, against a colored man born of a white woman, free colored persons not born of white mothers cannot be witnesses. *United States v. Beddo*, 5 Cr. C. C., 378.

§ 3668. Upon an indictment against a slave for stealing, it was held that the owner of the goods was not a competent witness for the prosecution, because he is interested in the fine

which, notwithstanding the prisoner is a slave, the act of congress has made it necessary to impose. *United States v. Rhodes*, 1 Cr. C. C., 447.

§ 3669. On an indictment against a free mulatto for theft, a negro slave is not a competent witness for the prisoner. *United States v. Swann*, 1 Cr. C. C., 148.

§ 3670. A slave is not a competent witness against a free-born mulatto, not subject to any term of servitude by law. *United States v. Hill*, 1 Cr. C. C., 521.

§ 3671. In assault, where the plaintiff was a negro, the defendant, a free white man, was not allowed to offer his slave as a witness. *Thomas v. Jamesson*, 1 Cr. C. C., 91.

§ 3672. Upon an indictment for larceny against a white man, a negro who had obtained his freedom by being removed from Virginia to Maryland contrary to the Maryland law of 1796, chapter 67, was rejected as a witness for the United States. *United States v. Minifie*, 2 Cr. C. C., 109.

§ 3673. Upon an indictment for assault and battery, the court permitted a black man to be sworn as a witness for the United States, after proof that he had publicly lived and acted as a freeman for eight years, and was generally reputed to be free. *United States v. Neale*, 2 Cr. C. C., 241.

§ 3674. Upon an indictment against a free negress for assault and battery, a slave was held a competent witness for the prisoner. *United States v. Terry*, 1 Cr. C. C., 318.

§ 3675. Upon an indictment against a free mulatto for stealing, freed negro slaves were allowed to testify in favor of the United States. *United States v. Barton*, 1 Cr. C. C., 132.

§ 3676. Upon an indictment for arson against a free negro, free negroes were admitted to testify against the prisoner. And the act of Maryland of 1717, chapter 13, section 3, was said to exclude only free negroes during their term of servitude by law, or mulattoes during their term of servitude by law. *United States v. Butler*, 2 Cr. C. C., 75.

§ 3677. A free-born mulatto is competent to testify against a white woman upon an indictment for larceny. *United States v. Douglass*, 2 Cr. C. C., 94.

§ 3678. Upon an indictment against a free white man for assault, a black woman who was proved to have passed for free for many years was admitted to testify for the United States. *United States v. Fisher*, 1 Cr. C. C., 244.

§ 3679. Under the fifth section of the Virginia act of December 17, 1792, a slave is a competent witness against a negro or mulatto. *United States v. Farrell*, 5 Cr. C. C., 311.

§ 3680. A mulatto, born of a white woman, and not in a state of servitude by law, is a competent witness for a white man, under the Maryland act of 1717 (c. 13, § 2). *United States v. Davis*, 4 Cr. C. C., 606.

§ 3681. A colored man, born of a white woman, is a competent witness against a white man. *United States v. Crandell*, 4 Cr. C. C., 683.

§ 3682. There is nothing in the color of a free negro which, upon general principles, renders him incompetent to testify in any case. *United States v. Dow, Taney*, 34.

§ 3683. Free-born negroes, not subject to any term of servitude, are competent witnesses in all cases. Color alone is no objection to a witness. *United States v. Mullany*,* 1 Cr. C. C., 517.

§ 3684. **Religious belief.**—The court inclined to think that the only mode of proving the fact of a witness' disbelief in a future state of rewards and punishments was by an examination of the witness himself, and that his unbelief, if proved, would go only to his credit. *Rutherford v. Moore*, 1 Cr. C. C., 404.

§ 3685. Persons who do not believe in the existence of a God, or of a future state, or who have no religious belief, are not competent witnesses. *Wakefield v. Ross*, 5 Mason, 16.

§ 3686. That a witness may be competent, it is necessary that he should believe in a God, and in rewards and punishments. It is immaterial whether he believes that they are sent in this life or in a life to come. *United States v. Kennedy*, 3 McL., 175.

§ 3687. A witness must be sworn in some way that is binding on his conscience; and a Chinaman who said that if he did not tell the truth the court would punish him, and that after he was dead he would "go down there" (making an emphatic gesture downward), may testify on his oath. *The Bark Merrimac*, 1 Ben., 490.

§ 3688. A witness objected to as incompetent, on account of his disbelief in the existence of a God and a future state of rewards and punishments, may be examined as to his belief. *United States v. White*, 5 Cr. C. C., 38.

§ 3689. **Conviction of crime.**—Conviction and judgment upon an indictment for conspiracy with a debtor to defraud his creditors, by secreting property on taking the oath of an insolvent debtor, is a conviction for an infamous crime, partaking of the nature of the *crimen falsi*, and renders the criminal incompetent as a witness. *United States v. Porter*, 2 Cr. C. C., 60.

§ 3690. A prisoner, convicted and sentenced for an infamous crime, is not restored to competency as a witness by the expiration of his sentence. *United States v. Brown*,* 4 Cr. C. C., 607.

§ 3691. A pardon restores the competency of one convicted of an infamous crime. *United States v. Rutherford*, 2 Cr. C. C., 528.

§ 3692. **Mental derangement.**—A witness is not incompetent because he is subject to fits of mental derangement, if at the time of giving his testimony he is sane. *Evans v. Hettick*,* 7 Wheat., 470.

§ 3693. On a trial in Pennsylvania, on an indictment for smuggling, a witness was offered for the prosecution, who had been convicted of an assault and battery with intent to murder, and sentenced to pay a fine and to six months' imprisonment. On objection to his competency the court ruled as follows: "The punishment of this offense at common law is fine and imprisonment, and frequently the pillory is added; but it seems to be in the discretion of the court. In lieu of the common law punishment of branding, whipping and pillory, the Penal Code of this state has substituted confinement and hard labor. Now, even if the incompetency produced by conviction depended on the punishment, instead of the nature of the offense, where the infamous punishment forms no part of the sentence, there would be no disqualification, because it might have been inflicted. In this case, the punishment by fine and imprisonment is not to be considered as an infamous punishment, so as to render the witness incompetent." *United States v. Brockius*, 3 Wash., 99.

§ 3694. **Parties and persons in interest.**—Interest in the event of the suit, both as to costs and the matter in dispute, lies at the foundation of the rule excluding parties as witnesses, and when that interest is removed the objection ceases to exist. *Willings v. Consequa*, Pet. C. C., 301.

§ 3695. The act of congress rendering parties to the suit and persons interested competent witnesses in the courts of the United States does not apply to the territorial courts. *Good v. Martin*, 5 Otto, 90.

§ 3696. Parties to a suit in equity in the courts of the United States are incompetent witnesses, congress having never relieved them from that disability, and rules of evidence prescribed by state laws being inapplicable to equity suits in the federal courts. *Blanchard v. Sprague*, 1 Cliff., 288.

§ 3697. The plaintiff cannot ask the defendant whether he has ever received a certain letter, for this would be examining him as a witness. *Vasse v. Mifflin*, 4 Wash., 519.

§ 3698. Under section 3 of the act of July 2, 1864, a party to a suit is competent to give a deposition in his own case, as well as to testify orally. *Cornett v. Williams*, 20 Wall., 243 (§§ 798-803).

§ 3699. The proviso to the third section of the act of July 2, 1864, rendering parties and interested witnesses competent, is not repealed or modified by the second section of the act of February 28, 1865, or the ninth section of the act of July 13, 1866. *United States v. Ten Thousand Cigars*, Woolw., 123.

§ 3700. If it appears on the cross-examination that the witness is interested, the court will instruct the jury that his testimony is not evidence. *Brohawn v. Van Ness*, 1 Cr. C. C., 366.

§ 3701. In the court of claims a party cannot testify in his own behalf. *Jones & Brown's Case*,* 1 Ct. Cl., 383.

§ 3702. The supreme court has settled the rule for all the federal courts—that a party to the record is an incompetent witness in the cause. And this, although his interest be nominal or entirely extinguished, or be protected by a deposit of money equal to any liability he may be subjected to. This rule applies to the parties to a libel in admiralty for a collision. But, upon petition to the court, the names of the master and crew may be stricken from the libel and they thereby made competent witnesses. *The Steamboat Neptune, Olc.*, 483.

§ 3703. The deposition of a party to the record is inadmissible. *Dick v. Balch*, 8 Pet., 30.

§ 3704. When by the law of the state in which the federal court is sitting a party is competent to testify in his own behalf, he is competent in the federal court. *Wright v. Bales*,* 2 Black, 535.

§ 3705. According to the law of Ohio a party is a competent witness in his own behalf; in a suit in the federal court, sitting in that state, he is competent. *Haussknecht v. Claypool*,* 1 Black, 431.

§ 3706. Interest does not disqualify a witness where it is against the party calling him. *Clements v. Dickey*, 1 Paine, 377.

§ 3707. Where the interest of a witness in the controversy is balanced he is competent. *Scott v. Propeller Plymouth*, 6 McL., 463; Newb., 56.

§ 3708. A witness is not excluded for interest unless it be an interest in the event of the suit, or the verdict can be used for or against him. *Bork v. Norton*, 2 McL., 422.

§ 3709. A party is a competent witness in his own behalf in the federal courts, when made competent by the laws of the state in which the trial is had. *Dibblee v. Furniss*,* 4 Blatch., 262.

§ 3710. What a witness has been heard to say about his interest shall not make him incompetent, for that is but hearsay evidence. *Vining's Lessee v. Wooten*,* 1 Cooke (Tenn.), 127.

§ 3711. Where a witness was objected to on the ground that he was an interested party, but this was not necessarily implied from the facts of the case, and he himself swore that he was not, it was error to disregard his testimony. *Taber v. Perrott*, 9 Cr., 39.

§ 3712. A witness who, after the transaction has taken place concerning which he is called on to testify, voluntarily becomes interested in the subject-matter of the suit, will be compelled to testify. *Tatum's Ex'rs v. Lofton*,* 1 Cooke (Tenn.), 115.

§ 3713. Where a party to the suit is examined as a witness, and it becomes material to inquire into the motive with which he did a particular act, he may testify to the motive himself. *Conway v. Clinton*,* 1 Utah T'y, 215.

§ 3714. A witness not interested in the particular fact to which he is required to depose is not incompetent for interest. *Smith v. Carrington*, 4 Cr., 62.

§ 3715. — particular cases. — A bill in equity, by a purchaser seeking damages for fraud and misrepresentation in making the sale, prayed that the defendants might be compelled to pay and deliver to the plaintiff the unpaid notes given by the plaintiff and one W., who was also interested in the purchase, to secure the purchase money. The holder of the notes had covenanted not to sue W. thereon. And the plaintiff had also released W. from liability on the notes should they be paid by plaintiff. It was held that as the notes had been indorsed, and the indorsers had not been released, they would have their remedy over against W., on their payment of the notes, and that therefore W. was not a competent witness. *Ferson v. Sanger*, Dav., 252.

§ 3716. Though in hearings in chancery the parties are listened to when testifying to their bills and answers, notwithstanding their interest, yet neither they nor others can be used as witnesses technically, as to the merits of the cause, in a court of equity, any more than in a court of law, if directly affected in a pecuniary point of view by the result of the proceedings. *Ferson v. Sanger*, 1 Woodb. & M., 138.

§ 3717. In a prize case, the examination of witnesses should be confined to persons on board the captured vessel at the time of capture, unless upon special permission of the court. It is a great irregularity only to take the depositions of two of the former crew of the captured vessel, who were not of the crew nor on board the vessel at the time of capture. *Ship Alliance*, Bl. Pr. Cas., 646.

§ 3718. In a suit in equity to restrain the defendant from removing from the District of Columbia the plaintiff's slave, which had been sold by the plaintiff to the defendant for a term of years, after which she was to become free, the complainant and his wife were held not to be competent witnesses against the defendant. *Thomas v. Mackall*, 5 Cr. C. C., 536.

§ 3719. A person interested in setting aside an instrument forged is not, in a prosecution for the forgery, a competent witness to prove any fact tending to prove the forgery. *United States v. Anderson*, 4 Cr. C. C., 476.

§ 3720. A statute allowing parties to testify in "actions on book debts" does not authorize the admission of a party as a witness in an action of *assumpsit* for articles and services charged on book, and ordinarily sued for in book-debt actions. (The judge questioned this ruling on the next day.) *Edwards v. Nichols*,* 3 Day (Conn.), 16.

§ 3721. A joint defendant with another in a suit then depending, the judgment wherein was to depend by agreement on the verdict in this case, was held incompetent as a witness. And he was not allowed to confess judgment to render himself competent. *Patton v. Janney*, 2 Cr. C. C., 71.

§ 3722. Several cases against several underwriters on the same policy having been submitted to the jury at the same time, and they having decided against the defendants on some of the cases, but wishing to reconsider the others, the court would not allow the defendants against whom verdicts had been found to be examined for the other defendants. *Ibid.*

§ 3723. Executors who are parties to the suit were formerly not competent witnesses without an order for their examination, and where it appeared that they were interested an order for such examination was refused. *Walker v. Parker*,* 5 Cr. C. C., 639.

§ 3724. When the interest of a person whose deposition is being taken appears on cross-examination, it is no waiver of the objection on that ground to continue to cross-examine on the merits,* especially where all exceptions to the competency of the witness were expressly saved by agreement. *Ibid.*

§ 3725. In a suit by a bank to recover money overpaid upon a check, by mistake, the book-keeper, whom the bank has sued upon his bond, intending to charge him with the balance, will not be compelled to answer whether the account upon the ledger showed a sum equal to or greater than the amount of the check, at the time it was paid, in favor of the defendant. *Bank of United States v. Washington*, 3 Cr. C. C., 295.

§ 3726. The deposition of a witness is not to be excluded as evidence for the plaintiff because he sent to the plaintiff certain certificates, not admissible as evidence in the cause, upon a contract to receive, as a compensation for furnishing them, one per cent. of what might be collected on the certificates. *Willings v. Consequa*, Pet. C. C., 301.

§ 3727. One A. received bonds upon an agreement to apply them toward the construction of a railroad, B. being surety on a bond that he would do so. A. converted these bonds to his own use, buying goods for himself with them. Upon D., a creditor of A., attaching the goods for debt, B. sued said D. in trover, claiming them by virtue of an assignment of the bonds and goods to him by A. to indemnify him on his suretyship. *It seems* that A. was incompetent as a witness for B., as, in case judgment went for D., A. would be liable to B. to indemnify him for the expenses of the litigation, besides being liable to B. for the property. *Comstock v. Carnley*, 4 Blatch., 58.

§ 3728. A letter notifying an occupant not to pay rent to another, and promising, in case of distress for rent, to save him harmless, if he will resist the payment by writ of replevin, renders the writer incompetent as a witness for the plaintiff when the distress is made and the action of replevin brought. *Scott v. Lloyd*, 9 Pet., 418.

§ 3729. In an action on the case for negligence of the defendant's driver in running against the plaintiff's stage-coach, the driver of the plaintiff's stage-coach is not a competent witness for the plaintiff, without a release. *Beltzhoover v. Stockton*, 4 Cr. C. C., 695.

§ 3730. Co-heirs are not competent witnesses for the plaintiff in a suit brought by one of their number for an accounting of a trust fund beneficial to them all. *West v. Randall*, 2 Mason, 181.

§ 3731. Where a testator has given a fee-simple estate to A., provided she should survive his daughter, dying without issue, then living; but should A. die before the happening of such contingency, then the estate to vest in the heirs of A., as purchasers, by way of executory devise, a daughter of A. is an incompetent witness in support of the will, having a contingent interest in upholding it. *Harrison v. Rowan*, 3 Wash., 580.

§ 3732. Under the statute of Massachusetts, declaring "that every person who shall become a member of a manufacturing corporation . . . shall be liable in his individual capacity for all debts contracted during the time of his continuing a member," a person who was a member of a manufacturing corporation during the time of its alleged infringement of a patent-right, but who sells his interest before the suit for the infringement is brought, is an incompetent witness for the defendant, on account of his interest in the event of the suit. *Carver v. Braintree Manufacturing Co.*, 2 Story, 432.

§ 3733. In an action brought to recover damages for a breach of contract—the measure of damages claimed being the profits which might have been made—one who had an understanding with the claimants that he was to have a share of the profits is incompetent to testify for them under the act of June 25, 1868. *Berole's Case*,* 7 Ct. Cl., 454.

§ 3734. A stockholder in a company which was a stockholder of the plaintiff company was permitted to testify for the plaintiffs. *Bank of Alexandria v. Mandeville*, 1 Cr. C. C., 575.

§ 3735. In a suit to rescind a purchase at auction on account of fraud on the part of the auctioneer in running up the price by pretending to have received bids not actually made, the auctioneer is a competent witness for the plaintiff, his interest being against him. *Veazie v. Williams*, 8 How., 134.

§ 3736. In an action on a valued policy of insurance on goods shipped on board a vessel, a part owner of the vessel, not interested in the goods, is a competent witness to prove the loss, and other facts. *Ruan v. Gardner*, 1 Wash., 145.

§ 3737. In an action on a contract made through a broker, the broker is a competent witness to prove his authority, although he has a suit pending for his commissions on making the contract. *Livingston v. Swanwick*, 2 Dall., 300.

§ 3738. In a suit between the original owner of a pre-emption right, and one claiming under an assignee of the owner, such assignee is a competent witness to prove that he never owned the land or assigned the warrant. *Wilson v. Speed*,* 3 Cr., 290.

§ 3739. The grantor in a deed is a competent witness to prove that it was fraudulently ante dated. The subscribing witness, though present, need not be called instead. *Holbrook v. Worcester Bank*, 2 Curt., 244.

§ 3740. If there be no evidence whatever to prove possession in one of the defendants in ejectment, the jury may find a verdict in his favor at the bar, so as to authorize the other defendants to examine him as a witness. *Lanning v. Case*, 4 Wash., 169.

§ 3741. The trustees of a religious corporation are competent witnesses for the corporation in a suit against the United States, not being "claimants" nor "persons interested" within the meaning of the act of June 25, 1868. *Hebrew Congregation's Case*,* 6 Ct. Cl., 241.

§ 3742. In a proceeding by the United States to enforce a forfeiture of goods for violation of the collection laws, the officers of the customs who made the seizure of the goods in controversy are witnesses from necessity, and are not disqualified by any interest in the cause arising from the fact that the law provides that they shall not be liable to any action on account of the seizure and prosecution if reasonable cause of seizure is made out. *Taylor v. United States*, 3 How., 197.

§ 3743. Where property is seized for violation of the internal revenue laws, the claimant is a competent witness in his own behalf under the proviso to the third section of the act of July 2, 1864, declaring "that in all the courts of the United States there shall be no exclusion of any witness on account of color, nor in any civil actions because he is a party to, or interested in, the issue tried." *United States v. Ten Thousand Cigars, Woolw.*, 123.

§ 3744. In a suit for the forfeiture of goods seized for violation of the revenue laws, one who assisted in the seizure is a competent witness for the United States; the contingency that the claimants will bring an action of trespass against him being too remote an interest to debar him. *United States v. Twenty-five Cases of Cloth, 1 Crabbe*, 356.

§ 3745. A creditor who has no specific lien is a competent witness for his debtor, though his testimony may tend to increase his debtor's estate. *Macy v. De Wolf, 3 Woodb. & M.*, 193.

§ 3746. A witness cannot be excluded because he has a bet on the event of the cause, the wager being void in law. But the fact may go to the credit of the witness. *United States v. Carrico, 5 Cr. C. C.*, 112.

§ 3747. In a suit upon an insurance policy, a person liable for a debt against the premises which the proceeds of the policy, if recovered, will go to discharge, is not on that account an incompetent witness for the plaintiff, the creditors having only a lien on the property insured and not upon the policy. *Columbia Ins. Co. of Alexandria v. Lawrence, 10 Pet.*, 507.

§ 3748. In an action of trover for the value of goods withheld under an alleged illegal claim of a lien for freight money, the plaintiff is a competent witness to prove the value of the goods, and the goods being his household goods which are not new, it is no objection that he has no knowledge of their market value. *Marsh v. Union Pacific R'y Co., 3 McC.*, 236.

§ 3749. If an executor, pending a suit against him, voluntarily pays a legacy, without taking a refunding bond, or requiring any promise, or making any condition, he cannot, especially after the lapse of time has created a bar, recover it back from the legatee, and the latter is a competent witness in the suit for the defendant. *Wilcocks v. Phillips, 1 Wall. Jr.*, 47.

§ 3750. In a suit in equity for relief against a judgment at law on certain notes given for the purchase money of land, which notes have been assigned, with the consent of the defendant at law, for certain creditors of the plaintiff at law, the trustee to whom the notes were assigned for the creditors, having no interest in them or charge upon them for costs or commissions, is not disqualified as a witness on account of interest. *Patton v. Taylor, 7 How.*, 133.

§ 3751. In a suit for the purpose of enforcing the collection of a debt due from A., out of goods belonging to him in the hands of B., which goods are also claimed by C., another creditor, as security for his debt, A. is not an incompetent witness for C., on the ground of interest, because his property will be applied to the discharge of debts against him in any event. *Grove v. Brien, 8 How.*, 429.

§ 3752. A person who is in possession of property, with no claim of title but as a mere depository, is a competent witness in a suit trying the title to the property. *Hamilton v. Russell,* 1 Cr. C. C.*, 97.

§ 3753. It was held that a defendant warehouseman's receipt for goods, to be held subject to the plaintiffs' order, could be contradicted by him if the plaintiffs had incurred no responsibility nor done any act on the credit of it — the plaintiffs appearing to have no further interest in the goods than to sell them as commission merchants. *Beebe v. Moore, 3 McL.*, 387.

§ 3754. It does not render a witness incompetent, in a suit in equity, that a copy of the interrogatories has been forwarded to him beforehand, no comments having accompanied them, nor influences used to shape his answers. *Warner v. Daniels, 1 Woodb. & M.*, 90.

§ 3755. A witness is not incompetent for interest, where the event of the suit will only determine which of the parties thereto he owes. *Bissell v. Farmers' and Mechanics' Bank of Michigan, 5 McL.*, 495.

§ 3756. In an action of trover to recover the value of a negro man, sold to the plaintiff by the defendant's son as his own property, the son was allowed to testify that the negro was the defendant's property, on the ground that his interest in the result of the suit was equal. *Stump v. Roberts,* 1 Cooke (Tenn.)*, 350.

§ 3757. One was held a competent witness for the defendant, because although, if the plaintiff recovered, the witness became liable to the defendant, yet if the plaintiff failed, the witness became liable to him also. *Harrison v. Evans, 1 Cr. C. C.*, 364.

§ 3758. Where the persons on board of a captured vessel were inadvertently allowed to leave her near the place of capture, and no one of them could be produced on the examination *in preparatorio*, the testimony of captors and witnesses present at the capture was allowed by special order of the court. *The Falcon, Bl. Pr. Cas.*, 52.

§ 3759. A witness who has ridden with a party in a railway car for part of two days is competent to testify from their general conduct that they formed one family and were of German nationality, although he did not understand the German language. *Kansas Pacific Railway Co. v. Miller,* 2 Colo. T'y*, 442.

§ 3760. Inhabitants of a town are competent witnesses in actions where the town is a party. The confessions of the inhabitants, however, do not bind the town, unless made as authorized agents thereof. *Hunter v. Town of Marlboro*, 2 Woodb. & M., 168.

§ 3761. The tract of land upon which a town was laid off was held under a patent from the state. The legislature afterwards granted a part of this tract to trustees, to be laid off into lots and given to the settlers or sold for the benefit of the proprietors. In an ejectment suit for one of these lots, which depended upon the validity of this act of the legislature, it was held that a witness who had no further interest in the suit than being the owner of a lot in the town, and the vendor of another with warranty, was not incompetent. *Owings v. Speed*, 5 Wheat., 420.

§ 3762. In an action upon a note by the surviving commissioner of the city of Washington, the superintendent of the city is a competent witness for the plaintiff. *Thornton v. Stoddert*, 1 Cr. C. C., 534.

§ 3763. In an action for the use of a county, on a bond conditioned to perform covenants respecting the building of a bridge, an inhabitant of the county was held competent to testify for the plaintiff, even though such inhabitant was one of the county commissioners who contracted for the bridge. *Virginia v. Evans*, 1 Cr. C. C., 581.

§ 3764. The principal debtor was held competent to testify for the sureties on an issue as to the identity of the articles of agreement. *Ibid.*

§ 3765. One who owned a few acres of land in the county was admitted to testify for the plaintiff. *Ibid.*

§ 3766. One surety was examined as a witness in behalf of the other. But the sureties were not admitted for the principal debtor. *Ibid.*

§ 3767. A surety for costs being offered as a witness, the court assented to having him discharged and another appointed, and the former was then permitted to testify. *Ibid.*

§ 3768. Citizens of Alexandria, in an action for a penalty by the corporation of Alexandria, are not competent as jurors, but are competent as witnesses. *Common Council of Alexandria v. Brockett*, 1 Cr. C. C., 505.

§ 3769. The grantor in a deed, which simply releases his title and warrants nothing, is a competent witness to prove that his title, at the time of the deed, was only a mortgage, and that the grantee took with knowledge of this fact. *Taylor v. Luther*, 2 Sumn., 228.

§ 3770. In a suit by a vendor to set aside a conveyance of land, a mortgagee called in to defend is a competent witness for the respondent, if it is shown that his interest ceased before the commencement of the suit. *Warner v. Daniels*, 1 Woodb. & M., 90.

§ 3771. The United States filed a bill against B. and S. for the purpose of removing a mortgage given by B. to S. to secure the payment of a certain sum, so as to let in a judgment which the United States had recovered against B. as surety on a duty bond. A judgment had been recovered against S. upon the same bond. The bill alleged that the mortgage was in fact given to indemnify S. against liability on the bond, and for no other purpose, while it was claimed upon the other side that the mortgage was given as security for all debts due from B. to S., and an indemnity against all responsibilities incurred for him. S. set up in his answer that he had assigned the mortgage to a third person in satisfaction of a debt owed by him to such third person. The United States thereupon filed a supplemental bill against the assignee of the mortgage. It was held that S. was not disqualified as a witness for the assignee of the mortgage on account of any interest. *Burroughs v. United States*, 2 Paine, 569.

§ 3772. In an action between mortgagees, the mortgagor is a competent witness for the party claiming to be the prior mortgagee, to identify the goods which were part of the stock on hand at the time of the first mortgage. *Wagner v. Watts*, 2 Cr. C. C., 169.

§ 3773. In a suit by an assignee to redeem from a mortgage, the heirs of the mortgagor are not competent witnesses to prove that the assignment is fraudulent. *Randall v. Phillips*, 3 Mason, 378.

§ 3774. The conviction of an owner of a vessel of the offense of destroying it with intent to prejudice the underwriters would be no evidence in a suit upon the policy, and therefore the president of the company is a competent witness, in an indictment against the owner for this offense, to prove the handwriting of the defendant to the manifest of the cargo. *United States v. Johns*, 1 Wash., 363.

§ 3775. In a prosecution under the second section of the act of congress of March 26, 1804, for destroying a vessel with intent to prejudice the underwriters, the president of the insurance company by which the vessel was insured is a competent witness to prove the order for insurance and the subscription to the policy. *United States v. Johns*, 4 Dall., 412.

§ 3776. In an action of replevin, where the defendant justifies the taking as constable under an execution directed to him, and states upon the *voir dire* that he has been indemnified by the plaintiff in the execution, and that he does not think himself interested, unless to the

amount of his fees on an execution which might be issued again in the cause, is not incompetent as a witness for interest. *Wise v. Bowen*, 2 Cr. C. C., 239.

§ 3777. In replevin for goods of the plaintiff taken by the defendant, a constable, as the goods of another against whom he held an execution, the defendant may testify for himself, upon being indemnified by the plaintiff in the execution. *Hilton v. Beck*, 4 Cr. C. C., 107.

§ 3778. In replevin for goods distrained for rent, whether the defendant, who acted as the mere bailiff of the landlord, and is indemnified by him, may be examined as a witness in the cause, *quære*. *Dixon v. Waters*, 2 Cr. C. C., 527.

§ 3779. K. and another, as supercargoes, gave their note to C. for a certain sum, on which note C. brought an action against W. and F., as being by the procurement of their agents. It was agreed by the parties that whatever damages should be recovered in a suit, tried at the same time, by W. and F. against C., should be set off against the sum due by them to C. It was insisted that, as K. was a dormant partner with W. and F. in relation to the merchandise for which the note was given, and consequently might be thereafter liable to be sued as such for that sum, unless it should be discharged by the recovery of damages sufficient for that purpose in the suit against C., it was the interest of K. to shelter himself against C. by increasing the damages so as to discharge the note altogether, or at least to diminish its amount as much as possible, and that he was therefore an incompetent witness for the plaintiffs in the suit against C. It was held that the interest of K. was too remote and contingent to furnish an objection to his competency, whatever weight it might have against his credit. *Willings v. Consequa*, Pet. C. C., 301.

§ 3780. A former partner in a firm which has gone into bankruptcy is admissible to speak to matters not involving his own interests, in a suit by the assignee against a third party. *Wright v. Rogers*,* 3 McL., 229.

§ 3781. An objection to a witness that he is a creditor of the partner signing the note, and so is interested in proving the partnership, goes only to the credibility, although the partner signing has become insolvent. *Bank of Alexandria v. Mandeville*, 1 Cr. C. C., 575.

§ 3782. Upon a bill in equity against the members of a partnership, defendants against whom no decree is sought are competent witnesses for the plaintiff. *Van Reimsdyk v. Kane*, 1 Gall., 630.

§ 3783. In an action by a partnership against a bank for paying out the partnership's money on the check of an individual partner, the plaintiffs offered such partner as a witness, the firm having been dissolved and all the effects transferred by the member offered as a witness to his copartner, with mutual releases given. But the court rejected him as incompetent. *Coote v. Bank of United States*, 3 Cr. C. C., 50.

§ 3784. If one summoned by the defendants as a witness swears on the *voir dire* that he is interested as a partner with the plaintiffs, he will not be compelled to swear contrary to his own interest. *Carne v. McLane*,* 1 Cr. C. C., 351.

§ 3785. The informer in a proceeding to forfeit a vessel, who is entitled to part of the forfeiture, is not a competent witness unless the court considers his testimony necessary, in which case "the part or share to which he otherwise would have been entitled shall revert to the United States;" and the depositions of such person, taken before the trial, when the court had no opportunity to judge of the necessity of his testimony, cannot be read at the trial unless the deponent had released his interest. *The Thomas and Henry*,* 1 Marsh., 367.

§ 3786. A strong bias in a witness in favor of the party calling him goes to his credibility and not to his competency. *Burroughs v. The United States*, 2 Paine, 569.

§ 3787. A letter written to a witness requesting him to tell the truth, without any suggestion as to what the writer considered to be the truth, does not affect his competency. *Warner v. Daniels*, 1 Woodb. & M., 90.

§ 3788. On the trial of a challenge for favor, the challenged juror was not allowed to testify. *Negro Joice v. Alexander*, 1 Cr. C. C., 528.

§ 3789. Actions on bills and notes.—A notary is a competent witness to prove that he has presented a note for payment, and that he acted, in so doing, according to the usual practice. And he is not rendered incompetent on account of interest in the suit because he is liable to the plaintiff for any negligence in making demand and giving notice, or because he has given a bond for the faithful performance of his duty as notary of the bank for which he acted in presenting the note. *Cookendorfer v. Preston*, 4 How., 317.

§ 3790. In an action by a *bona fide* holder of a bill of exchange, evidence intended to resist a recovery on account of the interest which a copartner or other person had in the consideration for which the bill was indorsed by the defendant is not admissible. *Evans v. Gee*, 11 Pet., 80.

§ 3791. The maker of a note is a competent witness, as between holder and indorser, to prove facts subsequent to his making and negotiation of the note. *Frazer v. Carpenter*,* 2 McL., 243.

§ 3792. In *assumpsit* upon a note against an indorser who pleads usury between the maker and the payee, the maker is competent to prove the usury, unless he is interested. *Knowles v. Parrott*, 2 Cr. C. C., 93.

§ 3793. In an action against an indorser, the maker of the note is a competent witness to prove an improper use of the note after its execution, and that time was given to the maker without the defendant's consent. *White v. Burns*, 5 Cr. C. C., 123.

§ 3794. The maker of a note is a competent witness for the indorser in an action against the latter thereon. *Bank of Columbia v. French*, 1 Cr. C. C., 221.

§ 3795. In an action on a promissory note against the maker, an indorser is a competent witness to prove payment by the defendant. *Mason v. Masi*, 5 Cr. C. C., 397.

§ 3796. In an action against the maker on a promissory note, an intermediate indorser was held to be a competent witness for the defendant, the note not being mercantile negotiable paper, and the plaintiff having cross-examined the witness before the objection. *Bradley v. McKee*, 5 Cr. C. C., 298.

§ 3797. In an action by indorsee of a bill against the acceptor, the indorsers are competent witnesses for the defendant to show usury in the plaintiff's transaction. *Gaither v. Lee*, 2 Cr. C. C., 205.

§ 3798. An indorser of a promissory note, when sued thereon by his indorsee, who still holds the note and has never put it in circulation, is a competent witness to prove an agreement at the time of the indorsement that he should not be held liable thereon. *Davis v. Brown*, 4 Otto, 423.

§ 3799. When the payee sues the maker on a promissory note, the latter is a competent witness to prove a failure of consideration, or that the contract was usurious. The rule that a party to a negotiable instrument cannot impeach it by his own testimony cannot be applied in an action between the original parties. *Eastwood v. Greecy*,* 1 MacArth., 232.

§ 3800. When the owner of a bill of exchange indorses it in blank and delivers it to another for collection, and this one gives it to his agent for collection, with directions to place the proceeds to the joint credit of the first two, but the last person, having collected the money, refuses so to credit it, the second person is a competent witness for the first to recover the money. *Taber v. Perrott*,* 9 Cr., 41.

§ 3801. In an action by the payee against the drawer of an inland bill of exchange, the acceptor is not incompetent, because a party to the bill, to prove that it was drawn for the accommodation of the plaintiff, without any consideration between him and the defendant. *Knowles v. Stewart*, 2 Cr. C. C., 457.

§ 3802. A bill of exchange in the hands of the payee, and which contains his indorsement and an indorsement by his indorsee, is *prima facie* evidence that he has paid the amount of it to those who had a right to call upon him, although it is not indorsed back to him. Therefore if he sues on it, his indorsee is a competent witness to prove that he (the witness) indorsed it to the other person for collection only, without receiving any consideration. Such a witness has no interest, and his testimony does not tend to discredit the bill. *Lonsdale v. Brown*, 3 Wash., 404.

§ 3803. The principle that no one party to a bill is a competent witness to invalidate it applies only to negotiable instruments. It has no application to a bond. *United States v. Leffler*,* 11 Pet., 94.

§ 3804. A party to a bill is not a competent witness to prove facts which, in connection with other facts, invalidate the bill. *Saltmarsh v. Tuthill*,* 13 How., 229.

§ 3805. In an action by the payee of an inland bill of exchange against the drawer, the acceptor is an incompetent witness for the defendant, unless released by him from liability for costs in case of recovery by the plaintiff. The fact that the act of limitations would be a bar to the plaintiff's action against the witness, if the plaintiff should fail in the present action, but would be no bar to the action which the defendant might bring against the witness upon his acceptance, in case the defendant should be compelled to pay the money, does not render the witness incompetent for interest. *Knowles v. Stewart*, 2 Cr. C. C., 457.

§ 3806. In an action against the acceptor of an inland bill of exchange, the drawer is not a competent witness to prove the defense of usury. *Nichols v. Wright*, 4 Cr. C. C., 700.

§ 3807. In *assumpsit* against the maker of a promissory note, an indorser was held competent to prove for the maker that the indorsement was without consideration; but the payee — being a previous indorser — was not competent to testify for the plaintiff indorsee. *Gilman v. King & Co.*, 2 Cr. C. C., 48.

§ 3808. In an action of trover for the wrongful conversion of a negotiable note, in which the plaintiffs seek to recover its value, a person who has received it for collection and sent it to the defendants to be collected by them, and indorsed it payable to the defendants or their order, *for collection*, is a competent witness to prove that he was not the owner of it, and did not mean to give to the defendants any lien on or title to it, or its proceeds when collected. *Sweeny v. Easter*, 1 Wall., 166.

§ 3809. In a suit on a promissory note against an indorser, another indorser is not incompetent as a witness for interest in the cause; but he cannot be permitted by his own testimony to invalidate the note. He cannot testify that the defendant indorsed the note under a representation that he thereby incurred no risk, and that he would not be looked to for payment. *Bank of United States v. Dunn*,* 6 Pet., 51.

§ 3810. A party to a negotiable instrument cannot be a witness to invalidate it. *Henderson v. Anderson*,* 3 How., 78; *Bank of the Metropolis v. Jones*,* 8 Pet., 12.

§ 3811. A. indorsed a bill of exchange, of which he was payee, to B. in blank, who indorsed it in full to C. C. sued A. A. offered B. as a witness to prove that he was the real party in interest in the bill. *Held*, that he was not competent. *Cropper v. Nelson*,* 3 Wash., 125.

§ 3812. A party to a negotiable instrument is not permitted to invalidate it by his own testimony. The rule in *Walton v. Shelley*, 1 T. R., 296, followed. *Bank of the United States v. Dunn*,* 6 Pet., 51.

§ 3813. An agent is a competent witness to prove his own agency. *Doggett v. Emerson*, 3 Story, 700; *Randall v. Rench*, 4 McL., 259.

§ 3814. If one of the creditors of a debtor is employed as agent to collect the debts, he is a competent witness to prove a payment to the other creditors of their proportion of the money received by him. *Howe v. Wade*, 4 McL., 319.

§ 3815. In an action against a deputy postmaster for the loss of a bank-note in the course of the mail, through the negligence of the defendant, the clerk of the plaintiff, who deposited the letter in the postoffice, is a competent witness for the plaintiff. *Dunlop v. Munroe*, 1 Cr. C. C., 536.

§ 3816. An agent who has shipped goods for which an action of conversion is brought against the consignees by the owners is not disqualified for interest. *Chapin v. Siger*, 4 McL., 378.

§ 3817. The agent in whose name the insurance is effected is a competent witness for the plaintiff in an action on the policy, after denying his interest on his examination on the *voir dire*. *Ruan v. Gardner*, 1 Wash., 145.

§ 3818. In *assumpsit* by a bank for money overdrawn, the cashier is a competent witness to prove the overdraft. *Bank of Alexandria v. McCrea*, 3 Cr. C. C., 649.

§ 3819. An agent authorized to purchase a boat and draw drafts on his principal in payment bought the boat for the joint benefit of himself and principal. In a suit on the draft it was held that the agent was not a competent witness, and that a release from liability on the drafts did not render him competent. *Peckham v. Lyon*, 4 McL., 45.

§ 3820. In a suit in equity by a purchaser of property for damages for alleged fraud and misrepresentation in the sale, the agent in whose name the purchase was made, who was jointly interested in the purchase, and who is a proper, if not a necessary, party to the bill, is not a competent witness. *Ferson v. Sanger*, Dav., 252.

§ 3821. Patents.—A person having an interest only in the question, and not in the event of the suit, is a competent witness; and in general, the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not exclude him. In a controversy whether the plaintiff is entitled to recover for an alleged breach of his patent by the defendant, a person using one of the machines is not incompetent as a witness for the defendant, because the special notice in the case asserts matter which, if true, and found specially by the jury, may authorize the court to adjudge the patent void. *Evans v. Eaton*, 7 Wheat., 356.

§ 3822. In a suit for the infringement of a patent, a witness was called by the defendant, who, it was admitted, was using a machine similar to that for the use of which by the defendant the suit was brought. On his *voir dire*, it appeared that he, together with six other persons, defendants in suits then pending for infringements of the same patent, agreed to contribute to a fund to defray the expenses of this witness in coming to the place of holding the court, remaining there, attending to the business of these suits, and returning. But the agreement extended no further. *Held*, that he was not incompetent for interest dependent on the event of the suit. *Evans v. Hettick*, 3 Wash., 408.

§ 3823. In an action for the infringement of a patent, the defendant, having given in evidence a patent issued to a third person for the machine used by the defendant, and an assignment of the same to him (the defendant), offered the third person as a witness to prove the priority of his invention. *Held*, that the witness was competent and had no interest in the event of the suit. *Treadwell v. Bladen*, 4 Wash., 703.

§ 3824. In an action to recover damages for the infringement of letters patent, the defendants, in their notice of special matter under section 15 of the patent act of July 4, 1836, gave notice that B. had invented and had knowledge of the article prior to the invention under the patent for which the plaintiff claimed. *Held*, that a witness was competent to prove such invention and knowledge on the part of B., although the name of such witness was not mentioned in the notice of defense. *Many v. Jagger*, 1 Blatch., 372.

§ 3825. On a reference to a master to take an account in an equity suit for the infringement of a patent, a defendant cannot be examined as a witness in his own behalf, if objection be made by the plaintiff. *Foot v. Silsby*, 3 Blatch., 507.

§ 3826. In an action for damages for the infringement of a patent, for a certain county, a witness on the *voir dire* said he had exclusive right to the patent other than the county in which the alleged infringement was committed, and felt great interest in sustaining the patent, and was prosecuting a suit against the same defendant. *Held*, that this was not a sufficient interest to disqualify him as a witness. *Buck v. Hermance*,* 1 Blatch., 323.

§ 3827. Salvors are from necessity admitted as witnesses to facts which are deemed peculiarly or exclusively within their own knowledge. As to other facts they are incompetent. *The Ship Henry Ewbank*, 1 Sumn., 400.

§ 3828. In a libel for salvage, the salvors are admitted as witnesses for themselves from necessity. *The Elizabeth and Jane*, 1 Ware, 35.

§ 3829. In instance cases, the court of admiralty generally deems a person incompetent as a witness who is a party to the cause, or has an interest in the event of it. But there is an exception to the rule as to interest, in cases of salvage, where the facts must come in a great measure, if not exclusively, from the salvors themselves. But the testimony of the master and mate, not to the *res gestæ* of the salvage service, but as general evidence touching charges of embezzlement in the answer, is inadmissible. *The Schooner Boston and Cargo*, 1 Sumn., 329.

§ 3830. Though it is generally true that interested witnesses are incompetent in courts of admiralty, yet in cases of salvage the testimony of the salvors as to the facts occurring at the time of the salvage service is admitted on account of necessity. But the rule has not been extended beyond this, and the salvors cannot testify as to other facts capable of distinct and independent proof. *The Schooner Boston*, 1 Sumn., 328.

§ 3831. A salvor is a competent witness in support of his own interest; and it matters not whether the service in rescuing, protecting and restoring the property be technically salvage, if it partook so far of the nature of salvage as to imply the same necessity as that on which the rule is founded. But so much of the deposition of the salvor as goes to matters of hearsay, and facts provable *aliunde*, will not be considered. *The Brig Huntress*,* 1 Phil., 122.

§ 3832. A person interested as underwriter on the vessel and cargo is not a competent witness in an action in admiralty for salvage. That, by the laws of the state, witnesses are not disqualified for interest, does not render such a witness competent in admiralty, since the thirty-fourth section of the judiciary act, adopting state laws concerning evidence, does not apply to proceedings in admiralty, where interested witnesses are excluded, except in certain cases where they are admitted *ex necessitate*. *The Independence*, 2 Curt., 350.

§ 3833. **Administrator a party.**—The act of March 3, 1865, with reference to the testimony of parties in actions by and against executors, administrators or guardians, excludes depositions of parties, taken subsequent to its passage, in an action pending at the time of its passage. *James v. Atlantic Delaine Co.*, 3 Cliff., 614.

§ 3834. It is not the effect of the exception in the act of congress of March 3, 1865, providing that neither party shall be allowed to testify against the other in actions by or against executors, guardians or administrators, in which judgment may be rendered for or against them, "unless required to testify thereto by the court," to reserve to the federal courts the power which they possessed before as courts of equity, to require or allow a party to testify in the case. *Robinson v. Mandell*, 3 Cliff., 169.

§ 3835. In an action by an administrator, as such, creditors of the plaintiff's intestate, whose estate was insolvent, were held competent witnesses for the plaintiff,—their remote possibility of interest going to the credit and not to the competency. *Robertson's Administrator v. Selby*, 1 Cr. C. C., 211.

§ 3836. A bankrupt is an admissible witness in a suit by his assignee against a third person. *Wright v. Rogers*,* 3 McL., 230.

§ 3837. In a suit by assignees in bankruptcy, against creditors at whose suit an execution had issued, to satisfy which the sheriff, also made a defendant, had sold the goods of the bankrupt, after an act of bankruptcy committed, and notice of the title of the plaintiffs, the bankrupt was admitted as a competent witness. *Barnes v. Billington*, 1 Wash., 29.

§ 3838. The deposition of a creditor of a bankrupt is inadmissible for the assignee, in an action by the latter, which, if successful, will increase the estate. *Carr v. Hilton*, 1 Curt., 390.

§ 3839. **Part owners.**—Interests of a remote and uncertain character are not now regarded as disqualifying a witness, and go only to his credibility. Thus, in a suit *in rem* for wages by a seaman, a former part owner and manager of the boat is a competent witness for the owners. *The Steamboat Hudson, Olc.*, 396.

§ 3840. In an action against the part owners of a ship, for supplies furnished, a mortgagee of the share of one of the part owners is not incompetent as a witness for any interest in the event of the suit. *Macy v. De Wolf*, 3 Woodb. & M., 193.

§ 3841. **Consignee.**—In an action by the master of a vessel against the owner of the goods, for freight, the consignee of the goods, who has received them and delivered them to the owner without payment of the freight, is a competent witness. *Bork v. Norton*, 2 McL., 422.

§ 3842. **Bonds — Sureties.**—Although generally, on a joint and several bond, the plaintiff should sue all jointly, yet if judgment is given against the principal obligor by default, but the suit is then prosecuted against the sureties, the principal obligor is a competent witness for the sureties. *United States v. Leffler*,* 11 Pet., 96.

§ 3843. In debt against two on their joint and several bond, the principal obligor having confessed judgment, and being released by the defendant from the costs of suit, was held competent to prove usury for the defendant. *Peirce v. Reintzel's Adm'r*, 2 Cr. C. C., 101.

§ 3844. When the sureties on an official bond execute a release of all claims against the principal obligor, including costs, he is competent as a witness for the sureties in a suit against them. *United States v. Leffler*,* 11 Pet., 95.

§ 3845. In an action against an administrator, a surety in his administration bond is competent to testify for the defendant. *Thompson's Adm'r v. Afflick's Adm'r*, 2 Cr. C. C., 67.

§ 3846. A liability of an executor to costs of a suit *de bonis decedentis*, which cannot be established until a *devastavit* is proved, does not make a surety on the executor's bond incompetent in the suit. *Craig v. Reintzel*,* 2 Cr. C. C., 128.

§ 3847. Upon the issue *plene administravit* one of the sureties in the administration bond was admitted as a witness for the defendant. *Fairfax v. Fairfax*, 2 Cr. C. C., 25.

§ 3848. In a suit by an administrator to recover money claimed to be due the estate, a surety on the administration bond, who is also a surety on the intestate's official bond as clerk of the house of representatives, is not incompetent as a witness for the plaintiff, though the estate is largely indebted to the United States. *Burch v. Spaulding*, 2 Cr. C. C., 422.

§ 3849. In an action against a surety on an auctioneer's bond, the principal in the bond against whom judgment has been rendered, and who has been released by the defendant, is not incompetent to testify for the defendant because he says he considers himself bound in honor to indemnify the defendant if judgment should go against him, not having promised to do so, nor bound to do so in law. *Corporation of Washington v. Fowler*, 4 Cr. C. C., 458.

§ 3850. In a proceeding in equity for relief against a judgment at law, the surety for the plaintiff in the suit at law is not an incompetent witness on account of interest in the suit, the judgment having already been rendered in favor of the plaintiff at law. *Patton v. Taylor*, 7 How., 133.

§ 3851. On a bill in equity, in which the plaintiff seeks to be relieved from a bond which he has given to the defendant as surety for the agent of the latter, and for an injunction to stay proceedings at law, brought on the bond against the plaintiff and the agent, the agent is a competent witness for the plaintiff. *Gass v. Stinson*, 2 Sumn., 453.

§ 3852. In an action against a surety on a note, an attorney is not an incompetent witness for the plaintiff because he has extended time to the maker, unless he was grossly negligent in proceeding against the maker, and might have collected from him if proper steps had been taken. *Suydam v. Vance*, 2 McL., 99.

§ 3853. **Liability for costs.**—A person liable to the costs of a suit is disqualified by interest from testifying in it. *Bridges v. Armour*,* 5 How., 95.

§ 3854. A possible liability for costs will not render a witness incompetent. It should be a fixed legal interest to disqualify a witness; a remote or contingent interest affects his credit only. *Burroughs v. United States*, 2 Paine, 569.

§ 3855. To disqualify a witness to give evidence, the court cannot look to such remote possibilities as his liability to the costs of the supreme court, should the case be taken there. *Willings v. Consequa*, Pet. C. C., 301.

§ 3856. In a suit in equity for the surrender and cancellation of notes, liability for costs in case of a recovery on the notes renders a witness incompetent for interest in the event of the suit. *Ferson v. Sanger*, 1 Woodb. & M., 138.

§ 3857. In an action on a bond against the surety, the principal obligor is incompetent as a witness, for if the decision is against the surety, the principal is liable for costs. *Riddle v. Moss*,* 7 Cr., 206.

§ 3858. One defendant, being a party to the record, cannot be examined as a witness for his co-defendant, though he is insolvent and has little or no interest in the event of the suit except as to costs. *De Wolf v. Johnson*, 10 Wheat., 367.

§ 3859. In an action of ejectment brought against a purchaser on failure to pay the purchase money, a witness who had become the assignee of a part of the consideration, instigated the suit, and also promised to indemnify those who became sureties for costs, was held incompetent on account of his interest. *Baird v. Wolfe*, 4 McL., 549.

§ 3860. Upon an indictment for selling spirituous liquors without license, the prosecutor

whose name is indorsed on the indictment, being liable to pay the costs, is incompetent as a witness for the prosecution. *United States v. Birch*, 1 Cr. C. C., 571.

§ 3861. **Master and mariners.**—In a libel against a vessel for the loss of goods shipped, the master is interested in the event of the suit, and is not a competent witness without a release. But if released by all but one of the owners, he is rendered competent, because the claim upon him being a joint one, a release by one bars all. *The Peytona*, 2 Curt., 21.

§ 3862. In case of a libel against a vessel *in rem*, and also against the master *in personam*, the master, being subject to a decree against himself for all the liabilities of the vessel, is an incompetent witness in the cause. *The Zenobia*, Abb. Adm., 80.

§ 3863. The master under whom the illegal act was done is not a competent witness for the claimant in a libel to forfeit the vessel. *The Nymph*, 1 Ware, 257.

§ 3864. The act of congress of 1790 having been construed to provide that the expense of medical advice shall be borne by the seaman, where the vessel is provided with a medicine chest, etc., whereas according to the general rule it is to be borne by the owners, the master is held to be an incompetent witness to prove that the vessel was provided with the chest and other appliance as required by the act, where this expense is sought to be deducted in a suit for wages. *The William Harris*, 1 Ware, 367.

§ 3865. The master of a vessel is not a competent witness in a suit to condemn the vessel for a forfeiture occasioned by the master's own misconduct. *The Hope*,* 2 Gall., 50.

§ 3866. It seems that the master is an incompetent witness to establish the necessity of the repairs in an action *in rem* upon a bottomry bond, where the defense is that the repairs were not necessary, the ground being that a decree in favor of the libelants would be evidence in a subsequent suit by the owner against the master for his misconduct. *The Ship Fortitude*, 3 Sumn., 228.

§ 3867. The master is not a competent witness in disputes with mariners. *Jones v. The Brig Phoenix*, 1 Pet. Adm., 201.

§ 3868. In a libel against a vessel for wages, the master is an incompetent witness to support any matters of defense set up, which originate in his own acts, because for those acts he may be held personally responsible. He is therefore an incompetent witness to justify his imprisonment of a seaman, and throw the expenses of imprisonment and of hiring another in his place upon the seaman, and thus exonerate himself from his own liability. *The William Harris*, 1 Ware, 367.

§ 3869. On a libel by the owners of a vessel against the charterer, for breach of covenant in refusing to furnish the vessel with a cargo, the master, who, by an agreement with the owners, was to have half the gross profits, and to man and victual the ship, and to pay half the port charges, is not a competent witness as to whether the vessel made reasonable and proper exertions to reach the port where the cargo was to be furnished. That he was unable to complete the voyage, and had to employ another master, does not render him competent; this not having released him from his contract with the owners. *Hall v. Hurlbut*, Taney, 589.

§ 3870. A master of a vessel who is also a part owner may be a competent witness to prove the delivery of a cargo in a suit by the owners against the shipper for freight. This is on the principle that an agent is admitted as a witness from necessity to show that he performed acts which were within the regular course of his business. *Swett v. Black*,* 1 Spr., 579.

§ 3871. In a controversy between the mate and the master as to the wages of the mate, the master is not a competent witness. *Atkins v. Burrows*, 1 Pet. Adm., 244.

§ 3872. In an action *in rem* by a mariner to recover for extra services, where the master interposes a claim and answer, the deposition of the master cannot be admitted in evidence on the part of the owners, while he continues a party. *The Exchange*, Bl. & How., 366.

§ 3873. The master of a vessel is a competent witness for the owners, in a suit by the owners against the owners of the cargo, claiming a contribution by way of general average, for the loss of masts, sails, spars and rigging, alleged to have been sacrificed in a storm for the common benefit of the ship, cargo and freight. In such a suit, the acts of the master are only collaterally drawn in question, and his liability for negligence at the suit of the owners is too remote and contingent to exclude him as a witness. *Patten v. Darling*, 1 Cliff., 254.

§ 3874. In an action by the owner of the ship and cargo upon a policy of insurance upon the cargo, the master is a competent witness for the owner to prove the loss. *Hicks v. Fitzsimmons*, 1 Wash., 279.

§ 3875. In a suit on a bottomry bond, the captain who gave the bond is a competent witness for the bondholders to prove that the supplies were furnished and that they were necessary. *The Medora*, 1 Spr., 138.

§ 3876. The master and crew of the vessel injured by a collision are competent witnesses for the libelants in an action against the other. No release is necessary. *The Steamboat Neptune*, Olc., 483.

§ 3877. In an action on a bottomry bond, the master who gave the bond is a competent witness for the libelants, when released by them. *Furniss v. Brig Magoun, Olc.*, 55.

§ 3878. The master is a competent witness for seamen in a suit *in rem* for wages. And this, notwithstanding he has executed a bill of sale of the vessel to the claimants, with covenants of warranty and against incumbrances. His testimony is sufficient to support the action of the libelants without their personal testimony. *The Trial, Bl. & How.*, 94; *The Schooner Eagle, Olc.*, 232.

§ 3879. The master is not a competent witness for the defense in a libel for wages, when made a party to the libel, though not served with process. *Malone v. Bell*, 1 Pet. Adm., 139.

§ 3880. In a libel against a vessel for wages, although the monition goes to the master and the owners, if the master does not appear and defend he is not an incompetent witness as a party. If incompetent at all, it is on the ground of interest. *The William Harris*, 1 Ware, 367.

§ 3881. Seamen are permitted to testify for each other in relation to their claims for wages earned on the same voyage, they being only united on the record in the suit for wages, while their interests in the recovery and their liabilities for costs are wholly distinct. *The Cypress, Bl. & How.*, 83.

§ 3882. The testimony of the libelants in support of the claims of each other, though admissible in actions *in rem* by seamen for wages, is always admitted with great caution and with very considerable distrust. *Graham v. Hoskins, Olc.*, 224.

§ 3883. In a suit by the members of a crew for double wages on account of short allowance of provisions, each is a competent witness for the others. *The Bark Childe Harold, Olc.*, 275.

§ 3884. In a joint libel for wages by the crew of a vessel, the libelants may testify for each other. But where their joint testimony is intended to establish for them a justification of a charge of disorderly and mutinous conduct, it is to be received with great caution. *The Steamboat Swallow, Olc.*, 4.

§ 3885. Seamen are competent to testify for each other in a suit for wages. The objection should go to the credit and not to the competency of the witness, considering the interest as one in the question only, and not in the event of the suit. *The Ship Elizabeth v. Rickers*, 2 Paine, 291.

§ 3886. Where bail is offered for one of several seamen committed for desertion, another seaman, though involved in the general charge of desertion, may be admitted to prove a permission from the master to the one tendering bail to leave the ship. *Simms v. Sundry Mariners*, 2 Pet. Adm., 293.

§ 3887. Where wages said to be due a seaman are withheld as a penalty for not rendering himself on board at the appointed hour, another member of the crew, involved in the same controversy, is a competent witness against the owners. *Thompson v. The Ship Philadelphia*, 1 Pet. Adm., 210.

§ 3888. Common seamen, like other persons, if not interested or infamous, are competent witnesses in the trial of criminal as well as civil causes. *United States v. Freeman*, 4 Mason, 505.

§ 3889. A mariner is competent to testify for other mariners in a suit respecting the voyage on which they all have been engaged, if not interested in the suit, although interested in the question. *Spurr v. Pearson*, 1 Mason, 104.

§ 3890. The proctor of the libelant, in a suit for wages, is a competent witness for the seaman to prove declarations or admissions of the respondent; but small confidence is to be placed in such testimony, unless it is corroborated. *Granon v. Hartshorne, Bl. & How.*, 454.

§ 3891. In a suit by a seaman for wages, the libelant is not a competent witness in his own behalf. *The Ship William Jarvis*, 1 Spr., 485.

§ 3892. Criminal cases.—The owner of stolen property is competent as a general witness on trial of an indictment under section 16, act of April 30, 1790, chapter 36, which provides that half of any fine imposed shall go to the owner of the property and half to the witness. *United States v. Murphy*,* 16 Pet., 203.

§ 3893. The owner of stolen property, having executed a release of all interest in the fine to be recovered, to the United States, is admissible as a witness in a prosecution for the theft. *United States v. McCann*,* 1 Cr. C. C., 207; *United States v. Brown*, 1 Cr. C. C., 210; *United States v. Tolson*, 1 Cr. C. C., 269; *United States v. Carnot*, 2 Cr. C. C., 469; *United States v. Clancy*, 1 Cr. C. C., 13; *United States v. Hare*,* 1 Cr. C. C., 82.

§ 3894. Upon an indictment for receiving a stolen bank-note, a stockholder in the bank to which the note belonged, having released his interest in the fine, was held a competent witness for the United States. *United States v. Morgan*, 1 Cr. C. C., 279.

§ 3895. Upon an indictment for stealing certain goods, a person who has given a receipt for the goods, stating them to be so many, to be delivered to other persons, is not for that reason an incompetent witness for the prosecution. *United States v. Bates*, 2 Cr. C. C., 405.

§ 3896. To exclude a party to the record from being a witness, it is necessary that objection be made. And where the testimony of one jointly indicted with the defendant becomes of great importance to the defendant to confirm the latter's statement, the inference to be drawn against the defendant for failing to call this witness is not to be destroyed by the fact that the witness is a party to the record, when the objection has not been taken. *United States v. Schindler*, 18 Blatch., 227.

§ 3897. Where two persons are jointly indicted for the same crime, and tried separately, the one is not a competent witness in behalf of the other unless he has been acquitted. *United States v. Clements*, 3 Hughes, 509.

§ 3898. If three persons are indicted for a riot, and for assault and battery, and two having forfeited their recognizances are not put upon trial, they cannot be examined as witnesses upon the trial of the other. *United States v. Rutherford*, 2 Cr. C. C., 528.

§ 3899. It is the rule of the common law that one defendant in a criminal prosecution cannot be a witness in behalf of his co-defendant, whether they are tried together or separately. This rule is not changed by the statutes of Minnesota Territory, allowing parties and others to be witnesses, in derogation of the common law, and providing that "no defendant in a criminal action or proceeding shall be a witness therein for himself." *Baker v. United States*,* 1 Minn., 207.

§ 3900. If several persons are jointly indicted, one is not a competent witness for the other, without being first acquitted or convicted, though the prisoners are tried separately. *Latshaw v. Territory*,* 1 Or., 140.

§ 3901. Persons separately indicted for the same offense are competent witnesses in favor of each other. *United States v. Henry*, 4 Wash., 428.

§ 3902. Where two persons who are jointly concerned in the same offense are indicted separately, but tried at the same time, one may testify for the other. *United States v. Hunter*,* 1 Cr. C. C., 446.

§ 3903. If two are jointly indicted for an assault and battery, and the court in its discretion allows a separate trial, neither can be examined as a witness for the other unless it appears that there is no evidence against the one offered as a witness; in which case the jury may acquit him, and he may then be examined for the other. *Caldwell v. Walters*, 4 Cr. C. C., 576.

§ 3904. If, upon an indictment for riot, there is no evidence against one of the defendants, he may be examined as a witness for the others. *United States v. Fenwick*, 4 Cr. C. C., 675.

§ 3905. If two are jointly indicted for robbery, and the one is acquitted while the other is convicted, and a new trial be granted to the latter, the former is a competent witness in his favor. *United States v. Campbell*, 4 Cr. C. C., 658.

§ 3906. Upon an indictment for treason, a person included with the defendant in another indictment for treason, founded upon the same transactions, is a competent witness for the defendant, not being included in the indictment being tried. *United States v. Hanway*, 2 Wall. Jr., 139.

§ 3907. Upon the indictment of a supposed father for not supporting his bastard child, the mother is a competent witness for the prosecution, though she will be relieved from the support of the child by convicting the defendant. She may be cross-examined as to her connection with others, the inquiry being limited to a period not more than twelve nor less than six months before the birth of the child. *United States v. Collins*, 1 Cr. C. C., 592.

§ 3908. A witness who has pleaded guilty to a felony is competent before sentence. But the circumstances under which he is offered may be used to impeach his credit. *United States v. Dickinson*, 2 McL., 325.

§ 3909. One who, as agent of the plaintiff, enters the house of the defendant with the officer who has an execution against the latter's goods, and is assaulted by said defendant,—upon an indictment against the latter for the assault,—is a competent witness to prove his own authority as the plaintiff's agent. *United States v. Baker*, 1 Cr. C. C., 268.

§ 3910. A witness who has been convicted of a felony and served his time out in the state's prison may be restored to competency by a pardon. But the jury should not believe him unless corroborated. *United States v. Jones*,* 2 Wheeler, 451.

§ 3911. Upon the trial of an indictment, under section 5358 of the Revised Statutes, for plundering a wrecked vessel, the defendant was permitted to testify as to his intention in taking the goods. *United States v. Stone*, 8 Fed. R., 232.

§ 3912. Upon an indictment against an attorney for defrauding and cheating his client, the latter is a competent witness for the prosecution, though he has suits pending against the attorney for the same property of which he is supposed by the indictment to have been cheated. *United States v. Porter*, 2 Cr. C. C., 60.

§ 3913. A grand juror is a competent witness to prove that the defendant confessed on examination before the grand jury. *Ibid.*

§ 3914. Upon the trial of an indictment for bigamy, a person having an action pending

against the accused for necessities furnished to the supposed first wife is incompetent to prove the first marriage, since the verdict may be given in evidence for the witness in his suit. *United States v. Maxwell*, 1 Cr. C. C., 605.

§ 3915. A bankrupt is not a competent witness in an indictment against him under the forty-fourth section of the act of 1867, for secreting and concealing property belonging to the estate, and fraudulently omitting the same from his schedule. The amendment of June 22, 1874, declaring "that, in all causes and trials arising or ordered under this act, the alleged bankrupt, or any party thereto, shall be a competent witness," does not apply to a criminal prosecution under this section. *United States v. Black*,* 12 Nat. Bank. Reg., 340.

§ 3916. Where complaint was made before a commissioner for the extradition of a criminal, the prisoner is competent as a witness in his own behalf. *In re Farez*, 7 Blatch., 345.

§ 3917. In a prosecution for practicing medicine without a license from the medical society, a member of that society is not a competent witness for the United States, because the defendant may show that the charter of the society has been vacated. *United States v. Williams*, 5 Cr. C. C., 62.

§ 3918. Upon an indictment for forging a draft, the drawee of the draft, who had paid it, was held a competent witness for the United States. *United States v. Bates*, 2 Cr. C. C., 1.

§ 3919. Upon an indictment for taking usury, the borrower is competent for the United States, it having appeared that he had paid the money and was not a voluntary informer. *United States v. Moxley*, 2 Cr. C. C., 64.

§ 3920. Upon an indictment against a plaintiff in equity for perjury in his affidavit to his bill, the defendant in equity is competent to prove the perjury, on the ground that there is no interest, as the prisoner's conviction cannot affect the cause in chancery. *United States v. Burford*, 2 Cr. C. C., 102.

§ 3921. An honorary obligation to indemnify the prosecutor, should he be obliged to pay costs, is not an interest such as will debar one from testifying for the prosecution. *United States v. Lyles*, 1 Cr. C. C., 322.

§ 3922. The person whose name is forged is a competent witness for the prosecution on an indictment for forgery. *United States v. Brown*, 3 Cr. C. C., 268.

§ 3923. The person whose name is forged, and the person intended to be defrauded, are competent witnesses to prove a forgery. But a witness who has paid money on the forged paper is not competent. *United States v. Crandell*, 2 Cr. C. C., 373.

§ 3924. Both the person to the prejudice of whose right the instrument is alleged to have been forged, and the person whose paper is alleged to have been forged, are competent witnesses to prove the forgery. *United States v. Jackson*, 4 Cr. C. C., 577.

§ 3925. **Informer.**—It is no objection to the competency of a witness that he may be entitled to a reward on conviction. Such an objection goes only to his credit. *United States v. Wilson*, 1 Bald., 78.

§ 3926. Upon the trial of an indictment of a marshal, under the act of March 3, 1839, for not paying over to his assistants in taking the census the amount received from the government for that purpose, an informer is a competent witness for the government, although he gets half the penalty. This is not the common law rule, but such evidence is admitted on grounds of necessity and public policy. *United States v. Patterson*, 3 McL., 53.

§ 3927. An informer who receives part of a fine recovered in an action for a penalty is a competent witness from necessity. *United States v. Patterson*,* 3 McL., 299.

§ 3928. **Joint defendants.**—In a joint libel against several for assault and battery, the court may, upon a proper case made, dismiss the libel as to one of them, though there be some evidence against him, that he may be introduced as a witness for the others. But the court refused the motion in this case, where the evidence on both sides had been given. *Elwell v. Martin*, 1 Ware, 53.

§ 3929. In an action against two for assault, although the defendants severed in pleading, one was not allowed to testify for the other. *Johnston v. Chapman*, 2 Cr. C. C., 32.

§ 3930. **Voir dire.**—Where a witness is sworn upon his *voir dire*, no evidence can be given to prove him to be incompetent, except such as arises from his own acknowledgments. But if it should appear in any subsequent stage of the examination that he is not competent, the court will set him aside. *Evans v. Eaton*, Pet. C. C., 322.

§ 3931. In all cases where the competency of a witness arises upon his deposition and not otherwise, it is to be disposed of upon the interrogatories in the deposition, in the same manner as it would be in an examination upon the *voir dire*; that is, the objection of incompetency may be removed in the same way and by the same evidence of the witness by which it has been established. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16.

§ 3932. When a witness is objected to on the ground of interest, the party who makes the objection may sustain it either by examining the witness himself on the *voir dire*, or by other independent evidence. He cannot adopt both methods. If he proves the interest by evidence

aliunde, this proof must be overcome by evidence independent of the witness himself. But if he adopts the other mode, the objection may be answered by the testimony of the witness himself. *The Watchman*, 1 Ware, 232.

§ 3933. Witnesses who are *prima facie* competent, but whose competency is disputed, are allowed to give evidence on their *voir dire* to the court upon some collateral issue on which their competency depends; but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue in the case, in order to establish his competency, and at the same time prove the issue. *Miles v. United States*, 13 Otto, 304.

§ 3934. Release.—If an interested witness executes a sufficient release, he is then competent. *Hall v. Fox*,* 3 Cr. C. C., 64.

§ 3935. A release of all liability touching the matters in suit restores the competency of an interested witness. *Clements v. Dickey*, 1 Paine, 377.

§ 3936. A witness protected from liability by the statute of limitations is competent without a release from the party calling him. *Wallar v. Stewart*, 4 Cr. C. C., 532.

§ 3937. In an action of ejectment, where both parties claimed under the same person, the plaintiff claiming the deed to the defendant's grantor to be fraudulent, the defendant was permitted to introduce his grantor as a witness in support of the validity of the deed upon the execution of a release. *Linthicum v. Remington*, 5 Cr. C. C., 546.

§ 3938. In an action of *assumpsit* against the drawer of certain checks, payable to bearer, which were lent by the defendant to one H. to enable him to raise money upon them for his accommodation, H., to whom the defendant had executed a release, was held to be a competent witness for the defendant to prove usury. *Hill v. Scott*, 5 Cr. C. C., 523.

§ 3939. A master and part owner of a vessel who sells his interest before a suit is brought for wages, and obtains a release on account of such wages, is a competent witness in the suit. *The Brig Osceola*, Olc., 450.

§ 3940. The master is not a competent witness for the owners in a libel against the vessel on a contract of affreightment, without a release. But a release by a part of the owners is sufficient, since it would be sufficient to bar a joint action against him by the owners. *The Peytona*, 1 Ware, 541.

§ 3941. To prove, as a set-off, a claim against the plaintiff for passage money due the defendant and another as joint owners of a vessel, the other joint owner is a competent witness to establish the claim, the defendant having credited him in account with his share of the passage money, and given him a release from all claim which he might have to recover it back from him upon failure to get it from the plaintiff. *Massoletti v. Miller*, 2 Cr. C. C., 313.

§ 3942. A defendant in an action of debt, against whom the suit has abated because he is not an inhabitant, is a competent witness for his co-defendant, if released by him. *Le Roy v. Johnson*, 2 Pet., 186.

§ 3943. In order to render one of the plaintiffs in an action a competent witness, an assignment was produced in which he released all his claim against the defendant to the co-plaintiffs. Also, a release to him by the co-plaintiffs from his liability for the costs which had accrued, or might thereafter accrue in the action, and from all liability for contribution to any sum which the defendant might recover against the releasors in a certain action tried at the same time. The other plaintiffs also released him from all demands against him by reason of the aforesaid assignment, or in case the claim against the defendant should not be established or recovered, and covenanted to indemnify him against liability for all costs which had then accrued or might accrue. The costs already accrued were paid by the other plaintiffs, and they at the same time offered to deposit in court any further sum which the defendant's counsel might require, and to give satisfactory security to pay all costs which might accrue. It was held that the witness was rendered competent. *Willings v. Consequa*, Pet. C. C., 301.

§ 3944. The grantor of a rent charge, having parted with all interest in the land and been released from liability for costs, and not a party to the record, is a competent witness to prove usury in the original contract. *Scott v. Lloyd*,* 12 Pet., 148.

§ 3945. Where A. has rescinded the contract under which B. sold goods for him and received back the invoice, B. has no interest in a suit brought by A. against one who has taken the goods from the former on execution, and is a competent witness. *Merrill v. Rinker*, 1 Bald., 529.

§ 3946. It seems that a release executed in order to render a party's testimony admissible in favor of an executor is sufficient, even though the executor's name is omitted, if by the terms of the instrument the estate is released. *Oliver v. Vernon*, 4 Mason, 275.

§ 3947. A release by parol, signed in the name of the firm by one of the partners, without a seal, is not sufficient to restore the competency of an interested witness; but a release under the seal of one of the firm, stating himself to be a partner, is sufficient. *Beltzhoover v. Stockton*, 4 Cr. C. C., 695.

§ 3948. A sale by a person of all his interest in property in controversy in order that he may become a witness is allowable. *Tobey v. Leonards*,* 2 Wall., 423.

§ 3949. A deponent producing a release from his own possession, as a part of his testimony, in answer to a question put to him, need not prove the execution of the release by the subscribing witness; but it is to be taken as a part of his testimony. Indeed, when the question is asked by a party of his own witness, in order to establish his competency, the party is afterwards estopped to deny it. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16.

§ 3950. A party of record in a suit is an incompetent witness, although he may have divested himself of all interest in the issue of the suit. *Bridges v. Armour*,* 5 How., 91.

§ 3951. A party to a suit, though released from liability to costs, is not a competent witness. *Stein v. Bowman*, 13 Pet., 219.

§ 3952. A release of all actions and causes of actions, or of a particular cause of action, which has happened before the time of the release, will discharge the witness from all liability depending upon the event of the suit in which he is called as a witness, touching his conduct in the matter on which the suit is founded; for the cause of action then existing, the release will operate to discharge that, and incidentally the future damages recovered on account thereof. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16.

§ 3953. The deposition of one defendant in a chancery suit is not admissible as evidence against a co-defendant, although the former has been discharged from his debts under the state insolvent law, the debt sued for, though contracted prior to the discharge, being contracted in a foreign country. *Clark v. Van Riemsdyk*, 9 Cr., 153.

§ 3954. In replevin a surety in the replevin bond was held incompetent to testify for the plaintiff although he held a bond of indemnification. *Thompson v. Carbery*, 2 Cr. C. C., 35.

3. *Credibility.*

§ 3955. **In general.**—A conviction of an infamous crime affects only the credibility of a witness. The conviction must be shown by the record. *United States v. Biebusch*, 1 McC., 44 (§§ 2601-6).

§ 3956. The fact that a witness participated in the crime charged goes merely to his credibility. *Lolander v. People*,* 2 Colo. T'y, 48.

§ 3957. Slight credit will be given to the unsupported evidence of a witness who testifies to admissions obtained by him from a party for the purpose of charging him thereby. *Sunday v. Gordon*, Bl. & How., 569.

§ 3958. The positive testimony of witnesses is liable to be controlled by strong presumptive circumstances, and must be weighed with care when it comes loaded with the temptations of private interests and the impressions of personal penalties. *Brig Short Staple and Cargo*, 1 Gall., 104.

§ 3959. Where a passenger is injured by the explosion of the boiler of a locomotive of the defendant, the distinct and positive testimony of unimpeached witnesses as to facts which are not contradicted is sufficient to overcome the presumption of negligence. But where the testimony proceeds from persons who will be guilty of a criminal fault unless they vindicate themselves from the presumption arising from the transaction, a question of credibility is presented to the jury. *Robinson v. New York Cent. & Hudson River R. Co.*, 9 Fed. R., 877.

§ 3960. If a witness testifies that on some particular occasion, long past, he communicated to the patentee the fundamental idea of his invention, and so far as appears nothing was ever heard or said about such communication until the patent became suddenly valuable, and a controversy arose between the patentee and others concerning it, his testimony should be cautiously received by the jury and acted upon with hesitation. *Spaulding v. Tucker*, Deady, 649.

§ 3961. A contradiction in immaterial matters ought to discredit a witness, where the falsity of his statements are entirely within his own knowledge. *The Santissima Trinidad and The St. Ander*, 7 Wheat., 283.

§ 3962. If two witnesses contradicting each other have previously given their depositions in the cause, reliance is to be given to the one sustained by his previous testimony, rather than the one who is contradicted by his, although the depositions are not introduced at the trial. *The Indiana and Buffalo*, Newb., 115.

§ 3963. Where a party swears in contradiction of his former oath, the statement most adverse to him must be taken as true. *Farrell v. Campbell*, 3 Ben., 8.

§ 3964. In collision cases there is much discrepancy in the testimony. Witnesses observing passing events from different positions cannot be expected to agree, either as to the location of the objects or the relative changes of the parties and things. In such a case the testimony of a witness may be rejected in favor of a contrary statement by one occupying a better position for observation, without ascribing any moral dereliction to the witness whose testimony is rejected. *The Indiana and Buffalo*, Newb., 115.

§ 3965. The testimony of a witness in a suit growing out of a collision is not to be discred-

ited because he made a statement contradictory to it, in a hurried conversation just after the accident. *Fashion v. Wards*, 6 McL., 152; *The Pacific and Brig Fashion*, Newb., 8.

§ 3966. In a case of collision, little reliance can be placed in the testimony of a witness which is contradicted by his voluntary written statement made a few days after the event. Especially will suspicion attach where he is brought to give evidence against his own vessel, impeaching the credit of his first story. *The Douglass*, 1 Brown, 105.

§ 3967. Because the former statements and affidavits of a witness contradict his testimony as given upon the stand, the jury are not to reject both of them. The object of putting in the former statements and affidavits is to arrive at the truth; and when the jury arrive at what they believe to be the truth on a given point, on which there is a contradiction of that kind, they are to act upon such truth. But if, after ascertaining the truth, they find that any witness has wilfully and deliberately told a falsehood upon the stand with respect to a material fact, they have a right to believe that he is not worthy of credit in any particular. *United States v. Blaisdell*, 3 Ben., 132.

§ 3968. The fact that one accused of murder, and aware of it, voluntarily makes contradictory statements, cannot, as in the case of an ordinary witness, have the effect merely of neutralizing his testimony. It is reasonable to assume that if he withholds the truth he does so because it may be favorable to his innocence. *United States v. Gleason*, 1 Woolw., 128.

§ 3969. If conflicting statements of witnesses can be reconciled, it should be done. But where this is impossible, the jury must decide to whom credit is due. Where the circumstances in favor of and against the credibility of a witness balance, the jury may disregard his testimony and decide upon the other evidence. *Ray v. Donnell*, 4 McL., 504.

§ 3970. There is no legal presumption against the credit of a witness from the fact that the prosecution declines, upon demand, to produce his written examination on a former occasion, and that of several of the prisoners. *United States v. Gibert*, 2 Sumn., 19.

§ 3971. Witnesses who have been proved guilty of fabricating one of the documents to which their names are attached in making out a grant are not worthy of credit in the proof of the genuineness of another one of the documents to which they have placed their signatures. *United States v. Galbraith*, 2 Black, 394.

§ 3972. The occupation of a person may be shown as bearing on his credibility. *United States v. Duff*, 19 Blatch., 9.

§ 3973. All persons are presumed to be worthy of belief until the contrary is shown. The business in which a person is engaged, if an honest one, ought not to discredit him. It is nothing to the discredit of a witness that he is a negro minstrel. *Robinson v. Gallier*,* 2 Woods, 178.

§ 3974. The veracity and impartiality of a witness may be considered as affected by his interest, although he is not excluded from testifying an account of interest. *Andrews v. Hyde*, 3 Cliff., 516.

§ 3975. The testimony of persons interested can avail but little against the opposing testimony of persons not thus situated. *The Schooner Boston and Cargo*, 1 Sumn., 328.

§ 3976. In an action under the internal revenue act for the recovery of a penalty, the pecuniary interest of the witnesses upon whose information the action is brought, and who are to share in the penalty, is to be considered by the jury. *United States v. Brown*, Deady, 566.

§ 3977. Where witnesses, otherwise unimpeached, are testifying under circumstances calculated to create a strong bias, and they state what is in its nature incredible, their testimony is not necessarily to be believed. *The Helen C. Cooper*—*The R. L. Mabey*, 7 Blatch., 378.

§ 3978. Where the testimony in relation to the leading facts is wholly irreconcilable, it is of consequence to consider the demeanor of the witnesses. *The Petrel and The Gore*, Newb., 45.

§ 3979. In a case in admiralty, where the testimony for the libellant conflicted with that of the officers of the ship, it was taken as a ground for distrusting the testimony of the officers that one of them was not examined on the principal points in dispute. *The Sandringham*, 10 Fed. R., 556.

§ 3980. In an action by a foreign seaman, in a court of admiralty of this country, against a foreign vessel for wages, the deposition of the master setting up a free discharge of the seaman from the ship should be received with distrust, when he has since reported to the consul of his nation that the seaman deserted. At any rate it affords a reason for the court to decline cognizance of the matter, and to remit the libellant to the courts of his own country. *The Infanta*, Abb. Adm., 263.

§ 3981. The transfer of a vessel from enemy owner to neutral is not proved by the testimony of the master that he heard the alleged owner say that he had bought the vessel and received a bill of sale; the master's testimony being proved unreliable. *The Maria*, Bl. Pr. Cas., 283.

§ 3982. **Question for jury.**—The credibility of witnesses is for the jury. *United States v. Emerson*,* 6 McL., 408; *United States v. Cole*, 5 McL., 513; *United States v. Montgomery*, 3 Saw., 544.

§ 3983. The credibility of witnesses is for the jury, and if they believe that any witness has wilfully sworn falsely with respect to any material fact, they may disregard the whole of his testimony. *Spaulding v. Tucker*, Deady, 649; *United States v. Harris*, 2 Bond, 318; *Machette v. Wanless*,* 2 Colo. T'y, 169; *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Biss., 31.

§ 3984. If it is proved beyond a reasonable doubt that a witness is guilty of prevarication either in deliberately stating what is not true, or in wilfully suppressing material and important facts which are within his knowledge, his whole testimony must be discredited. *Sherwood v. McIntosh*, 1 Ware, 109.

§ 3985. If a witness is shown to have knowingly testified falsely, either on the trial or before the grand jury, his whole testimony may be rejected by the jury. But the jury are the judges of the weight of the evidence and the credibility of the witnesses. *United States v. McKee*, 3 Dill., 551.

§ 3986. If the jury believe that a witness deliberately and corruptly swears falsely, they should put little confidence in any other part of his evidence which is uncorroborated by other witnesses. But if the misstatement is the probable result of mistake or misapprehension, the jury will not regard it further than as showing an inaccuracy of memory or judgment. *Giltner v. Gorham*, 4 McL., 402.

§ 3987. The jury are not bound to believe the testimony of the defendant in a criminal case because it is uncontradicted. They are the judges of the credibility of the witnesses. *United States v. Borger*, 19 Blatch., 249; 7 Fed. R., 193.

§ 3988. Where the evidence of witnesses, opposed by other evidence, is relied on by either side to prove a particular fact, the jury must necessarily weigh their credit, and every circumstance which can affect the veracity of the witnesses must be considered. But if there is no evidence against the testimony of the witnesses, and the fact may exist without a violation of probability, there is nothing to weigh against their credit, and they must be believed. *Evans v. Hettick*, 3 Wash., 408.

§ 3989. If witnesses contradict each other, the jury are to judge of their credibility, and in doing so they must consider who had the best opportunity of knowing and recollecting the facts. If the witnesses are equally respectable, and one states positively that the fact did transpire, and the other that he did not see or hear it, the weight of evidence will be with the one who affirms the fact. *Abbe v. Rood*, 6 McL., 106.

§ 3990. The credit due to the witnesses belongs exclusively to the jury. They should reconcile conflicting statements, if possible, that the whole may be regarded as consistent with the truth and the integrity of the witnesses. But if the statements of the witnesses are so discrepant that they cannot be thus made to harmonize, it is for the jury to say where the truth lies. *Driskell v. Parish*, 5 McL., 64.

§ 3991. The testimony of a witness who may have sworn falsely upon his cross-examination upon an immaterial point may, if corroborated by other evidence, be received by the jury; and a verdict may be found upon his and such other corroborating evidence. *Turner v. Foxall*, 2 Cr. C. C., 324.

§ 3992. If it is shown that a witness has sworn falsely in a matter not connected with the main facts of the case, the jury are justified in discarding his evidence, unless he is corroborated by other evidence. As to facts so corroborated, his testimony should not be rejected. *Robinson v. Gallier*,* 2 Woods, 178.

§ 3993. If a witness, in testifying, contradicts himself in any material statement, it will impair his credit with the jury. If he is proved to have uttered a deliberate falsehood as to any material fact, it may justify the jury in disregarding his testimony altogether. *United States v. Harries*, 2 Bond, 311.

§ 3994. In judging of the credibility of a witness, the jury should consider the circumstances under which he testifies, and under which his statements at different times were made. *United States v. Brown*, 4 McL., 142.

§ 3995. A witness who is intentionally false in a material part of his testimony ought to be at least distrusted as to the rest of it. *United States v. Montgomery*, 3 Saw., 544.

§ 3996. It is for the jury to weigh the evidence, and judge of the credibility of the witnesses. If conflicting testimony cannot be reconciled, it is for them to decide where the truth lies. *United States v. Foulke*, 6 McL., 349.

4. *Privilege.*

SUMMARY—*What answer will entitle the party to take advantage of the privilege, § 3997.*

§ 3997. When a question is asked a witness, the answer to which is improper, as tending to degrade the witness or the party calling him, if the party aggrieved wishes to have the supreme court revise the case on that account, he must show by his bill of exceptions that the

question was answered by the witness, and answered in such a way as to prejudice him. *Nailor v. Williams*, § 3998.

[NOTES.— See §§ 3999-4030.]

NAILOR *v.* WILLIAMS.

(8 Wallace, 107-109. 1868.)

APPEAL from the Supreme Court for the District of Columbia.

STATEMENT OF FACTS.— Upon the trial two questions were asked a witness on cross-examination — whether, at a certain time, plaintiff was engaged in trading in negroes, and whether he, the witness, was not aiding him in that business. The questions were objected to, the objection overruled, and that ruling excepted to. No answers to the questions appear in the bill of exceptions.

Opinion by MR. JUSTICE MILLER.

If a question is asked of a witness on the stand, the answer to which is pertinent and legal testimony, and the court refuses to permit the witness to answer, this is error which a revising court will correct, because the injury to the party consists in the refusal of the court to permit the answer to be given, and he can do nothing more to prove the wrong done him than to show that he asked a legal question, the answer to which, by the action of the court, was denied him.

§ 3998. *Where a question is permitted to be asked which is not in itself wrong, but the answer may be improper, it is the answer that makes the error.*

But where a question is asked which is illegal only because it may elicit improper testimony, and the court permits it to be answered against the objection of the other party, the injury done the party is by the answer; and notwithstanding the erroneous ruling of the court, if the witness knows nothing of the matter to which he is interrogated, or if his answer is favorable to the objecting party, it works him no injury. If it does, he can show it by making the answer a part of the bill of exceptions, and unless he does this there is no error of which a revising court can take notice.

For this reason, and also because there is nothing in the bill of exceptions which enables us to say that the questions themselves exceeded the reasonable license which a court, in its discretion, may allow in cross-examination, we are of opinion that no error is shown by these bills of exception. As they constitute the only matters alleged against the judgment of the court below, it is affirmed.

§ 3999. **Refusal to answer or testify.**— A witness is not compellable to answer a question where the answer may tend to criminate him. *United States v. Moses*, 1 Cr. C. C., 170.

§ 4000. If an answer has a probable tendency to criminate a witness, he will not be required to answer. *United States v. Lynn*,* 2 Cr. C. C., 309.

§ 4001. By the act of February 25, 1868, a witness may be compelled to testify to facts tending to criminate himself, when the inquiry is pertinent to the proceeding; but such evidence cannot be used against him in a criminal proceeding. *United States v. Brown*, 1 Saw., 531.

§ 4002. The fact that a witness cannot testify in a case without criminating himself is a good reason for his objecting to answer the question when put to him, but not a good reason for his refusing to be sworn in the cause. Per CRANCH, J., dissenting, in *Neale v. Coningham*,* 1 Cr. C. C. 76.

§ 4003. An answer by a witness as to whether he saw defendant at a gaming table does not tend to criminate the witness. *Ex parte Lindo*,* 1 Cr. C. C., 445.

§ 4004. Where it was testified that a certain party had lost a sum of money in a gambling house kept by B. & M., at No. 16, West Twenty-fourth street, and B. & M. were summoned as witnesses, and the question put to B., "What year was it you removed from No. 16, West

Twenty-fourth street?" and to M., "Did you ever reside at No. 16, West Twenty-fourth street?" — *held*, that the witnesses were privileged from answering. *In re Graham*,* 8 Ben., 419.

§ 4005. On the examination of a witness before a commissioner he is bound to answer a question unless an answer would accuse him of something penal, criminal or infamous. *In re Danforth*,* 1 Penn. L. J., 148.

§ 4006. A witness before a grand jury refused to answer a question on the ground that the answer would criminate him. It was held that he was obliged to answer. *Devaughn's Case*,* 2 Cr. C. C., 501.

§ 4007. Interrogatories put to a respondent by an assessor of internal revenue, when they are relevant to the subject-matter of inquiry and that is within the assessor's jurisdiction, cannot be objected to on the ground that they will subject the respondent to a criminal prosecution. *In re Phillips*,* 2 Am. L. T., 155.

§ 4008. If the answer of a party to an information for the forfeiture of his property for a violation of a law of the United States is offered in evidence against him in an action of debt, or an indictment for the penalty, on account of the same violation, and he is entitled to the benefit of the rule which excuses a person from answering upon oath anything which may subject him to a forfeiture, the court will exclude the evidence. *Clark v. United States*, 2 Wash., 519.

§ 4009. A witness is not bound to answer a question which has no relation to any matter of fact in issue, or to any matter contained in his direct examination, if he says that the answer to the question would tend to degrade him. *In re Lewis*,* 4 Ben., 67; 39 How. Pr., 155.

§ 4010. A witness is not bound to answer, nor is the court to compel him to answer, a question which will disgrace him, unless the evidence is material to the issue to be tried. *Conway v. Clinton*,* 1 Utah T'y, 215.

§ 4011. A witness cannot be compelled to answer a question which, if answered one way, will show his character to be infamous. *United States v. Dickinson*, 2 McL., 325.

§ 4012. A witness cannot be asked any question on cross-examination tending to degrade him. So held where the witness was asked whether he had not been arrested for counterfeiting money. *United States v. White*, 5 Cr. C. C., 73.

§ 4013. Where it was proposed to ask a witness whether he was concerned with a certain person in counterfeiting money, it was decided that no question could be put to the witness tending to disgrace him, and which he was not bound to answer. *United States v. White*, 5 Cr. C. C., 457.

§ 4014. Where a witness, being under examination before a commissioner, refused to answer a question, a motion to the court to compel him to answer cannot be granted unless some assurance is given to the court that the question is relevant to the case. *In re Hill*,* 6 Ct. Cl., 83.

§ 4015. In a criminal prosecution, the officer who apprehended the prisoner is not bound to disclose the name of the person from whom he received the information which led to the detection and apprehension of the prisoner, when such a disclosure is not of any importance to the defense. *United States v. Moses*, 4 Wash., 726; *Same v. Craig*, 4 Wash., 729.

§ 4016. On a motion for an attachment against a witness for not answering a question put to him in his examination before a commissioner, it must be shown to the court that the question was material. *In re Judson*, 3 Blatch., 148.

§ 4017. A witness, in a proceeding in bankruptcy, cannot in his oath reserve the right to refuse an answer to any question which shall infringe on his privilege as attorney of the bankrupt. *In re Adams*, 6 Ben., 56.

§ 4018. The fact that a witness has been counsel for a bankrupt will not warrant a refusal to be sworn in the bankruptcy proceedings. The privilege cannot be interposed until a question is asked which invades it. *In re Woodward*, 4 Ben., 102.

§ 4019. A witness may be called on to explain facts attempted to be used against him. *United States v. Cole*, 5 McL., 513.

§ 4020. A witness, on the trial of an indictment of a defendant for smuggling, who has testified in favor of the defendant, cannot be asked, on cross-examination, questions regarding his own violations of the revenue laws. *United States v. Harris*,* 12 Blatch., 434.

§ 4021. Where an action against a *particeps criminis* is barred, he may be compelled to testify; and where the government thus uses his testimony, he cannot be subsequently prosecuted. *United States v. Smith*,* 4 Day (Conn.), 121.

§ 4022. Where a challenge to an array of jurors involves a charge of misconduct against the officer who selected them, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is not bound to be a witness against himself. *United States v. Collins*, 1 Woods, 499.

§ 4023. An inquisitorial examination, under oath, of a party charged with an offense, is repugnant to the principles of liberty, which are embodied in the common law, and would also infringe the spirit and the letter of the fifth amendment to the constitution. *Ibid.*

§ 4024. A witness who refused to be sworn because of a solemn declaration he had made not to take an oath, but who did not belong to the society of Friends, was committed for a contempt. *United States v. Coolidge*, 2 Gall., 364.

§ 4025. The court cannot instruct a witness, before his examination begins, that he is not bound to answer any questions where the answers will tend to criminate him. But the court will interfere for the protection of the witness when necessary. *United States v. Darnaud*, 3 Wall. Jr., 143.

§ 4026. A witness is the sole judge whether an answer would implicate him; the court may decide whether the answer could implicate him. *Sanderson's Case*,* 3 Cr. C. C., 638.

§ 4027. A witness will be compelled to answer, if the court can see that no direct answer will tend to criminate him. *United States v. Miller*,* 2 Cr. C. C., 247.

§ 4028. **Privilege from arrest, etc.**—A witness is privileged from arrest for a reasonable time, to prepare for his departure, and return to his home, as well as during his actual attendance upon court. But the privilege does not extend throughout the term at which the cause is marked for trial; nor will it protect him while engaged in his general private business, after he is discharged from the obligation of the subpoena. *Smythe v. Banks*, 4 Dall., 329.

§ 4029. The recommitment of a debtor to close custody upon a *ca. sa.*, after he has been out on a prison bounds bond for more than a year, agreeably to the act of congress of June 24, 1812, is not a violation of his privilege as a witness bound to attend court. *Ex parte Bill*, 3 Cr. C. C., 117.

§ 4030. A citizen of another state, who, while in attendance on the federal court as a suitor, is subpoenaed as a witness in another suit in the same court, is, while at his lodgings, privileged from arrest on an execution issuing from a state court. *Hurst's Case*, 4 Dall., 387.

XXX. DEPOSITIONS.

SUMMARY — *Depositions under a dedimus are in chief*, § 4031. — *Form and service of notice*, § 4032. — *Certificate as to notice*, § 4033. — *Personal service necessary*, § 4034. — *Cross-examination*, § 4035. — *Motion to appoint commissioners to take testimony abroad*, § 4036.

§ 4031. Depositions taken under a *dedimus potestatem* issued by the court are not taken *de bene esse*, but are evidence in chief. *Sergeant v. Biddle*, §§ 4037-38.

§ 4032. A deposition was taken *de bene esse* under the thirtieth section of the judiciary act. The notice given to the opposite party stated that the witness was about to depart the state, but did not say "on a voyage to sea," etc. The service of notice by the marshal was not certified to by the magistrate, nor did he certify the reasons for taking the deposition. It was held that the deposition could not be read. *Harris v. Wall*, §§ 4039-40.

§ 4033. Under the judiciary act, a certificate to a deposition, stating that the magistrate did not give notice to the opposite party or his attorney, as neither lived within one hundred miles of the place of taking the deposition, is sufficient unless it is shown that the magistrate knew that the party entitled to notice, or his attorney, was temporarily within one hundred miles distance from such place. *Dick v. Runnels*, §§ 4041-42.

§ 4034. Personal service must be had on the adverse party or his attorney, of a notice of taking a deposition under the thirtieth section of the judiciary act. Service at his place of abode is not enough. *Carrington v. Stimson*, § 4043.

§ 4035. As a general rule, no evidence is legally admissible which has not been subjected to the examination of both parties to the suit. Therefore, if a deponent is not cross-examined, his evidence is not admissible. But if, after a deponent has been examined, several months elapse before the other side makes any attempt to file cross-interrogatories, and the witness then dies, the deposition will be admitted. *Gass v. Stinson*, §§ 4044-52.

§ 4036. A motion to appoint commissioners to take testimony abroad will not be granted as a matter of right, but will be granted only when it appears to the court that the testimony to be taken is material to the cause. *United States v. Parrott*, §§ 4053-59.

[NOTES.—See §§ 4060-4337.]

SERGEANT *v.* BIDDLE.

(4 Wheaton, 508-513. 1819.)

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—The only question certified by the circuit court for the district of Delaware to this court is, whether certain depositions taken under a commission issued from that court to Philadelphia could, under the

circumstances of the case, be given in evidence to the jury. This question arises out of the following facts: On the 25th of October, 1817, a consent rule was entered in this cause "for a commission to issue to take depositions on both sides to be directed to Thomas Bradford, Jr., and William J. Duane, of Philadelphia, interrogatories to be filed on ten days' notice." The agreement of the counsel, under which this rule was entered, was filed in court on the 11th of November of the same year.

On the 27th of October, 1817, an *ex parte* rule was entered, on the motion of the defendants' counsel, "for a commission to issue to the city of Philadelphia, on the part of the defendants, to be directed to George Vaux and William Smith, or either of them, commissioners on the part of the defendants, on ten days' notice of filing interrogatories, with liberty to the plaintiff's counsel to name a commissioner or commissioners, if they should choose to do so, at any time before issuing the commission."

After the counsel for the lessor of the plaintiff had opened his case and gone through his evidence, the counsel for the defendants having opened his case, offered to give in evidence to the jury sundry depositions of witnesses taken under a commission to Philadelphia, bearing date the 31st of October, 1817, directed to George Vaux and William Smith, or either of them, and to George M. Dallas and Richard Bache, or either of them. This evidence was objected to by the plaintiff's counsel on the ground that the depositions so taken were to be considered, in point of law, as taken *de bene esse*.

In support of this evidence the defendants stated, and the opposite counsel admitted, that previous to the execution of this commission an agreement had been entered into that the same should be executed by George M. Dallas, one of the commissioners on the part of the plaintiff, and George Vaux, another of the commissioners on the part of the defendants; and that it was further agreed, and so indorsed on the commission, that the said George Vaux might be permitted to take a solemn affirmation, instead of an oath, and that the commissioners who should act might be qualified by any alderman of Philadelphia and their clerk by the commissioners; and which agreements were entered into upon the application of the defendants' counsel. He further gave in evidence that commissions had heretofore issued to Philadelphia and other places within one hundred miles of the place of trial, from the circuit court of that district, upon motions made for that purpose; and that upon motion, commissions had issued to Philadelphia and to other places without the state from the supreme court of the state of Delaware previous and subsequent to the year 1789. That upon the return of the commission in this case publication thereof was ordered by the court; and lastly, that all the witnesses examined in the execution of the said commission resided in Philadelphia, distant thirty-three miles from the place of holding the court.

It is contended by the plaintiff's counsel that as by the sixth section of the act of the 2d of March, 1793 (1 Stat. at Large, 335), subpoenas for witnesses may run into any other district than that in which the court is holden, provided that in civil causes the witnesses do not live at a greater distance than one hundred miles from the place of holding the court, the deposition in this case ought not to have been received unless it had appeared to the court that the witnesses had been duly summoned and were unable to attend. This argument appears to be founded upon the provision of the thirtieth section of the judiciary act of 1789, chapter 20, to which this case has no relation. That section authorizes the taking of depositions in the specified cases without the

formality of a commission, but declares that the depositions so taken shall be *de bene esse*; and to prevent any conclusion from being drawn against the power of the courts to grant commissions for taking depositions by reason of the above provisions, this section goes on to provide that nothing in the said section contained shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power it is declared they shall severally possess.

§ 4037. *Depositions under a commission, according to common usage, are not considered as taken de bene esse.*

The only question then is, whether depositions taken under a *dedimus potestatem*, according to common usage, are, under any circumstances, to be considered as taken *de bene esse*? And it is the opinion of this court that they cannot be so considered. What might be the effect of the agreement of the parties, or of an order of the court to the contrary, need not be decided in this case, as the rule, as well as the commission which issued under it, was absolute and unqualified. Whenever a commission issues for taking depositions according to common usage, whether the witness reside beyond the process of the court, or within it, the depositions are absolute; the above section of the act of congress relating to depositions *de bene esse* being most obviously confined to those taken under the enacting part of that section. But it is contended by the plaintiff's counsel that this commission to take depositions of witnesses living within one hundred miles from the place at which the court was to sit, although in another district, was improvidently issued, and that the rule under which it issued was made erroneously.

§ 4038. — *assent to issuing commission.*

Whether this objection ought, or ought not, to have been made at the time, or during the term when the rule was entered, is a question which does not occur in this case; because it is most obvious from the conduct of the plaintiff's counsel in the court below, that, if they did not agree to the rule, the commission was issued with their consent. A consent rule was entered on the 25th of October, differing from the *ex parte* rule, entered two days afterwards, in no other respect but as to the names of the commissioners. The plaintiff's counsel afterwards joined in the commission, removed every possible objection as to the commissioners, by naming one on the part of the plaintiff, to act with one of the defendant's commissioners, and filed his cross-interrogatories, to be propounded to the witnesses. The commission was executed by the commissioners so named, and the witnesses were regularly examined, as well on the cross-interrogatories as on those in chief. After such unequivocal evidence of consent to the issuing of the commission, it is not competent to the plaintiff's counsel to object that it issued improvidently, or that the rule was improperly obtained.

It is to be certified to the circuit court for the district of Delaware, that the depositions taken under the commission, referred to in the transcript of the record sent to this court, dated the 31st day of October, 1817, ought to be given in evidence to the jury upon the trial of the cause in which they were taken.

Certificate accordingly.

HARRIS v. WALL.

(7 Howard, 693-706. 1848.)

ERROR to U. S. Circuit Court, Southern District of Mississippi.

STATEMENT OF FACTS.—On the deposition of one Sims in this case was the following indorsement, signed by counsel: “When sworn to, it is agreed this deposition of B. G. Sims may be used in the cause stated in the caption as evidence.” Other facts are stated in the opinion.

Opinion by MR. JUSTICE GRIER.

On the trial of the issues of fact in this case before the circuit court, the defendant offered to read the deposition of William S. Rayner, which had been taken, *de bene esse*, under the thirtieth section of the judiciary act. It was objected to by the plaintiff’s counsel, as not coming within the conditions prescribed by that act. The court admitted the deposition, and sealed a bill of exceptions, which is the foundation of the first assignment of error.

A notice was served on the plaintiff’s counsel, signed by the commissioner or magistrate, and stating the time and place at which it was intended to be taken, and that “I shall take the deposition of William S. Rayner (about to depart the state), to be read on the part of the defendant, *de bene esse*,” etc. When the deposition was offered, the defendant proved to the court that, “when said deposition was taken, said Rayner was on his way to the republic of Texas, to reside there, and that he was a citizen of, and resided in, said republic.”

§ 4039. *A deposition de bene esse, not properly certified by the magistrate, cannot be read in evidence.*

It has been decided by this court, in the case of *Bell v. Morrison*, 1 Pet., 351, that “the authority to take depositions in this manner, being in derogation of the rules of common law, has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible.” The conditions under which a party is permitted, and a magistrate authorized, to take depositions *de bene esse*, under this act, are: 1. That the witness lives at a greater distance from the place of trial than one hundred miles; 2, or is bound on a voyage to sea; 3, or is about to go out of the United States; 4, or out of such district to a greater distance from the place of trial than one hundred miles, before the time of trial; 5, or is ancient or very infirm.

The magistrate is required also to deliver to the court, together with the depositions so taken, a certificate of the reasons of their being taken, and of the notice, if any, given to the opposite party. In order to entitle the party to read such depositions, when taken and certified in due form of law, he must show that, at the time of the trial, 1, either the witness is dead; 2, or gone out of the United States; 3, or to a greater distance than one hundred miles from the place where the court is sitting; 4, or that, by reason of age, sickness or bodily infirmity, he is unable to travel and appear at court.

Now, assuming that the defendant has brought himself within the conditions which would enable him to read a deposition regularly taken and certified according to the requisitions of this act, the question is, whether this deposition was so taken and certified.

The authority or jurisdiction conferred on the magistrate by this act is special, and confined within certain limits or conditions; and the facts calling for the exercise of it should appear upon the face of the instrument, and not

be left to parol proof. The act of congress requires them to be certified by the magistrate. It would be reasonable, also, where notice is required to be given to the opposite party, that such notice should show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives a right to the party to have the deposition taken, so that the party on whom the notice is served may be able to judge whether it is necessary or proper that he should attend. The notice in this case states only that the witness is "about to depart the state," not that he is bound on a voyage to sea, or about to go out of the United States, or a hundred miles from the place of trial.

This notice is appended or annexed to the deposition, with a return of service by the marshal; but the service is not certified by the magistrate, nor does he certify, as required by the act, "the reasons" for taking the deposition. The presence of the plaintiff's attorney, who declined to take any part in the proceedings, cannot affect the case, or amount to a waiver of any objection to the want of authority apparent on the face of this certificate. We are of opinion, therefore, that the court erred in admitting this deposition to be read to the jury.

§ 4040. *When parties agree that a deposition should be read with full knowledge of its contents, this embraces both what is competent or incompetent evidence contained in it.*

The third and fourth exceptions have been abandoned on the argument, and the second does not appear to be well taken. When parties, with a full knowledge of the contents of a deposition, agree that it shall be read to the jury on the trial of the cause, they have no right to complain of the court for not excluding from the consideration of the jury the very matter which they themselves have agreed should be read to them.

The record in this case does not show that any judgment was given by the court below on the demurrer. If a defendant plead several pleas in bar, either of which is a defense to the whole action, and one be found in his favor, he is entitled to judgment. For this reason, the parties may have considered it unnecessary to pray the judgment of the court on the plea demurred to, as the issues on the other pleas had been found in favor of the defendant, and judgment rendered thereon for him. And the plaintiff here, who was also plaintiff below, cannot assign error on an issue in which there was no judgment of the court below. The validity of the defense set up in that plea is, consequently, not before this court, and cannot be noticed. But, as the trial of these issues below took place before the decision in this court of the cases of *Rowan v. Runnels*, 5 How., 134, and *Sims v. Hundley*, 6 id., 1; and as these cases show that the issues of fact are immaterial, though found for the defendant, the defense will probably turn wholly on the decision of the point raised by the demurrer. The judgment of the circuit court is reversed.

DICK v. RUNNELS.

(5 Howard, 7-10. 1846.)

CERTIFICATE OF DIVISION from U. S. Circuit Court, Southern District of Mississippi.

§ 4041. *Under the judiciary act, a certificate to depositions by the officer taking them, that he did not give notice to the adverse party or his attorney, as neither lived within one hundred miles of the place of taking the depositions, is sufficient.*

Opinion by MR. JUSTICE McLEAN.

The only point raised in this case is whether the certificate of the officer who took the deposition objected to is sufficient. He states that he did not give the defendant Runnels, nor his counsel, notice, as neither lived within one hundred miles of the place where the deposition was taken. This may be true, it is alleged, and yet one or both of them might have been in New Orleans, or near to it, at the date of the certificate.

The law requires that a "notice shall be made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption," etc. The officer taking the deposition is presumed to know the residence of the party entitled to notice, as the person at whose instance the deposition is taken is bound to communicate that fact to him. But beyond this he cannot be presumed to know or required to certify. If, in the words of the act, he certifies "that the adverse party or his attorney is not within one hundred miles," he is presumed so to state from the known fact that the residence of neither is within the distance specified. If the party or his counsel live within the one hundred miles, a notice left at his residence would be good.

§ 4042. — *but if such party or attorney was known to the party or magistrate taking the deposition, to have been temporarily within one hundred miles of such place, this fact may be shown and the deposition excluded.*

Where the party entitled to a notice lives more than one hundred miles from the place where the deposition is taken, and the officer so certifies, it would be sufficient, although it might be proved that such party was within the distance specified at the time, if the fact were unknown to the officer and the person in whose behalf the deposition was taken. The certificate may be controverted by parol proof, especially in regard to the facts stated, of which the magistrate is not supposed to have official knowledge. And if it were made to appear that the person entitled to notice did not live one hundred miles from the place of the caption of the deposition, or if he were known to the magistrate or the party to be temporarily within that distance, where a notice might be served on him, though his residence might be more than one hundred miles distant, without a notice, the proceeding would be irregular and the deposition inadmissible.

Upon the whole, we think the certificate under consideration was sufficient, and that the deposition, on the ground stated, ought not to be overruled.

CARRINGTON *v.* STIMSON.

(Circuit Court for Massachusetts: 1 Curtis, 437-439. 1853.)

§ 4043. *Personal service of the notice to take depositions must be had on the adverse party or his attorney.*

Opinion by CURTIS, J.

There is a preliminary question in this case, concerning the admissibility of the deposition of William A. Dahl. The commissioner certifies that "the adverse party was notified, as appears by the notice hereto appended, but was not present." The notice to the respondent is in the usual form, and the officer's return thereon states that he served the notice "by leaving a copy of the same on board the bark Weybopel, lying at Constitution wharf, in Boston, where I was informed the within named Stimson lodged."

It was objected that this was not proof of the notice required by law, and I am of that opinion. The deposition was taken under the thirtieth section of the judiciary act (1 Stat. at Large, 88), which contains the following proviso: "Provided that a notification from the magistrate before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of caption," etc.

The authority to take depositions under this act has always been construed strictly. *Bell v. Morrison*, 1 Pet., 351; *The Patapsco Ins. Co. v. Southgate*, 5 Pet., 604. It must appear that every requisite has been complied with. One requisite is service of a notice on the adverse party, or his attorney, if either be within one hundred miles. This must be construed to require personal service; no substituted service, by leaving the copy at his dwelling-house or usual place of abode, being authorized by the act. Consequently, the service in this case was insufficient to authorize the taking of the deposition. There is also another objection to this notice not mentioned at the bar. The notice contains the names of two other persons, but not of the witness whose deposition was taken. I have, therefore, excluded this deposition.

Judgment affirmed.

GASS *v.* STINSON.

(Circuit Court for Massachusetts: 3 Sumner, 98-115. 1837.)

Exceptions to master's report.

§ 4044. *The general rule of law seems to be that no evidence shall be admitted but what is or might be under the examination of both parties.*

Opinion by STORY, J.

The first exception is to the admissibility of the deposition of Noah James in the case, he having died before any cross-interrogatories were propounded to or answered by him. The general rule at law seems to be that no evidence shall be admitted but what is or might be under the examination of both parties. So the doctrine was laid down by Lord Ellenborough in *Cazenove v. Vaughan*, 1 Maule & Selw., 4, 6, and his lordship on that occasion added: "And it is agreeable to common sense that what is imperfect, and, if I may say so, but half an examination, shall not be used in the same way as if it were complete." The same principle seems recognized in *Attorney-General v. Davison*, 1 McClell. & Younge, 160. See, also, 1 Starkie on Evidence, 265

(2d ed.); *id.*, 270, 271. But neither of these cases called for an explicit declaration as to what would be the effect of a regular, direct examination where the party had died before any cross-examination. In ——— *v. Brown*, Hardres, 315, in the case of an ejectment at law, the question occurred whether the examination of a witness, taken *de bene esse* to preserve his testimony upon a bill preferred and before answer, upon an order of court, where the witness died before he could be examined again, and he being sick all the meantime, so that he could not go to be examined, was admissible on the trial of the ejectment; and it was ruled, after consultation with all the judges, that it could not be, “because it was taken before issue joined in the cause; and he might have been examined after.” From what is said in the same book in Watts’ Case, Hardres, 332, it seems to have been held, at that time, that, if witnesses are examined *de bene esse* before answer upon a contempt, such depositions cannot be made use of in any other court but the court only where they were taken. And the reason assigned is “because there was no issue joined so as there could be a legal examination.” It may well be doubted, if this doctrine would prevail in our day, at least in courts of equity. See, on this point, 1 Starkie on Ev., 271 (2d ed.), and note (o), note (q); *id.*, 272, note (x), note (y). Indeed, it seems directly against the decision of the court of king’s bench in Cazenove *v. Vaughan*, 1 Maule & Selw., 4, 6; for in that case it was ruled that a deposition taken *de bene esse*, where the party might have cross-examined, and did not do so or take any step to obtain a cross-examination, might be read in a trial at law, the witness having gone abroad. On that occasion the court said: “If the adverse party has had liberty to cross-examine, and has not chosen to exercise it, the case is then the same as if he had cross-examined; otherwise the admissibility of the evidence would depend upon his pleasure whether he will cross-examine or not, which would be a most uncertain and unjust rule.”

But it is the more important to consider how this matter stands in equity; for, although the rules of evidence are, in general, the same in equity as at law, they are far from being universally so.

It seems clear that, in equity, a deposition is not, of course, inadmissible in evidence, even if there has been no cross-examination and no waiver of the right. Thus, if a witness, after being examined on the direct interrogatories, should refuse to answer the cross-interrogatories, the party producing the witness will not be deprived of the benefit of his direct testimony; for, upon application to the court, the witness would have been compelled to answer. So it was held in *Courtenay v. Hoskins*, 2 Russ., 253. But if the witness should secrete himself, to avoid a cross-examination, there the court would, or at least might, suppress the direct examination. *Flowerday v. Collet*, 1 Dick., 288. In such a case a cross-examination is still possible; and the very conduct of the witness in secreting himself has a just tendency to render his direct examination suspicious.

§ 4045. *Where direct interrogatories have been fully answered, and an inevitable accident occurs, which, without the fault of either party, prevents a cross-examination, the deposition will not be suppressed.*

But where the direct interrogatories have been fully answered, and an inevitable accident occurs, which, without any fault on either side, prevents a cross-examination, I do not know that a like rule has been established or that the deposition has been suppressed. So far as authorities go, they incline the other way. In *Arundel v. Arundel*, 1 Chan. R., 90, the very case occurred. A witness was

examined for the plaintiff, and was to be cross-examined for the defendant, but before he could be cross-examined he died. Yet the court ordered his deposition to stand. *Copeland v. Stanton*, 1 P. Will., 414, is not an adverse authority; for, in that case, the direct examination was not completed, and the witness had not signed the deposition so far as it went; and the examination being postponed to another day, he was the next morning taken suddenly ill, and died. The court denied the motion to allow the deposition, as far as it had been taken. But the court refused because the examination was imperfect; and, indeed, until the witness had signed the examination, he was at liberty to amend and alter it in any part. In *O'Callaghan v. Murphy*, 2 Sch. & Lefr., 158, Lord Redesdale allowed the deposition of a witness, whose examination had been completed, but who died before his cross-examination could be had, to be read at the hearing, deeming it proper evidence, like the case of a witness at *nisi prius*, who, after his examination, and before his cross-examination, should suddenly die, under which circumstances he thought that the party producing him would not lose the benefit of the evidence he had already given. But the want of such cross-examination ought to abate the force of the testimony. However, the point was not positively and finally ruled, as, upon examining the cross-interrogatories, they were not found to apply to anything to which the witness had testified in his direct examination, and, therefore, the deposition was held admissible. In *Nolan v. Shannon*, 1 Molloy, 157, the lord chancellor held that the direct examination of a witness might be read at the hearing, where a cross-examination had been prevented by his illness and death. My own researches, and those of the counsel, have not enabled me to find any other cases in which the question has been raised; and in the latest book of practice, 1 Smith's Chan. Pr., 294, no other case is alluded to on the subject than that of *Copeland v. Stanton*, 1 P. Will., 414. So that the general doctrine is far from being established in the manner which the argument for the defendant has supposed, and appears strongly to lead the other way.

§ 4046. *Where a deposition is taken by consent, and the witness lives several months after direct examination, during which time no cross-interrogatories are filed, and then dies, the deposition will not be suppressed.*

But if it were, I should have no doubt that the special circumstances of this case would well create an exception. The direct examination was taken by consent. No cross-interrogatories were ever filed. The witness lived several months after the original examination was begun; and there is not the slightest proof, that, if the cross-interrogatories had been filed, they might not have been answered. Under such circumstances, I am of opinion that the omission to file the cross-interrogatories was at the peril of the defendant. I do not say that he was guilty of laches. But I put it upon this: that, as his own delay was voluntary, and the illness of the witness well known, the other party is not to be prejudiced by his delay. His conduct either amounted to a waiver of any objection of this sort, or to an election to take upon himself the whole hazard of the chances of life. It appears to me that the case falls completely within the principles laid down in *Cazenove v. Vaughan*, 1 Maule & Selw., 4, 6.

§ 4047. *Where the books of a witness are out of his reach and that of the court, he may testify as to the contents.*

The second exception is to the inadmissibility of James' testimony to the contents of his books of account. But those books were not in the witness' possession, and were beyond his reach and that of the court. They had been

formerly in the cause; but had been withdrawn from the custody of the court, by the tacit consent of both parties. Under such circumstances, it seems to me that the master was right in admitting the testimony. The case is not essentially different from what it would be if the books had been mislaid or lost, for no access could be had to them by the parties or by the witness; and, therefore, secondary evidence of their contents was admissible.

The third exception is to the disallowance by the master of the supposed balance of a former old account, asserted to be due from James and one Stone, as agents under the defendant Stinson, in the state prison business, at a prior period, and his refusal to apply any of the payments and credits of James to the liquidation of that balance. The reasons given by the master for this disallowance and refusal seem to me to be entirely satisfactory. He had been auditor between the same parties in the suit at law (still pending in this court), upon the same matters in regard to which the present bill is brought, and it was agreed by the parties that his report, rendered in that case, should be deemed evidence before him upon the hearing of the present cause. The master now says that he is not satisfied that the present claim, for such balance of the old account, is well founded; and he has stated very strong reasons for entertaining a presumption against it, which reasons are not in the slightest manner affected by any rebutting proofs before the court. Under such circumstances, the report is entitled to be treated as importing entire verity, as to the matter of fact of the invalidity of the claim. I would add, that I exceedingly doubt whether, in a case of this sort, the payments and credits made by one partner, after a dissolution of the partnership and joint agency, and after a new individual agency in him, can be rightfully applied to the extinguishment of a debt of the partnership, unless the attendant circumstances justify a presumption that the debt of the partnership has been adopted as his individual debt, and brought into account as such, or the payments and credits were intended by the parties to be so actually applied. No evidence of this sort exists in this case. The natural presumption is, that a partner, paying a sum of money to his private creditor, who is also a creditor of the partnership, means to pay it on his own private account, unless some circumstances occur which repel or qualify that presumption. No case has been cited, in which a different doctrine has been asserted and acted on; and certainly my own researches have not enabled me to find any. The case of *Baker v. Stackpoole*, 9 Cowen, 420, 436, so far as it goes, is rather the other way.

But I wish to add a few words upon the subject of the appropriation of payments, because I cannot concur in some of the views which have been suggested in the argument; and because they will serve more fully to explain the ground of the doctrine of indefinite payments in relation to cases of running accounts, hereinafter stated.

§ 4048. *The doctrine of the common law, as to the appropriation of indefinite payments, borrowed from the Roman law.*

There is no doubt that the doctrine of the common law, as to the appropriation of indefinite payments, has generally been borrowed from the Roman law; and it is deeply to be regretted that there has been any departure in any of the authorities from its true results. The Roman law is equally simple, convenient and reasonable upon this subject; and, for most cases, will furnish an easy and satisfactory solution. Sir William Grant, in *Clayton's case* (*Devaynes v. Noble*, 1 Meriv., 604), has stated the general doctrine of the Roman law in an accurate manner. "The leading rule," says he, "with regard

to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor. *'In re præsentī, hoc est, statim atque solutum est:—Cæterum, postea non permittitur.'* If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual intention of the debtor that would, in the first instance, have governed, so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burdensome debt,—to one that carried interest, rather than to that which carried none,—to one secured by a penalty, rather than to that which rested on a simple stipulation;—and, if the debts were equal, then to that which had been first contracted. *'In his, quæ præsentī die debentur, constat, quotiens indistinctè, quid solvitur, in graviolem causam videri solutum. Si autem nulla prægrævet,—id est, si omnia nomina similia fuerint,—in antiquiorem.'*” (The doctrine of the Roman law is still more fully shown and compared with the common law decisions in a very able note to the case of *Pattison v. Hull*, 9 Cowen, 773 to 777, to which I gladly refer.) Pothier in his edition of the Pandects has collected together all the texts of the Roman law on this subject (Pothier, Pand., lib. 46, tit. 3, art. 1, n. 89 to n. 99); and he has summed up the general results in his Treatise on Obligations (Pothier, Oblig., n. 528 to n. 536).

§ 4049. — *the doctrine of the Roman law turns upon the intention of the debtor.*

Now, the whole of this doctrine of the Roman law turns upon the intention of the debtor, either express, implied or presumed; express, when he has directed the application of the payment, as in all cases he had a right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of payment without objection; presumed, when, in the absence of any such special appropriation, it is most for his benefit to apply it to a particular debt. And notwithstanding there are contradictory and conflicting authorities on this subject in the English and American courts, I cannot but think that the doctrine of the Roman law is, or at least ought to be, held, and may well be held, to be the true doctrine to govern in our courts. There is a great weight of common law authority in its favor; and in the conflict of judicial opinion, that rule may fairly be adopted which is most rational, convenient and consonant to the presumed intention of the parties.

§ 4050. *In what case, if any, a creditor may elect to what debt to appropriate a payment.*

If the creditor has a right in any case to elect to what debt to appropriate an indefinite payment, it seems to me that can be only when it is utterly indifferent to the debtor to which it is applied, and then, perhaps, his consent that the creditor may apply it as he pleases may fairly be presumed. Mr. Justice Cowen, in his learned and elaborate opinion, in *Pattison v. Hull*, 9 Cowen, 747; id., 765 to 773, has examined and criticised all the leading authorities; and manifestly leans in favor of adopting the doctrines of the Roman law throughout. I confess myself strongly inclined the same way; and shall yield only to authorities which I am bound to follow.

§ 4051. — *rule as to payments on account.*

The fourth exception is as to the mode in which the payments, made by James, have been appropriated by the master. In the case of a running account between parties, where there are various items of debit on one side and various items of credit on the other, occurring at different times, and no special appropriation of payments constituting the credits has been made by either party, the successive payments and credits are to be applied in discharge of the items of debit, antecedently due, in the order of time in which they stand in the account. In other words, each item of payment or credit is applied in extinguishment of the earliest items of debt, until it is exhausted. This was the rule laid down in Clayton's Case, 1 Meriv., 572, 604, 608; and it was recognized and acted upon by the supreme court of the United States, in *United States v. Kirkpatrick*, 9 Wheat., 720, 737, 738 (BONDS, §§ 419–22); and by this court in *United States v. Wardwell*, 5 Mason, 82, 87. In *McDowell v. The Blackstone Canal Co.*, 5 Mason, 11, the doctrine was limited to debts antecedently due, and not applied to debts which were not due at the time of the payments or credits. This qualification is indispensable to the good sense of the rule, which is founded upon the apparent intentions of the parties; for it would be almost absurd to suppose that a man owing to his creditor two debts, one of which was due and the other not, should be presumed to intend to apply payments made to his creditor in discharge of the debt not yet due, rather than to the debt actually due. (See the cases in the same point referred to in *Pattison v. Hull*, 9 Cowen, 765, 773, 777 and note.)

Now, upon the ground of these principles, it is plain that unless some moneys were due and unpaid for stone supplied in fulfillment of the New Orleans contract, before the 30th of April, 1832, there is no room for the application of any prior payments to any other than the agency account. In this view of the matter, the master's report would be perfectly unexceptionable. Now, I would have been unable to find, in any of the evidence, any positive or clear proofs that, up to the 30th of April, 1832, there was a single cent due from James, on account of stone supplied under the New Orleans contract,—a contract which, it is not unimportant to add, was not a contract originally made by Stinson alone, but by Stinson and Hastings, his partner. Some deliveries of stone, on account of the New Orleans contract, were made before the 30th of April, 1832; but it does not appear how much. They were continued for a considerable length of time after the 30th of April, 1832, and the job itself was not completed until a subsequent period; and (as it is said) after very injurious delays. Now it is nowhere questioned that Stinson did undertake to supply all the stone, of the proper dimensions, to complete the New Orleans job. And in contracts of this sort it is a natural presumption, at least in the absence of all rebutting circumstances, that the right to payment depends upon a due fulfillment of the whole contract. If this be so,—and there is not a *scintilla* of evidence to dispel the presumption,—then the court is bound to act upon it, and to treat these deliveries for the New Orleans contract as only in fulfillment of an executory contract, upon which no sums were finally due. In the evidence (which, however, under the form of the report, is not properly before the court) which has been alluded to at the argument, it appears that the first charge in the books of account for the New Orleans contract is debited on the 31st of May, 1832, and the last on the 13th of July of the same year, making an aggregate to upwards of \$5,030. So that, upon the face of the accounts, it would seem that the charges were not understood to be proper debits

in account, until the respective times above stated. An explanation, however, is made in the testimony of the defendant's witness (Mr. Wild), who was superintendent of the stone-shop under Stinson, and who stated that his practice was first to enter in his own memorandum book the number of the stone and the dimensions; and, when the stone was sent off from the shop, he then affixed the date when it was so sent. He added, "It was my uniform practice to charge in the day-book the amount of stone for a particular job or contract, when it was finished and delivered, and not before, unless on the last day of May, when it was necessary to bring up the books for the warden to make his annual report, when I charged in the day-book what had then been delivered of any unfinished job or contract." It seems to me that this statement completely establishes what the facts were in regard to the New Orleans contract; that is to say, that payments were not expected to be made, or debits deemed due thereon, until the whole job was finished. If this be true, then the New Orleans job cannot be admitted to form an item of the account, to which the prior payments and credits were to be applied.

But it is not necessary in this case to resort to general presumptions. The *onus probandi* is on the defendant to establish a subsisting debt, due *in presenti* and not *in futuro*,—and much more, one not contingent,—in order to bring the case within the reach of the principles as to the appropriation of payments and credits. If he fails in his proof, that is sufficient to apply the payments and credits to other known or admitted debts.

§ 4052. *Courts of equity in matters of set-off follow the analogy of the law.*

The fifth and last exception is, as to the allowance by the master of a sum for labor, wharfage and services to James, as a credit in the account. The ground of objection to the allowance of this item seems to be, that it is properly matter of set-off, and not of credit in account. But it seems to me, that where there are mutual running accounts between the parties in a case of this sort, there is a necessary understanding between the parties that every item of account on either side, ending in a debt, is to be deemed a credit in favor of the party *pro tanto* upon the final adjustment of the accounts. Every service performed by a factor or agent respecting the business of his principal intrusted to his charge, and every expenditure by him about the same, constitutes a proper debit on his side, to be deducted from the amount of the debt due by him to his principal. In the present case, this doctrine is the less important to be considered, for the item objected to seems to amount, up to the 30th of April, 1832, to the sum of \$125.83 only, whereas the balance then due by Stinson to James is found to be \$1,044.18. Whether allowed or not cannot make the slightest difference in the present case. Besides, it seemed to be admitted at the argument, that this constituted a proper item of set-off to an action at law brought to recover the balance due on the account of Stinson against James, under the Massachusetts statutes of set-off. If so, then it is properly allowable in equity; for courts of equity in such cases follow the analogy of the law.

Upon the whole, the exceptions must be overruled and the report be confirmed so far as it applies to the accounts up to the 30th of April, 1832.

UNITED STATES *v.* PARROTT.

(Circuit Court for California: 1 McAllister, 447-466. 1859.)

Opinion by McALLISTER, J.

STATEMENT OF FACTS.—In this case a bill was filed by the district attorney of the United States, in behalf of the government. Among other matters, it alleged that the title to the premises in dispute was in the United States; that defendants had taken tortious possession of them; that they consisted of a mine of great value; that defendants had extracted minerals therefrom to the value of \$8,000,000; that they were extracting therefrom minerals to the annual amount in value of \$1,000,000, and threaten to continue the waste; that they were unable to respond for the damages which had already accrued and which would still accrue; that the defendants, in the name of one Andres Castillero, had presented a petition to the “Board of Land Commissioners,” under the act of congress approved March 3, 1851, which was pending on appeal from the decision of the commissioners, before the district court of the United States for the northern district of the state of California, the object of which petition was to obtain from the United States a confirmation of the title which they pretended to hold from the Mexican government; that the title under which they held possession was forged, ante-dated and fabricated in pursuance of a conspiracy to cheat and defraud the United States of their rights to the said property. The bill concluded by charging that defendants were destroying the substance of the mine, and prayed that an injunction might issue to stay the waste defendants were committing, and threatened to commit, until the determination of their alleged title by the tribunals to which the adjudication of it was confided, and that a receiver be appointed. To this bill an answer was filed, and on the bill and answer the motion for injunction was argued and decided. The charges in the bill specifically made, of forgery and ante-dating of the documentary title under which defendants held, were not directly and fully denied; all that was averred was the ignorance of defendants of their existence, and their belief of the genuineness of the documents. In relation to the charge made in the bill of a conspiracy to cheat and defraud the United States, after admitting the genuineness of all the letters save one, appended to the bill, the answer, in response to the allegation of conspiracy, denies “that the said letters and communications were written by the said parties with intent to commit a fraud or in furtherance of a conspiracy to fabricate a title, as charged in said bill, except so far as the said intention appears from said letters on the part of the said James Alexander Forbes.” So far, then, as the intention of conspiracy appears from the letters, it was admitted that “Forbes,” under whom two of the defendants claimed, may be guilty. In view of the insufficiency of the denials in the answer, the irreparable character of the mischief complained of, and the *prima facie* title of the complainants exhibited by the bill, answer and exhibits, the court granted the injunction and refused the appointment of a receiver.

§ 4053. *Full, direct and positive denials must be given to the charges of fraud, forgery, ante-dating and conspiracy.*

The well-settled rules of chancery require that full, direct and positive denials should have been given to the charges of fraud, forgery, ante-dating and conspiracy. This doctrine is enunciated by uniform decisions. *Poor v. Carleton*, 3 Sumn., 77 (EQUITY, §§ 1679-85); *Clark v. Van Riemsdyk*, 9 Cranch, 160; *Everly v. Rice*, 3 Green, Ch., 553; *Roberts v. Anderson*, 2 Johns. Ch., 202;

Apthorpe v. Comstock, 1 Hopk., 143; *Ward v. Van Bokkelen*, 1 Paige, 100. Independently of authority, reason and common sense affirm the propriety of the rule. The facts charged in the bill were forgery and ante-dating. These were not denied, but the ignorance of the defendants of their existence and their belief in the non-existence of them averred. In *Roberts v. Anderson*, 2 Johns. Ch., 202, Chancellor Kent has well said: "the defendants may have given all the denial in their power; but the fraud may exist notwithstanding, and consistently with their ignorance or the sincerity of their belief."

It has been suggested that the allegations of the forgery and ante-dating not having been sworn to from personal knowledge, *that* circumstance should modify the rule. No authority has, nor, it is believed, can be invoked to sustain a proposition so novel. The allegations of a bill properly made, which so clearly charge the fraud as to make it perfectly intelligible to the defendants, entitle the complainant to such a denial as is prescribed by the rules of chancery. If such an one is not put in, the defendant cannot arrest the issue of an injunction on the ground that he has filed an answer denying the equity of the bill. Relax that rule, and what might not be the injurious results?

There are many cases in which rights may be violated under circumstances which may warrant an honest belief that atrocious fraud had been perpetrated; but those circumstances may have transpired at a distance from the party, and he unable to swear to them from personal knowledge. Can it be contended with any reason, that when the party comes into a court of equity, that tribunal will award to an answer whose denials of forgery and ante-dating are made "upon information and belief," the character which the law annexes to an answer where the denial of the fraud is on personal knowledge? The allegations of a bill are mere pleadings; the averments in an answer responsive to them are regarded as evidence equivalent to two disinterested witnesses, or one witness and strong corroborative circumstances.

§ 4054. *Effect of denials in answer on information and belief.*

To consider that the denials of an answer on "information and belief" are to be deemed sufficient because the allegations of the pleadings are not sworn to from personal knowledge is simply to confound the distinction which exists between pleadings and evidence. So to modify the rule would exclude any application by way of information, through its officer, by a government. To every such application an answer on "information and belief" would be sufficient, for personal knowledge of facts is not to be expected from the government. Deeming the rule applicable to this, as it is to all similar cases, the court considered that the denials of the fraud, ante-dating and forgery were not such as ought to arrest the issue of an injunction; that the case was one of irremediable mischief; and lastly, that the pleadings and exhibits in the case showed a probable foundation to entitle the complainants to be protected against that irreparable mischief, until the determination of the question of title in the tribunal in which it was pending,—this court, without pausing to dwell upon the title set up by defendants, independently of any alleged forgery of it, directed the injunction to issue, but declined for the present the appointment of a receiver.

The injunction exists; the issue of title is still pending in the district court; there is no suggestion of any fact that has arisen since the decision of the court to change the relative attitude of the parties from what it was at that time, nor to alter the jurisdiction of the court in any way over the case. That jurisdiction was distinctly enunciated to be confined to granting the prayer of the

bill, the court disclaiming at the same time all power to decide upon title, either on a motion to dissolve an injunction, or on a final hearing.

In this condition of things, an application is made to this court to designate commissioners to take testimony abroad. The facts expected to be proved go mostly to the establishment of the title of the defendants, and the genuineness of the documents by which they propose to sustain that title. The avowed object of invoking that testimony is "to offer it in evidence on the trial of this case, or on a motion to dissolve the injunction which has been granted against the defendants therein, or for any other purpose in said cause to which such evidence shall be applicable."

The grounds taken in support of this motion are: 1st. That it is matter of right, grantable of course. 2d. That the materiality of the testimony invoked, whether there is to be any hearing at all in the case, whether the testimony would be hereafter admissible, are all matters to be considered when the evidence is offered, not by anticipation. If the first proposition be correct, the second follows as a corollary from it.

§ 4055. *A motion to appoint commissioners to take testimony abroad is not grantable of course.*

The first ground which claims the action of this court as matter of right, and the granting of the application as matter of course, presupposes the act of the court to be merely ministerial. If this be so, it has no right to investigate whether the testimony be material, or whether it can be used when obtained. All it has to do is to perform the mere ministerial duty which it is commanded to discharge, and the present application is needless. Whence the necessity of naming witnesses, the facts they are expected to prove, and the purpose for which their testimony is invoked, if this motion is grantable as a matter of course? Both these grounds will be discussed together, for each is involved necessarily in the other; for if the granting a "*dedimus potestatem*" is matter of course, the court has nothing to do with the materiality of the testimony, the use to be made of it, or any other matter connected with it. If, on the contrary, the power of this court to grant this application depends upon the materiality of the testimony, and the purposes for which it is invoked, it is evident that neither ground can be tenable.

To sustain the proposition that the granting of the present application is matter of right, reference is made to the sixty-seventh rule governing equity practice, as amended in 1854 by the supreme court of the United States, and to the fifth section of the act of congress of 22d August, 1843.

By the sixty-seventh rule it is provided that, after a cause is at issue, commissions to take testimony may be taken out in vacation, as well as in term time, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice being given to the adverse party to file cross-interrogatories before the issuing of the commission, etc. And the rule provides that, in all cases, the commissioners shall be named by the court, or a judge thereof. The amendment to this rule, to be found in 17 Howard, p. vii, declares that the presiding judge of any court exercising jurisdiction, either in term time or vacation, may vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge can now do by the sixty-seventh rule.

The presiding judge of this court has never vested in the clerk any such power. We must look, therefore, to the former rule, the construction of which will necessarily determine the extent of any power which the judge could have

delegated to the clerk; for the judge could not have delegated any power which he did not himself possess, and which, by the requisitions of the amended rule, was to be exercised by the clerk in the same manner as it could be by the judge. The fifth section of the act of 22d August, 1843 (5 Statutes at Large, 517), provides that the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for certain purposes, and that it will be competent for any judge at chambers, and in vacation as well as in term time, to award all such process, commissions, rules and proceedings, etc., *whenever the same are not grantable of course*, according to the rules and practice of the court. It is evident, then, from the act, that all commissions are not granted of course. Looking through the equity rules, it will be found that a distinction is preserved between special motions and those grantable of course.

§ 4056. *Special motions require application to a judge and notice to the opposite party.*

What constitutes a motion grantable of course, and a special one, is to be inferred from the fifth rule of equity. The distinction is, that a motion which requires an allowance from the judge, or a notice to the opposite party, is a special one; all others are grantable of course. This motion asks for the interposition of the judge to nominate commissioners, and requires that previous notice of ten days should be given.

In addition to foregoing rules and act of congress, reference has been made to Daniel's Ch. Practice, 1099, where that author discusses the question what facts are necessary to be inserted in the affidavit on which the application for a commission is founded, and shows it is, from the authorities, uncertain whether the names of the witnesses, or a statement of the points to which it is intended to examine them, are necessarily to be given in the *affidavit*. In relation to the names of witnesses, he states that, according to the books of practice, all that need be stated in the *affidavit* is that the testimony of some of the witnesses whom it is proposed to examine is material, and that the party cannot proceed to trial safely without their testimony. He further states, when the application is made in an early stage of the case, the court seldom denies the application for a commission; it will, however, exercise a discretion upon this subject, and he gives various instances where such applications were refused.

As to the necessity of stating the *facts* to be proved, or the names of the witnesses in the *affidavit*, the conclusion to which he comes, after a review of the authorities, is that, in order to dispense with the necessity of stating them in the *affidavit*, the names of the witnesses, and the object to which their testimony is required, and the necessity for examining witnesses abroad, must be evident from the *pleadings*, if not made so by the *affidavit*; and he distinctly states, that the reason why Lord Eldon, in the case of *Montizibel v. Machada*, did not require those matters to be stated in the affidavit, was, that his lordship had looked into the case, as made by the pleadings, in order to see whether there were facts to which it was proper to examine the witnesses. The same author tells us, that it must appear that the facts relied on as to which evidence is sought are such as can be made use of, either in support of the action or in defense of it. Daniel's Ch. Practice, 1096.

The foregoing authorities (all that have been cited by counsel) do not sustain the proposition asserted. There are but two sources of power to which this court can look for its action to obtain the testimony of absent witnesses.

The first is by the issue of letters rogatory. There is no instance on record of these having been issued as a matter of course, nor is the present an application for such. The second source is statutory; nor can this court receive any aid, save by implication, from that source.

§ 4057. *The power to grant a dedimus potestatem is given to the federal courts to prevent a failure of justice, and to be exercised according to common usage.*

The two acts of congress upon this subject are those of 24th September, 1789, and 24th January, 1827. The former, after describing minutely the mode of taking depositions *de bene esse*, limits the execution of commissions to an American magistrate. The latter act (1827) is limited in its terms to the execution of commissions within the limits of the United States and their territories. It would be a strange state of things, that, without any express legislation as to the mode and manner of issuing commissions, parties would have the right to consider the issue of a commission to take testimony abroad grantable of course, and the nomination of commissioners a mere ministerial act by the judge. The only source of power to which this court can look is the thirtieth section of the judiciary act of 1789 (1 Statutes U. S., 90); and from it derive that power by implication. That section provides "that nothing herein contained shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice." This act, like all laws made in derogation of the common law, should be strictly construed.

§ 4058. *Where a motion for a dedimus potestatem is made to a court of equity, "common usage" means the practice of courts of chancery, not that of the state in which the court sits.*

No commission should be issued under it, unless necessary to prevent a failure or delay of justice, or in accordance with *common usage*. What is meant by common usage, when an application is made to a court of equity for a *dedimus potestatem* to authorize the taking of testimony abroad? It has been contended, on this motion, that by the terms "common usage" in the statute of 1789, congress must have meant the practice of the courts of the states; and the case of *Buddicum v. Kirk*, 3 Cranch, 293, has been cited to sustain this proposition.

It is true that Conkling, in his treatise (p. 421), states that the above case enunciates a proposition which he embodies in these words: "The circumstances under which a commission will be issued, and the mode of obtaining, executing, and returning it, in the several districts, depend upon the practice and laws of the respective states, and the rules of the several courts of the United States." If this text-writer intended to say that the rules of chancery, in relation to taking testimony abroad, were to be in accordance with the practice and laws of the different states, he asserts a doctrine totally indefensible. If such was his intention, his ingenuity has detected in that case what has escaped the sagacity of Mr. Justice Curtis; for the latter, in his head-notes (1 Curtis, 584), has failed to perceive, for he does not notice, any such doctrine. The case of *Buddicum v. Kirk* was a common law case, and the question arose whether service of a notice to take a deposition upon an attorney at law was equivalent to one upon an attorney in fact? As the law of Virginia required the notice to be made on the attorney in fact, the court, very properly, under the thirty-fourth section of the judiciary act, adopted the law of the state in a common law case. That case is no authority to sustain the

proposition that the practice of this court, acting as a court of equity, is to be controlled by the practice of the state courts, whatever that may be. It would make the chancery jurisdiction and practice of the federal courts subservient to the practice of the courts of every state in which the federal court might sit; whereas, it must be uniform in all the states. In *Gaines v. Relf*, 15 Pet., 9, this question is fully discussed, and even in Louisiana, where there is no equity state court, it was decided that chancery practice prevails in the circuit court of that state, and must prevail in accordance with the rules prescribed by the supreme court, and where they are silent, according to the practice of the high court of chancery.

§ 4059. — *the materiality of the testimony, and the purposes for which it is invoked, will determine the action of the court.*

The question then arises, whether an application to a court of equity to take testimony abroad is grantable of course, and all considerations of the materiality of the testimony invoked, and the purposes for which it is sought, are to be postponed until the testimony is offered as evidence. Authorities have been cited to sustain the position that a party has a right to move to dissolve an injunction, and even to renew such motion. This is doubtless true; but the right to make any number of such motions does not alter the nature of the evidence proposed to be offered to sustain them, or fix the propriety of granting the application to take testimony abroad. These are to be controlled by the usages and rules of a court of chancery.

The proviso to the thirtieth section of the judiciary act of 1789 (1 Statutes U. S., 90) gives the power to issue a *dedimus potestatem* according to "common usage." When an application for such process is made to a court of equity, that common usage is to be ascertained by reference to the usages of chancery. One of the fundamental principles which controls that court is, that as its object in compelling a discovery, or granting an application for a commission to take testimony abroad, is to enable itself, or some other court, to decide on a matter in dispute between the parties, the discovery or testimony sought must be material *to the relief prayed for*, or material to be used in some other suit actually instituted or proved to be capable of being instituted in another *forum*. If, therefore, the party does not show the testimony he seeks is material to enable him to support or defend a suit, he shows no title to what he seeks; and, consequently, if he seeks it by bill a *demurrer* will lie; if he seeks it by motion, he is not entitled to it. Such is the doctrine enunciated by Lord Redesdale (Mitford's Ch. Pl., 192).

It is illustrated by decided cases. Daniel, in his treatise, cites from the case of *Shedden v. Baring*, 3 Anst., 880, to sustain the proposition that a bill for discovery or a commission to take testimony abroad must not only show that the action has been brought, but it must show that the facts relied on as to which evidence is sought are such as can be made use of, either in support of the action or in defense of it; otherwise, the bill will not lie. In England, the usual mode is to apply by a bill for a discovery and a commission to take testimony abroad, or to take testimony abroad only. "A bill of this kind [says Daniel], for the mere purpose of examining witnesses abroad, is subject to nearly the same rules as bills for discovery in aid of an action at law." Daniel, 1096. There can be no stronger proof that an application to take testimony abroad is not matter of course, but is an application to the judicial discretion, than the fact that the ordinary course in England is to apply by bill in equity to obtain it. In *Lousada v. Templer*, 2 Russ., 561-564, Lord

Eldon says, "that though the circumstances were such that, even if the plaintiff at law had obtained a verdict, he could not allow him to receive the money until it was ascertained what had been done in Peru, yet he would not grant commissions in aid of a defense to an action when he was not satisfied that the facts alleged as a defense would constitute a legal defense to the legal demand." The court (he added) ought never to grant a commission without examining strictly what is the state of the pleadings." It is evident, from this statement of the lord chancellor, that when after his retirement from office he gave an opinion, as stated by Daniel, that the witnesses' names need not be inserted in the *affidavit*, he did not intimate they and the other facts were not necessarily made to appear in the pleadings and by other means.

In the case of *Martin v. Nicolls*, 3 Simons, 458, there is a strong illustration of this doctrine. The principle asserted is that a bill for discovery against a defendant, and a prayer for a commission to take the examination of witnesses, is *demurrable*. The facts in the case were that a bill was filed, alleging that a judgment had been obtained against complainant in Antigua, on which an action was pending in England against the complainant. It set forth certain facts to show the foreign judgment was void, prayed a discovery against the defendant, and stated that without proof of such facts the complainant could make no defense at law; it prayed, also, that a commission might issue to take the testimony of witnesses at Antigua and other places beyond sea. A *demurrer* was filed. The court, after deciding (correctly or not is not the inquiry) that to the foreign judgment the facts, if proved, could not constitute a defense, for that reason sustained the *demurrer*. The chancellor said, "If I were to allow this bill to stand, I should be in effect saying that the judgment obtained in 'Antigua' may be overruled in the court of common pleas." In the language of the chancellor in that case, this court may say that if they allow the present application, so far as the evidence as to title goes, that it is in effect to say it has the right to try title.

Lord Eldon has said, as we have seen in *Lousada v. Templar*, 2 Russ., 561, the court ought never to grant a commission without strictly examining the pleadings. This is for the purpose of ascertaining the issue to be tried by the court, and the materiality of the testimony to try it. When we look at the pleadings in this case, we find the relief prayed for is the issue of an injunction to arrest the destruction of property until an adjudication of it has been made by the tribunals to which it has been confided by law. The whole structure of the bill assumes the ground, and upon it asks the relief prayed, that the district court has sole jurisdiction between the parties on the question of title, and that all the power of this court is limited to granting an injunction, and thus extending a relief not within the sphere of the district court. In the answer a *demurrer* is incorporated, which assigns as one of its grounds, that it appears from the bill itself that no other than the district court can entertain jurisdiction of said claim. It has been contended throughout, by the defendants, that this court could not adjudicate upon title, it being within the sole jurisdiction of the district court, and that circumstance assigned as a reason why this court could not entertain jurisdiction of this bill, which asks for the issue of an injunction. The court, by decreeing the relief prayed for, asserted jurisdiction over the injunction, although it disclaimed all power to decide title. They did so upon the ground that a court of equity would provide for the safety of property in dispute, pending a litigation, and sustained the position by reference to the action of the English chancery in relation to

the preservation of property in dispute in the ecclesiastical courts. Now, the pleadings in this case are not changed; the issue is the same; title is no more now in issue in this court than it was; the jurisdiction of this court over this case is in no ways altered, increased, or diminished.

Under these circumstances, application is made to obtain testimony from abroad which relates to the title of defendants, to be used on the trial of this cause, or upon a motion to dissolve the injunction which has been granted. It is the ordinary practice of a court of chancery to dissolve an injunction already issued, after answer filed; and there is no objection to the renewal of such motion upon new and material testimony which would be admissible as evidence on the issue pending between the parties. Indeed, such motion may arise on any new matter which may have arisen since the issuing of the injunction. For instance, the injunction issued in this case has been granted to preserve property, the title of which is pending in another court. This tribunal will watch the conduct of the parties, and continue or dissolve the injunction, as the justice of the case may demand. If the conduct of the complainants be such as to intimate a desire to delay or postpone the trial of the title, this court would, upon motion, dissolve the injunction and dismiss the bill. If, on the other hand, the conduct of the complainant be such as evinces a desire to go to prompt trial of the title, the injunction would be continued until the determination of the title by the courts to which it was confided by law. If that determination be in favor of defendants, a dissolution of the injunction would be decreed, and the bill dismissed. If in favor of complainants, it is unnecessary to prejudge the action of the court. But the result must be, in one event, to decree a perpetual injunction; and in another, to dissolve the injunction, restoring the parties to their former relative position and respective rights, the court having accomplished its object—the preservation of the property pending the dispute. Whether a perpetual injunction be granted or the bill dismissed, the decree will be final on the only issue of which this court has jurisdiction.

Upon the ground, then, that the court has no jurisdiction to try title, and that it would be the assertion on its part of the right to do so if this application were granted; that the evidence as to title cannot be used in this court,—this tribunal, in the exercise of the discretion reposed in it, as controlled by the usages and principles of a court of chancery, is constrained to deny the present motion.

But there is another aspect in which this case must be viewed, and which must also control the discretion of the court. Whatever may be the legal effect of the adjudications of the tribunals to whom the question of title is confided by law, upon the rights of third parties, who have conflicting claims to the property disputed, and who were not parties to the proceedings in those tribunals, there can be little doubt, that, as between the claimants under the act of March 3, 1851 (9 Statutes U. S., 631), and the government of the United States, the provisions of that law cannot be disregarded by this court. By that act, congress prescribed the agencies, manner, and conditions on which the government consented to be sued, and through which, in which, and upon which, they would surrender the legal title which had become vested in them by the treaty of Guadalupe Hidalgo, to such as established a better title, in accordance with the provisions of that law.

By it that body delegated to certain special tribunals the adjudication of title, and limited the manner in which they were enabled to act, taking every

precaution by the provisions of the law to guard against fraud and imposture. The power of this court, as one of chancery, to grant injunction, and the application by the United States for such process, gives no additional jurisdiction to this court, nor confers power, beyond that which it has exercised as a court of equity, to preserve the substance of the property. To grant this application would (to use the language of the chancellor in *Nicolls v. Martin*, 3 Simons, 455, as we have seen) be in effect saying, that this court has jurisdiction to try title, and, consequently, to give relief if decided in favor of the defendants.

Was it within the power of congress to pass the act of 3d March, 1851, or is it in conflict with any clause in the constitution of the United States? In the case of *West v. Cochran*, 17 How., 415, the supreme court of the United States enunciate the following principles: "It was also competent for congress to provide that, before a title should be given to any one, the exact limits of his possession, and the title which the United States was to give, should be defined, and that this should be done by such agencies, and in such manner, as might be fixed by congress. This is in entire accordance with the provisions of the treaty, which guaranties to the inhabitants the rights of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced,—these being left to the nation to whose powers they were confided; so that the question is: What has congress deemed expedient?"

Now, to ascertain what has been done in this case, we must look to the act of congress passed March 3, 1851 (9 Statutes at Large, 631), entitled "An act to ascertain and settle the private land claims in the state of California."

By it, they have confined exclusively to certain tribunals the adjudication of title, with specially delegated powers, and which, not being courts of general jurisdiction, can exercise none not expressly granted, or directly and necessarily derived by implication. So far from conferring authority upon them to send process to a foreign country to procure testimony, a power exercised by courts of general equity powers, as we have seen, with great caution, congress have excluded a conclusion that any such power can exist, by enacting that "no deposition taken by or in behalf of any such claimant shall be received in any case, whether before the commissioners, or before the district or supreme court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same; and like notice shall be given of the time and place of taking any deposition on the part of the United States." The introduction of this clause into the act is a clear expression of the determination of congress, when they gave their consent that the government should be sued, that her rights were not to be affected by any deposition or testimony in writing, save such as had been taken in the presence of their agent, or of the district attorney of the proper district.

Now, that clause in the law may have been "gross injustice" or "oppression," and a refusal on the part of the present administration to amend the law may be an "iniquitous attempt to suppress the means of truth," as zealously urged by one of the solicitors of those who are making this application. Congress may, however, have been impelled by what they deemed legitimate and prudent precaution to shield the rights of the government from the dangers of

testimony taken in a foreign country, among a people who had just ceased to be avowed enemies of this country, without the checks and sanctions thrown around the proceeding by the presence of the agent of this government, and by the execution of the commission before an American functionary. The present administration may have been actuated by the same motives in refusing to amend the said act as has been urged.

The general rule is, however, "that if the motive and design of an act may be traced to an honest and legitimate source, equally as to a corrupt one, the former ought to be preferred." *Arredondo's Case*, 6 Pet., 716. But with the motives of the government which passed the law, or the present administration, which, it is urged, has declined to aid in its repeal, this court has nothing to do. Such legislation, if it be as represented, does not conflict with the constitution of the United States; and the highest tribunal in our country has decided that it is competent for congress to regulate the manner and agencies by which the title of claimants to lands shall be ascertained, and that such legislation does not violate any rights intended to be secured by the treaty. The conclusions to which the court has come are:

1st. That an application for the appointment of commissioners to take testimony abroad is not grantable of course; but it is addressed to the judicial discretion which is controlled by the usages and rules of chancery practice, in accordance with which the present motion cannot be granted.

2d. The act of 3d March, 1851 (9 Statutes, c. 31), cannot be disregarded; and this court ought not to violate the spirit and policy of that act by granting its process to take testimony abroad, to be used in the trial of title in this cause. The motion, therefore, must be denied.

§ 4060. *De bene esse*, when admissible.—It appears to be the true construction of the act of congress, that those circumstances which will warrant the taking of a deposition *de bene esse* should, if they exist at the time of the trial, authorize the reading of it when the other requirements have been complied with. *Jones v. Neale*,* 1 Hughes, 268.

§ 4061. A deposition *de bene esse* cannot be read at the trial unless the party introducing it shows that the witness is dead, or has removed out of the United States or to a greater distance from the place of trial than one hundred miles, or that he is unable to attend the court; and if such a deposition is offered, unaccompanied by the evidence which would justify its being read as a deposition *de bene esse*, it must be considered as a deposition in chief, and objections to the reading thereof are objections to it as a deposition in chief. *The Thomas and Henry*,* 1 Marsh., 367.

§ 4062. Where a deposition *de bene esse* is offered in evidence, the party offering it must prove that he had used due diligence to procure the attendance of the witness, and particularly that he had made inquiries at the last place of abode of the witness in order to have him served with a subpoena. *Pettibone v. Derringer*,* 4 Wash., 215.

§ 4063. A deposition, taken *de bene esse*, cannot be read, unless it appears that the witness has been served with a subpoena, and that for some sufficient cause he cannot attend. *Brown v. Galloway*, Pet. C. C., 291; *Penns v. Ingraham*,* 2 Wash., 487.

§ 4064. Depositions *de bene esse* cannot be read unless it appear that the witness is not within reach of the court or cannot give his testimony in open court. *The Samuel*,* 1 Wheat., 9.

§ 4065. When a deposition is taken *de bene esse*, it is admissible at the trial only if it is shown that the witness cannot attend. *Barnet v. Day*,* 3 Wash., 244.

§ 4066. The return of *non est* upon a subpoena issued only a few days before the sitting of the court is not sufficient to show that the witness is unable to attend, so as to make his deposition, taken *de bene esse*, admissible. *Jones v. Greenolds*, 1 Cr. C. C., 339.

§ 4067. A deposition taken *de bene esse* under the thirtieth section of the judiciary act of 1789 cannot be used on the hearing of a suit in equity. It cannot be used if the witness is present, nor can his testimony be taken *viva voce*. *Walker v. Parker*,* 5 Cr. C. C., 639.

§ 4068. A deposition is not admissible in admiralty where the witness is a permanent resident of the locality and is not proved to be absent when the deposition is offered. *Thomas v. Gray*, Bl. & How., 493.

§ 4069. Depositions will not be received in evidence when no reason appears why the witnesses were not introduced in person. *Rutherford v. Geddes*,* 4 Wall., 220.

§ 4070. A deposition cannot be read if the witness is able to attend the trial. *Weed v. Kellogg*,* 6 McL., 44.

§ 4071. A deposition taken under a rule of court, on twenty-four hours' notice, to be read in case of the inability of the witness to attend, cannot be given in evidence without proof of such inability, or that the witness lives beyond the reach of a subpoena. *Read v. Bertrand*, 4 Wash., 558.

§ 4072. **Letters rogatory.**—The court will issue letters rogatory to obtain testimony in a country, the government of which will not permit a commission to be executed. *Nelson v. United States*, Pet. C. C., 235.

§ 4073. In testimony taken under letters rogatory, where the government of the country where it is taken will not permit a commission to be executed, a modification of the strict rules of evidence will be permitted. *Ibid.*

§ 4074. **Taken in another suit.**—A deposition taken in one suit cannot be read in another unless the parties in the two suits are the same. A deposition, taken by the owners of a schooner, in a suit against a steamboat for damages to the schooner, occasioned by a collision, cannot be read in another suit against the same steamboat by the master of the schooner for damages to the cargo occasioned by the same collision. *The Steamboat John H. Starin*,* 9 Ben., 331.

§ 4075. Defendants, in a former suit against them by the same plaintiff for the same cause of action, which has been dismissed by plaintiff, took the deposition of a certain witness who appears to be still living, and nothing appears which prevented his being examined in the usual way in this case. *Held*, that defendants could not read the deposition in this case. *Brewer v. Caldwell*,* 13 Blatch., 361.

§ 4076. A deposition taken in another case will not be admitted as evidence, on proof that the witness had left the state and had not been heard from. A subpoena returned *non est inventus* would be better evidence of diligent search for him. *Stein v. Bowman*, 13 Pet., 209 (§§ 2251-59).

§ 4077. Depositions are inadmissible which were taken in another action to which the party against whom they were offered in evidence was not a party or privy, and in which he had no opportunity to cross-examine the witnesses. *Rutherford v. Geddes*,* 4 Wall., 220.

§ 4078. In a suit by a slave for his freedom, depositions taken in another suit for freedom by one of the same family cannot be read to prove the condition of the ancestor. *Negro Humphries v. Tench*, 2 Cr. C. C., 337.

§ 4079. The deposition of a party taken in another cause may be admitted in evidence if it contradicts anything in his oral testimony given at the trial, or contains an admission by him. *Lastrapes v. Blanc*, 3 Woods, 134.

§ 4080. A deposition in an action in a district court which was not received in time for the trial is inadmissible on the trial of the cause in the circuit court on appeal. *The Buckeye State*,* 1 Brown, 65.

§ 4081. Depositions taken in the state court may be read in the same cause in the federal court,—the case in the state court having been dismissed,—unless special reason is shown why they should not be read. *Gruninger v. Philpot*,* 5 Biss., 104.

§ 4082. Depositions taken in an action which is subsequently dismissed are admissible in a new action between the same parties on the same cause of action in the federal courts in Minnesota, according to the laws of that state. *Gravelle v. Minneapolis & St. Louis R'y Co.*,* 3 McC., 385.

§ 4083. **In equity.**—In the old chancery practice, a plaintiff who took the deposition of a defendant without order of the court, thereby released him from all liability in the suit. This is not now the case in federal courts, under section 858 of the Revised Statutes. The phrase civil actions, in that statute, includes equity suits. *Rison v. Cribbs*,* 1 Dill., 181.

§ 4084. Depositions in equity, taken before a standing examiner, not designated in the particular case, are regular and admissible. *Van Hook v. Pendleton*,* 2 Blatch., 93.

§ 4085. Under equity rule 67, the court may appoint an examiner to take depositions, outside as well as inside its territorial jurisdiction. *North Carolina R. Co. v. Drew*, 3 Woods, 692.

§ 4086. The depositions of witnesses in chancery proceedings are always taken *de bene esse*, and with a saving of all just exceptions. *United States v. One Case of Hair Pencils*, 1 Paine, 400.

§ 4087. In suits in equity in districts where there is no state law to give effect to the act of congress of April, 1802, one party cannot require the opposite party to attend before a commissioner or master to take the depositions of witnesses within the jurisdiction, to be read at the final hearing, except in cases specially provided for by the act of 1789. *Bronson v. La Crosse, etc., R. Co.*,* 9 Am. L. Reg. (O. S.), 350.

§ 4088. The only method of taking the testimony of witnesses, in such cases, is either by examination in open court, or upon a commission with written interrogatories annexed, unless the commission be waived. *Ibid.*

§ 4089. A deposition taken in *perpetuam rei memoriam* before a state magistrate, which has not been recorded within the time required by law, cannot be received in evidence in a court of the United States. Nor can it be received as proof of what a deceased witness swore on a lawful occasion, as to the subject in controversy, when the deposition was not taken in any suit at all, nor in a controversy substantially by and between the same parties. *Gould v. Gould*, 3 Story, 516.

§ 4090. The complainants in a bill to perpetuate testimony *in perpetuam rei memoriam* alleged that they were using a certain process to which the defendant claimed the exclusive right under letters patent which were void for want of novelty; that the defendant had neglected to bring suit against the complainants, and that they were unable to bring their rights to a judicial determination; that if they were sued for infringement they would rely upon the testimony of N., who was upwards of ninety years of age, who would testify that he had used the process twelve years before the patent was issued. *Held*, that the bill stated a case for the taking of such testimony under section 866, Revised Statutes of the United States. *New York & Baltimore Coffee Polishing Co. v. New York Coffee Polishing Co.*,* 9 Fed. R., 578.

§ 4091. Complainant applied for a rule on defendant that he show cause why he should not be punished for contempt in not answering the bill. The sole ground for the motion, as stated by complainant, was to lay a foundation for a motion to issue a commission to take testimony which was prayed for in the bill. The motion to show cause was refused, because attaching the defendant would not tend to establish the truth of the allegations in the bill. Thereafter, complainant applied for a commission, and defendant opposed on the ground that issue had not been joined in the cause. The objection was overruled, and order made for a commission to issue to take the testimony of the witnesses named in the bill, *in rei perpetuam memoriam*, upon written interrogatories. *New York, etc., Co. v. New York Coffee Polishing Co.*,* 11 Fed. R., 813.

§ 4092. Under acts of congress.—The act of congress of June, 1872 (R. S., § 914), providing “that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as nearly as may be to the practice, pleadings, and forms and modes of procedure, existing at the time in like causes in the courts of record of the state, within which such circuit and district courts are held,” does not repeal sections 863, 864 and 865, Revised Statutes, prescribing the manner in which depositions shall be taken. If this statute could be construed as repealing these sections by implication, they are re-enacted by the revision of 1873. *Sage v. Tauszky*,* 6 Cent. L. J., 7.

§ 4093. Where a deposition is taken, under a rule of court, as in state practice, the same degree of strictness is not required as when taken under the act of congress, in the absence of the other party and without notice. Where a deposition, taken under a rule of court, was objected to because it did not appear by whom it was written or how it came into the hands of the clerk, it was received subject to any proof showing unfairness or fraud. *Wilkinson v. Yale*, 6 McL., 16.

§ 4094. The mode of issuing commissions for the taking of depositions, to be used in the courts of the United States, is governed by the statutes of the United States and not by those of the particular state in which the court sits. *United States v. Pings*,* 4 Fed. R., 714.

§ 4095. Depositions in common law actions, in the federal courts, may be taken in conformity with the state statutes, instead of according to the acts of congress, at the party's election. *Flint v. Board of Commissioners*,* 5 Dill., 481.

§ 4096. A deposition taken according to the practice of the state courts, and not under the laws of the United States or the rules of the court, is not admissible in the circuit court of the United States, unless by consent. *Evans v. Eaton*, 7 Wheat., 356.

§ 4097. The provisions of section 866, Revised Statutes of the United States, that in case testimony is taken on a *dedimus*, the commission is to issue “according to common usage,” means that it is to issue according to the rules or law governing the court issuing it at the time. The mode of issuing the commission and the authority and directions to be contained in it are prescribed by such rules and laws, but the cases in which it may issue are prescribed by act of congress. *Jones v. Oregon Cent. R'y Co.*,* 3 Saw., 523.

§ 4098. It is not “according to common usage,” as that term is used in section 914, Revised Statutes, for the attorney of one of the parties, at the request of the magistrate, to write down the witnesses' answers in the absence of the opposing counsel. *United States v. Pings*,* 4 Fed. R., 714.

§ 4099. The authority to take depositions in the manner prescribed by the act of September 4, 1789, being in derogation of the rules of the common law, must be construed strictly; and it is

necessary, therefore, to establish that all the requisites of the law have been complied with, before such testimony is admissible. *Bell v. Morrison*, 1 Pet., 351.

§ 4100. *Ex parte*.—Under the act of congress an *ex parte* deposition may be taken out of the district in which the court is held. *Patapsco Insurance Co. v. Southgate*, 5 Pet., 604.

§ 4101. *Witness residing more than one hundred miles distant*.—The judiciary act of 1789 permits, but does not require, the taking of the depositions of witnesses who live more than one hundred miles from the place of trial. And if such witnesses personally attend the trial, their travel and attendance may be taxed as costs. *Prouty v. Draper*, 2 Story, 199.

§ 4102. Section 30 of the act of congress of September 24, 1789, must be so construed as to confine its operation to depositions of witnesses living within the district, but beyond one hundred miles from the place of trial. *Evans v. Hettick*, 3 Wash., 408.

§ 4103. A deposition of a witness residing within the district, and more than one hundred miles from the place of trial, not taken in conformity with the provisions of section 30 of the act of September 24, 1789, cannot be received. *Ibid*.

§ 4104. When a deposition is taken under a *dedimus potestatem* from a federal court, and the residence of the witness and place of taking the deposition is within the district of the court, though more than one hundred miles from the place of trial, the depositions are not absolute, but *de bene esse*. *Rhoades v. Selin*,* 4 Wash., 725.

§ 4105. It is sufficient, in order to admit a deposition taken because of the prospective absence of a witness, to show at the time of trial the witness was gone to a greater distance than one hundred miles from the place of trial. It is not indispensable that a subpoena be issued and returned *non est*, as that is only one means, and not the only one, of showing that fact. *Leatherberry v. Radcliffe*,* 5 Cr. C. C., 550.

§ 4106. If a witness lives more than one hundred miles from the place of holding the court, his deposition may be taken. *Dreskill v. Parish*, 5 McL., 213; S. C., 5 McL., 241.

§ 4107. Where the deposition of a witness is taken who lives more than one hundred miles from the place of trial, no subpoena need issue, nor need it be proved that the witness is unable to attend the trial. *Patapsco Insurance Co. v. Southgate*, 5 Pet., 604.

§ 4108. It is no objection to reading the deposition of a witness who lives in another state, more than one hundred miles from the place of trial, taken under a rule of court, that he had been at the place of trial during the sitting of court, when it appears that the fact of the witness being at the place of trial was unknown to the party at whose instance the deposition was taken. *Pettibone v. Derringer*,* 4 Wash., 215.

§ 4109. If a witness resides in another state and more than one hundred miles from the place of trial, so that a subpoena cannot be made effective, the party is not therefore bound to take out a commission to take his testimony if the witness will voluntarily appear; and if he does attend, the party is not deprived of the benefit of the act of February 5, 1853, allowing witnesses' fees. *Anderson v. Moe*, 1 Abb., 299.

§ 4110. It is a fatal objection to the admission of the deposition of a witness in a federal court that it nowhere appears that he lives more than one hundred miles from the place of holding the court. *Curtis v. Central Railway*, 6 McL., 401.

§ 4111. In this case, a deposition objected to because the witness lived within the district and more than one hundred miles from the place of trial, because the requisites of the act of congress of September 24, 1789, section 30, had not been complied with, and because the case did not come within any of the provisions of the rules of court, was rejected. *Evans v. Eaton*, 3 Wash., 443.

§ 4112. The deposition of a witness, living out of the district, and more than one hundred miles from the place of trial, cannot be read in evidence, unless taken under a commission. *Bleecker v. Bond*, 3 Wash., 529.

§ 4113. Under the Maryland law of 1773 (c. 7, § 7), authorizing the court to issue a commission to take the deposition of a witness "residing or living out of this province," the court will not issue a commission where the witness resides out of the District of Columbia, but within one hundred miles of the place of trial, because the court may compel the attendance of such a witness. *Gustine v. Ringgold*, 4 Cr. C. C., 191.

§ 4114. The court refused a commission to take testimony, in a case at common law, where the witnesses, who resided in Virginia, within one hundred miles, might be summoned to attend personally. *Wellford v. Miller*, 1 Cr. C. C., 485.

§ 4115. A witness who lives within fifty miles of the place of trial, but who is casually absent from home, at a place more than a hundred miles from the place of trial, cannot be subjected to an examination *de bene esse*, unless he is about going to sea, or is aged, infirm, etc., and cannot be punished by attachment for not obeying the subpoena. *Ex parte Humphrey*,* 2 Blatch., 228.

§ 4116. A deposition taken *de bene esse* of a witness residing fifty miles from Alexandria was

held inadmissible by the circuit court for the District of Columbia. *Park v. Willis*,* 1 Cr. C. C., 357.

§ 4117. The deposition of a person who had sailed to Philadelphia, taken by the defendant, was offered by the plaintiff, and received by the circuit court of the District of Columbia. *Ibid.*

§ 4118. *In the supreme court.*—The judiciary act of 1789 does not authorize the taking of depositions *de bene esse* in cases in the supreme court. Depositions for the supreme court can be taken only under a commission issued according to its rules. *The Argo*,* 2 Wheat., 287.

§ 4119. *Taken without commission or rule of court.*—Depositions may be taken under the act of congress, although a rule to take them has expired. *Buckingham v. Burgess*, 3 McL., 368.

§ 4120. Depositions taken without a commission or rule of court, more than one hundred miles from the place of trial, but conforming in all respects to the thirteenth section of the judicial act of the 24th September, 1789, may be read in evidence. *Pettibone v. Derringer*,* 4 Wash., 215.

§ 4121. *Practice on taking out commission.*—Whether a party taking out a commission to take testimony will be compelled to name the witnesses depends on the discretion of the court. In cases of pedigree the commission will issue without the names of the witnesses. *Parker v. Nixon*,* Bald., 291.

§ 4122. A deposition taken in a case more than six months after the filing of the replication was dismissed under the statute. *Wiggins v. Wiggins*,* 1 Cr. C. C., 299.

§ 4123. When a commission to take evidence in foreign lands is applied for, the interrogatories should generally be filed before the commission issues, though this is a matter in the discretion of the court. *Cunningham v. Otis*,* 1 Gall., 166.

§ 4124. When a commission issues to take depositions in a particular place, if it appears from the certificate of the person taking the depositions, or by other evidence, that some or all of them were not taken at that place, those depositions cannot be read in evidence. *Rhoades v. Selin*,* 4 Wash., 723.

§ 4125. A commission to take a deposition in one county cannot be executed in another. *Boudereau v. Montgomery*, 4 Wash., 187.

§ 4126. Where, under the twelfth rule of the supreme court, an application in an admiralty case was made to a circuit court for a commission to examine witnesses claimed to be necessary for an appeal to the former court, it is for the supreme court to decide, before the commission can be issued, whether the evidence sought to be taken will be admissible in the case. *The Ocean Queen*, 6 Blatch., 24.

§ 4127. The rules of court for the conduct of its practice must be strictly observed, or a satisfactory excuse be furnished for not observing them; the violation of the rules in regard to making a motion for a commission to take testimony abroad, without making any excuse therefor, is a sufficient ground for denying the motion. *The Steamship Louisiana*,* 1 Ben., 328.

§ 4128. The court has full control over the mode of procedure to be observed in executing commissions for the taking of testimony. So where a party making a motion for a commission to take testimony would be denied his motion on account of a non-observance of rules of court in making the application, yet if the other party to the suit consents to the issuing of the commission, upon being allowed to cross-examine the witness orally, the court will grant the commission, allowing the other party to cross-examine the witness orally. *Ibid.*

§ 4129. Notwithstanding the fact that the court in an admiralty case, by consent of the parties, limited the time of filing commissions, yet the court will enlarge the time if new evidence is discovered, but will confine the order to evidence not known at the time of the former order. *The Schooner Ruby*,* 5 Mason, 451.

§ 4130. If, in a suit in admiralty, pending an appeal to the supreme court, both parties join in the execution of a commission to take testimony, an order for the issuing of the commission will be presumed to have been made; and if not, it is waived by the act of the parties. *Rich v. Lambert*, 12 How., 347.

§ 4131. *Attendance of witnesses.*—On a motion for an attachment against a witness for refusal to obey a subpoena issued by the court, requiring him to appear before a commissioner to be examined, *de bene esse*, as a witness in a suit pending in another district, the court will not inquire into the good faith of the parties to such suit; the proper place for such inquiry is before the court in which the suit is pending. *Ex parte Judson*,* 3 Blatch., 89.

§ 4132. The Spanish consul at New York, representing that he had received a commission, from the judge of the southern district of Santiago, in the island of Cuba, empowering him to take the testimony of certain witnesses, to be used in a criminal prosecution for swindling, petitioned the district court to issue a summons requiring the witnesses to attend and testify. *Held*, that the court had no power to issue the summons; that the only power of the court to

enforce the giving of testimony in judicial proceedings pending in a foreign country is derived from the acts of congress of March 2, 1855, and March 3, 1863, and that those acts do not grant the power asked to be exercised in this case. In the Matter of the Petition of the Spanish Consul at New York,* 1 Ben., 225.

§ 4133. A commission to take a deposition in a foreign country will not be issued unless commissioners are named, though the opposite attorney assents. *Vanstophorst v. Maryland*,* 2 Dal., 401. See § 4132.

§ 4134. An application for a commission to take depositions in Canada must be made in open court. A judge at chambers has no power to award one. Nor is it necessary or proper to come into equity for it, the circuit court, sitting as a court of law, having full power to grant it. *Peters v. Prevost*, 1 Paine, 64.

§ 4135. In admiralty, the testimony of witnesses taken on a commission sent abroad is admissible, although there was no previous designation of the witnesses to the opposite party, where it is satisfactorily proved that the names of the witnesses, or the importance of their evidence, were not discovered until after the commission was put in execution abroad. *The Infanta*, Abb. Adm., 263.

§ 4136. It is no objection to the reading of a deposition taken on a commission sent abroad, that the witness had previously been examined and cross-examined under a commission in the United States. *Winthrop v. Union Insurance Co.*, 2 Wash., 7.

§ 4137. A commission to take depositions was issued to five persons at Buenos Ayres, or to any one of them, three nominated by the plaintiffs and two by the defendants. The deposition produced was taken by one of the persons named in the commission, in conjunction with the American consul at that place, who certified that all the persons named in the commission but one were dead or removed, that the commission was delivered to him, and that he convoked the remaining commissioner and the witness before him, and that the examination of the witness was taken by himself and the commissioner. The deposition was held to be inadmissible because the examination was taken in conjunction with a person not named in the commission, and who voluntarily and unnecessarily obtruded himself into the business. *Willings v. Consequa*, Pet. C. C., 301.

§ 4138. To certain depositions, taken in Holland under a commission, it was objected to their admission that they were written in English, though the commissioners were Dutchmen, and it did not appear that there was a sworn interpreter; that the cross-interrogatories were not put to each witness after he had answered the direct interrogatories, but after they had been answered by all the witnesses, and that the commissioners and clerk were not sworn. *Held*, that there was not the slightest weight in either objection. *Gilpins v. Consequa*,* Pet. C. C., 85; 3 Wash., 184.

§ 4139. A certificate of a British minister resident in a foreign country, attesting the signature of an officer taking a deposition abroad, is not a sufficient authentication of the signature. *Stein v. Bowman*, 13 Pet., 209 (§§ 2251-59).

§ 4140. Where the execution of a commission by the commissioners is not permitted by the government of the country to which it is sent, and a judge of that country executes it in the presence of the commissioners, the deposition is admissible as the best evidence which, under the circumstances, can be produced. *Winthrop v. Union Insurance Co.*, 2 Wash., 7.

§ 4141. Exhibits.—Where exhibits were attached to a deposition, and it was desired to withdraw them and attach them to a commission for the purpose of taking other depositions, leave was granted on condition that photographic *fac-similes* were left in lieu of the originals. *Daly v. Maguire*,* 6 Blatch., 137.

§ 4142. Where the exhibits which accompanied a deposition, under the same envelope which covered the commission, were not annexed to the deposition, or identified by any marks of reference, to show that they were the very exhibits referred to by the witness, the objection was considered to be of great weight, the deposition being rejected on other grounds. *Dodge v. Israel*,* 4 Wash., 323.

§ 4143. Where a complaint was made before a commissioner for the extradition of a criminal, the foreign complaint and depositions attached thereto are not inadmissible because—the offense being forgery—the original forged papers are not produced before the commissioner. It is not necessary that each of these papers should be certified by itself. *In re Farez*, 7 Blatch., 345.

§ 4144. In order to qualify the statements of a deposition relating to the boundaries of certain lots, a book written by the deponent when the facts were fresh in his recollection, relating to the same matter, is admissible in evidence. *Harmer v. Morris*, 1 McL., 44.

§ 4145. Objection was made at the trial to the reading of a deposition because the witness had not annexed to it a copy of a former deposition, which, in answer to a previous interrogatory, he admitted he had seen and had used to refresh his memory. The former deposition was not in the power of the witness, but in that of the commissioner or party objecting.

Held, that the court below properly overruled the objection. *Winans v. New York & Erie R. Co.*,* 21 How., 88.

§ 4146. Exhibits attached to the deposition of a claimant, and proved in no other way, fall with it, since the act of June 25, 1868. *Waters' Case*,* 4 Ct. Cl., 389.

§ 4147. *Before whom taken*.—A commissioner to take depositions, appointed by the court, though nominated by a party, is in no sense an agent of the party nominating him. *Gilpin v. Consequa*, 3 Wash., 184.

§ 4148. A deposition was offered in the circuit court for the District of Columbia for Washington county. It was taken in Louisiana by a commissioner appointed by the district court for Louisiana under act of congress of February 20, 1812, chapter 348. It was sealed and directed to the clerk of the trial court. It was objected that the commissioner was only authorized to take depositions in causes pending in his own district, and that his appointment should have been authenticated by the record, and that it should have been directed to the court, but the court allowed it to be read. *Whitney v. Hunt*,* 5 Cr. C. C., 120.

§ 4149. A county commissioner of the state of Illinois is not authorized to take depositions *de bene esse* under the judiciary act of 1789. *Garey v. Union Bank of Georgetown*,* 3 Cr. C. C., 91.

§ 4150. A deposition may be taken before a notary public under the act of 1854. *Dinsmore v. Maroney*,* 4 Blatch., 416.

§ 4151. A probate court being established in each county in Mississippi, and having a seal, and being a court of record, such a court is a county court within the meaning of section 30 of the judiciary act of 1789 allowing depositions *de bene esse* to be taken before the judge of any county court. *Merrill v. Dawson*, Hemp., 563.

§ 4152. A court of probate being organized for each county in Mississippi, and being a court of record having a seal, depositions may be taken before a probate judge in that state, where section 30 of the judiciary act of 1789 allows them to be taken before a judge of a county court. *Fowler v. Merrill*, 11 How., 375.

§ 4153. A judge of the city court of the city of Lexington, in Kentucky, is not such a judge or chief magistrate as is described in the thirtieth section of the judiciary act of 1789; and a deposition taken before such a judge cannot be read. *Foreman v. Holmead*, 5 Cr. C. C., 162.

§ 4154. Depositions taken under a rule of court and executed by a justice of the peace may be read. *Barnet v. Day*,* 3 Wash., 244.

§ 4155. The orphans' court in the District of Columbia is not bound to receive, as evidence, testimony taken under a commission issued in the cause, without the consent of the parties, and not in conformity with any established practice or rule of the court, or any other court in the District, and not directed to commissioners mutually named by the parties, but directed to any notary public, justice of the peace, or mayor, in England, Ireland, or elsewhere. *Walsh v. Walsh*, 3 Cr. C. C., 651.

§ 4156. Though a register in bankruptcy has no authority to take a deposition, yet when by the assent of the parties he has taken such a deposition to be used in the cause, the same becomes a sworn statement made in the case, to be used as evidence therein, to which the party causing the same to be taken cannot object. *Andrews v. Graves*, 1 Dill., 108.

§ 4157. Under the statute of Utah declaring that a commission to take the depositions of witnesses residing out of the territory "shall be issued to a person agreed upon by the parties, or, if they do not agree, to any judge or justice of the peace selected by the officer granting the commission, or to a commissioner appointed by the governor of this territory, to take affidavits and depositions in states and territories," a deposition taken outside of the territory, by a person selected by the officer granting the commission, and not by the parties, who holds none of the local offices mentioned in the statute, cannot be read. *Newton v. Brown*,* 1 Utah T'y, 287.

§ 4158. A deposition taken by other persons than those named in the commission cannot be read, even though offered merely to prove pedigree. *Barnet v. Day*,* 3 Wash., 243.

§ 4159. *Joint commissioners*.—Where a commission to take depositions confers upon any one of several commissioners power to execute it, it may be executed by any one of them. *The Griffin*, 4 Blatch., 203.

§ 4160. A commission to take depositions directed to A. and B., or either of them, authorizes B. to take the deposition of A. *Lonsdale v. Brown*, 3 Wash., 404.

§ 4161. If a commission for taking depositions be directed to five commissioners, of whom three are named by the plaintiff and two by the defendant, and is executed by three only, or any less than all, the deposition is not well taken and cannot be read, although the two commissioners named by the defendant, by whom the objection is made, were present. *Armstrong v. Brown*, 1 Wash., 43.

§ 4162. If a commission, issued to four commissioners jointly, is executed by three only, two of whom were of the defendant's selection, the deposition cannot be read, although the objec-

tion is made by the defendant, the authority of the commissioners being derived from the court and not the consent of the parties. *Guppy v. Brown*, 4 Dall., 410.

§ 4163. If a commission be directed to several commissioners, some of whom are nominated by the plaintiff and some by the defendant, and, after proceeding some length in the examination, the defendant's commissioners withdraw and refuse to act further in the execution of it, and the others execute and return it, the deposition cannot be read. *Munns v. Dupont*, 3 Wash., 31.

§ 4164. Notice.—In taking depositions under a commission, notice of the time and place of executing the commission is requisite, where the commission is a joint one. But where it is not joint, but *ex parte*, notice is not required. *Merrill v. Dawson*, Hemp., 563. The provision of the act of congress of 1789, permitting *ex parte* depositions, without notice, to be taken where the witness resides more than one hundred miles from the place of trial, should never be resorted to unless in cases of absolute necessity, or for the purpose of obtaining mere formal proof. In closely contested cases of fact, testimony thus obtained is always unsatisfactory and liable to abuse. *Walsh v. Rogers*, 13 How., 283.

§ 4165. Certain depositions, objected to because, although a rule had been granted to take depositions, these had been taken after its expiration, were held to be taken under the act of congress which requires no notice after the rule has expired. *Buckingham v. Burgess*, 3 McL., 368.

§ 4166. Where depositions were taken under a commission sued out at the instance of the defendant, it is sufficient to enable the plaintiff to read them in evidence that he admits notice of the time and place of taking them, even supposing that notice to him was necessary. *Yeaton v. Fry*, 5 Cr., 335.

§ 4167. Depositions taken without previous notice to the opposite party, and without the attendance of his counsel, are admissible under the act of congress; and are entitled to credit, although the party against whom they are used does not exercise his right of recalling and re-examining the witnesses. *Jolly v. Terre Haute Draw-bridge Company*, 6 McL., 237.

§ 4168. An objection to a deposition that notice was not given to the other party, although neither such party nor his attorney was within one hundred miles of the place of caption, and also on the ground that the magistrate had not certified that he was not of counsel for either party nor interested in the event of the cause, was overruled. *Miller's Administrator v. Young*, 2 Cr. C. C., 53.

§ 4169. The notice of the taking of a deposition stated that it would be taken on a certain day, and that if not taken on that day the commissioners would adjourn from day to day. The attorney on whom the notice was served agreed that it might be taken whether he was present or not. The taking was not completed on the day named, but was adjourned for two days, and on the adjourned day again adjourned. The deposition was read by such attorney, who had had no notice, and no objections were made by him. The witness subsequently died. *Held*, that the deposition would not be excluded because it was not taken pursuant to the notice. *Buddicum v. Kirk*,* 3 Cr., 293.

§ 4170. A deposition is admissible in evidence though taken before one of the defendants was served with process. *Pannil v. Eliason*,* 3 Cr. C. C., 358.

§ 4171. Where notice of the taking of depositions was given, but not in accordance with the provisions of the judiciary act, and the opposite party attended and cross-examined the witnesses, the deposition was admitted in evidence. *Dinsmore v. Maroney*,* 4 Blatch., 416.

§ 4172. Notice must be given by the magistrate before whom a deposition is taken under the thirtieth section of the judiciary act of 1789. Notice by the party is not sufficient. *Young v. Davidson*, 5 Cr. C. C., 515.

§ 4173. A deposition taken under a commission issued by consent, but without interrogatories filed, and without notice to the other party of the time and place of taking it, cannot be admitted. *Dunlop v. Munroe*, 1 Cr. C. C., 536.

§ 4174. In an action against three persons, where only one was taken, a deposition taken under the act of congress, to be used in the cause, and naming the three defendants, was rejected because the defendants not taken, and living within one hundred miles, were not notified. *Brown v. Piatt*,* 2 Cr. C. C., 253.

§ 4175. Notice of the taking of a deposition, directed to the party, may be served upon his attorney. *Barrell v. Limington*,* 4 Cr. C. C., 70.

§ 4176. Notice of the taking of depositions is required in all cases where there is an attorney of record. *The Argo*,* 2 Gall., 313.

§ 4177. Where there is an attorney of the United States residing within one hundred miles of a place where a deposition is taken, notice of such taking must be given to him where the depositions are to be used in an action in which the United States is a party. *Ibid*.

§ 4178. Notice of the taking of a deposition given to an attorney held insufficient under the laws of Virginia. *Wheaton v. Love*,* 1 Cr. C. C., 429.

§ 4179. A notice of the taking of a deposition *de bene esse* is sufficient when given to the attorney-at-law of the parties, where one of the parties, a resident of the town, was away and his house was closed. *Leiper v. Bickley*,* 1 Cr. C. C., 29.

§ 4180. Under the law of Virginia of 1806 an attorney-at-law could not be compelled to receive notice of the taking of a deposition, but he might consent to receive it or waive it, and after doing so was not allowed to object for want of it. *Buddicum v. Kirk*,* 3 Cr., 293.

§ 4181. Sections 863, 864 and 865 of the Revised Statutes, providing the manner of taking depositions, do not require that the notice shall assign a reason why the deposition should be taken. *Sage v. Tauszky*,* 6 Cent. L. J., 7.

§ 4182. A notice of the taking of depositions need not state the reason for taking them. *Debutts v. McCulloch*,* 1 Cr. C. C., 286.

§ 4183. Notice of filing interrogatories and the time and place of taking depositions may be served by delivering a copy to the other party, or by leaving a copy with a member of his family, or by delivering a copy to his counsel where he is not a resident of the district. Such notice may be served the same as a subpoena in equity. *Merrill v. Dawson*, Hemp., 563.

§ 4184. A notice to take depositions was held insufficient, where the person who served it testified that he left it at the lodgings of the other party, and the latter testified that he did not receive it. *Hill v. Norvell*, 3 McL., 583.

§ 4185. A notice to take depositions on a day stated, to be adjourned from day to day, if necessary, is a good notice. *Knode v. Williamson*, 17 Wall., 587 (§§ 3482-84).

§ 4186. That the deposition was not taken on the day named in the notice, and witnesses who testified simply that they knew nothing of the case were examined for four days to keep the notice alive until the real witness should appear, is not a ground for the suppression of the deposition, though the practice ought not to be encouraged. *Sage v. Tauszky*,* 6 Cent. L. J., 7.

§ 4187. It cannot be objected to depositions that the notice did not state the names of the witnesses whose depositions were to be taken, as required by the statute, where the attorneys of the opposite party have indorsed their acceptance on the notice, and thereby given to the party giving the notice a right to rely on its sufficiency. *Ibid.*

§ 4188. A deposition taken during the session of the court at which the cause was tried, and without giving notice to the opposite party or his counsel, such party having counsel at the very place where the deposition was taken, was excluded, where the names of the parties in the suit were not correctly given in the caption of the deposition, being described as a suit against one where it was a suit against two, though the latter was not served, and both pleaded and defended. *Allen v. Blunt*, 2 Woodb. & M., 121.

§ 4189. It seems that it is no objection to the reading of a deposition that the notice was given and the deposition taken during the term of the court at which the cause was set for trial; or that the Christian names of the parties are not set forth in the caption, the caption and the notice being entitled in the cause; or that it is not proved, at the time of offering the deposition, that the reasons for taking it still exist. *Claxton v. Adams*,* 1 MacArth., 496.

§ 4190. A notice to take depositions in the "city" of Guilford is not good for a deposition taken in the "town" of Guilford. *Knode v. Williamson*, 17 Wall., 589 (§§ 3482-84).

§ 4191. Notice that a deposition will be taken on the morrow is not too short, where all the parties reside in the town where the deposition is to be taken and the notice given. *Atkinson v. Glenn*, 4 Cr. C. C., 134.

§ 4192. One hour's notice of the taking of a deposition *de bene esse*, given to an attorney in the same town, held reasonable in the absence of special circumstances showing it to be unreasonable. *Leiper v. Bickley*,* 1 Cr. C. C., 29.

§ 4193. A deposition taken by *dedimus* from the court, and according to common usage, is admissible, though but one hour's notice of its taking was given, and the deposition was in the handwriting of the counsel for the party in whose behalf it was taken. *Nichols v. White*,* 1 Cr. C. C., 58.

§ 4194. Depositions taken in this case, under an order requiring notice to be given to the opposite party, were objected to because the notice was so short that the counsel of the opposite party were not able to see him or confer together before the time arrived, and to reach the place of taking them seasonably. The court, being satisfied that no unfairness was intended in the notice, admitted the depositions on the condition that the opposite party should be allowed to take them over again and cross-examine the witnesses if he desired. *Aiken v. Bemis*, 3 Woodb. & M., 349.

§ 4195. Where the notice of the taking of a deposition was unreasonably short, the deposition was rejected. So a notice given at noon, of the taking of a deposition between four and six of the same day, was held unreasonable, there being nothing to show the necessity of so short a notice. *Renner v. Howland*,* 2 Cr. C. C., 441.

§ 4196. Notice to the counsel of the other side, given at Washington on the 31st of Decem-

ber, that a deposition will be taken at Baltimore on the 2d of January, is not reasonable notice. *Barrell v. Simonton*, 3 Cr. C. C., 681.

§ 4197. A notice of the taking of a deposition is insufficient, where, in order to attend at the taking, the attorney would be unable to be present at the commencement of the court. *Bell v. Nimmon*,* 4 McL., 539.

§ 4198. A notice to take a deposition under the act of 1789, section 30, dated the 27th of May, to appear on the same day in Alexandria, between 9 and 2 o'clock, and served by leaving a copy with the defendant's wife at 8:30 A. M. of the 27th, and a copy offered to the defendant on the morning of the same day at the market, is not reasonable, although the parties resided in Alexandria. *Jamieson v. Willis*, 1 Cr. C. C., 566.

§ 4199. **Caption.**—The title of the cause must be stated in the caption of a deposition. *Centre v. Keene*,* 2 Cr. C. C., 198.

§ 4200. Depositions not specifying the parties between whom they are taken, in the caption, nor naming them as parties in the body, cannot be received. *Murray v. Marsh*,* 2 Hayw. (N. C.), 290.

§ 4201. A deposition whose caption does not state the title of the cause correctly may be admitted where from the docket there is no uncertainty as to the cause in which it was taken. *Buckingham v. Burgess*, 3 McL., 368.

§ 4202. It must appear from the caption that the deposition is taken in the cause. The omission of the name of one defendant is fatal. *Smith v. Coleman*,* 2 Cr. C. C., 237.

§ 4203. In depositions taken under the judiciary act of 1789, it is necessary to specify the names of all the parties to the suit, in the caption or in some other part of the deposition. *Waskern v. Diamond*,* Hemp., 701.

§ 4204. Where the name of the plaintiff is correctly stated in the title of a deposition, the fact that a wrong name is used in speaking of the plaintiff, as such, will not render the deposition inadmissible. *Voce v. Lawrence*,* 4 McL., 203.

§ 4205. Where all the parties have notice of the taking of a deposition, and know in what case it is taken, it is not necessary that the names of all the parties appear in the caption where it follows the title of the case as given in the notice and docketed. *Egbert v. Citizens' Ins. Co.*,* 2 McC., 386.

§ 4206. An objection to the admission of a deposition because the name of one of the defendants in the cause was omitted in its caption was overruled, where his name appeared as defendant in the order of the court appointing the commissioner, in the notice served on the defendants, in the caption of the interrogatories which were filed, attached to, and issued with, the commission, in the commission which issued under the authority of the court, and in the oath of the commissioner to execute the same; and the commissioner stated in the caption of the deposition that it was taken in pursuance of said commission and interrogatories. *Merrill v. Dawson*, Hemp., 563.

§ 4207. It is not necessary that the caption of a deposition taken in San Francisco, to be used in St. Louis, should state that the two places are more than one hundred miles apart. The court knows that fact judicially. *Egbert v. Citizens' Ins. Co.*,* 2 McC., 386.

§ 4208. Where the place of taking a deposition is named in the caption, the statute is complied with. *Tooker v. Thompson*,* 3 McL., 92.

§ 4209. An objection to a deposition taken under the act of congress, that the judge who took it had not stated whether any notice was given to the defendants, although he had stated that the place of caption was more than one hundred miles from the place of trial, was overruled. *Travers v. Bell*, 2 Cr. C. C., 160.

§ 4210. Unless the caption of a deposition contains the names of all the parties, the deposition will be rejected. *Peyton v. Veitch*,* 2 Cr. C. C., 123.

§ 4211. **Interrogatories.**—Where evidence was obtained under a commission, the interrogatories to which were settled by the judge without objection, and the evidence was directly responsive to the interrogatories, it was thought doubtful by the court whether the evidence could be objected to at the hearing. *Star of Hope*, 2 Saw., 15.

§ 4212. The court may allow depositions to be taken before a master in chancery, after due notice given, without first filing interrogatories and cross-interrogatories, allowing each party to put such questions as he may wish at the taking, where the evidence is to be derived chiefly from books and accounts. *Russell v. McLellan*, 3 Woodb. & M., 157.

§ 4213. Where a commission for taking depositions is not joint, but *ex parte*, the other party failing to join, the party taking the deposition need not cause all his interrogatories to be propounded to the witness, provided the last interrogatory is put. *Merrill v. Dawson*, Hemp., 563.

§ 4214. Each interrogatory in a deposition should be answered, at least in substance. And not to have examined the witness to each is fatal to the commission. *Ketland v. Bissett*, 1 Wash., 144.

§ 4215. If the general interrogatory is not answered it is fatal to the whole deposition. All the interrogatories must be substantially answered. *Dodge v. Israel*,* 4 Wash., 323.

§ 4216. The objection to a deposition, that no answer was given to or notice taken of the general interrogatory, is a good objection. *Richardson v. Golden*,* 3 Wash., 109.

§ 4217. While it is a rule of law that all the interrogatories accompanying a commission must be put to a witness, yet if the answer to the interrogatory which was not put by the commissioners would not have been legal evidence, the answers to the remaining interrogatories may be read. *Bell v. Davidson*,* 3 Wash., 328.

§ 4218. If the interrogatories be substantially put, although not in the precise form in which they are propounded by the parties, and if it appear that they have been answered by the witness, it is sufficient. But if they are not all put or answered, the deposition cannot be read. *Winthrop v. Union Insurance Co.*, 2 Wash., 7.

§ 4219. It is sufficient if interrogatories are substantially, though not formally, answered, where the deposition is taken under a commission; and the same rule applies where it is taken under letters rogatory. *Nelson v. United States*, Pet. C. C., 235.

§ 4220. An oral examination before an examiner, without a waiver of written interrogatories, is irregular; but a party who has notice that the examination would be taken orally, or has been taken, and acquiesces, is held to waive his objections, especially after the lapse of a year. *Van Hook v. Pendleton*,* 2 Blatch., 93.

§ 4221. Where a deposition was taken on the plaintiff's direct interrogatories only, and the cross-interrogatories of the defendant were omitted, though the omission was the fault of the commissioner nominated by defendant, yet as such commissioner was in no sense defendant's agent, but an officer of the court, the deposition was rejected. *Gilpins v. Consequa*,* Pet. C. C., 85.

§ 4222. If a deposition is taken upon the direct interrogatories of the plaintiff, but the cross-interrogatories are not put to the witness, it cannot be read. *Gilpin v. Consequa*, 3 Wash., 184.

§ 4223. In the direct examination of a deponent, an interrogatory and the answer to it were objected to at the time of taking the deposition, and the objection, being insisted upon at the trial, was sustained, and the interrogatory and the answer were ruled out. It was held that the answers to the cross-interrogatories were admissible, not purporting on their face to have been asked in consequence of the direct interrogatory or the answer to it, and not being dependent upon it, or drawn in a form which would exclude them from the deposition on its suppression. *Alsop v. Commercial Insurance Co.*, 1 Sumn., 451.

§ 4224. **Refusal of witness to answer.**—Motion for an attachment against a witness for refusing to answer a question put to him on his examination *de bene esse*, before a commissioner, on a *subpœna duces tecum*, as a witness in a case pending in another district. *Held*, that it must be made to appear that the commissioner had jurisdiction in the matter, and that the witness resided more than one hundred miles from the place of trial; also, that the witness was called to testify to facts material and relevant to the issue in the case. It is also a vital objection, that the *subpœna* was issued without any preliminary evidence showing the case to be one in which an examination *de bene esse* could be lawfully had. *Ex parte Peck*,* 3 Blatch., 113.

§ 4225. **Examination of witnesses.**—Where notice is given that a deposition will be taken between certain hours, the examination need not be kept open till the last hour. *House v. Cash*,* 2 Cr. C. C., 73.

§ 4226. On the taking of depositions under a notice in pursuance of a state statute, the plaintiff's counsel left before the last witness was examined, with the understanding that the witness would only be examined on the same points on which the other witnesses testified; but the examination was on other points. The court held that the deposition could be read only as taken by consent, and that the latter part of it could not be read except by consent of the parties. *Henckley v. Hendrickson*, 5 McL., 170.

§ 4227. **Cross-examination.**—A continuance was granted where the defendant had no opportunity to cross-examine a witness whose deposition was taken under the act of congress. *Dade v. Young*, 1 Cr. C. C., 123.

§ 4228. Where parties had notice of the time and place of taking depositions, and failed to attend, the court refused to stay the proceedings to enable them to cross-examine the witnesses. *Van Hook v. Pendleton*,* 2 Blatch., 94.

§ 4229. That the cross-interrogatories were not put to each witness after he had answered the direct interrogatories, but were put after the direct ones had been answered by all the witnesses, is not ground for the exclusion of the depositions. *Gilpin v. Consequa*, 3 Wash., 184.

§ 4230. A deposition will not be received in evidence unless the party against whom it is offered was either present at the examination, or at least had an opportunity of being so and

cross-examining the witness. But where the counsel of the party were present at the examination, which continued several days, he cannot object because his counsel were absent on one of the days to which the examination was adjourned, they having notice of the adjournment. *Newton v. Brown*,* 1 Utah T'y, 287.

§ 4231. Cross-examination of the witness by the opposite party is a waiver of the objection that the deposition is irregular, because taken after the cause was set down for hearing, and without any order of court for the purpose. *Mechanics' Bank of Alexandria v. Seton*, 1 Pet., 299.

§ 4232. Where a deposition has been taken *de bene esse*, pursuant to the thirtieth section of the judiciary act of September 24, 1789, and the deponent has been cross-examined by the opposite party, the latter cannot claim the right to read the cross-examination in evidence, and at the same time object to the direct examination for incompetency of the witness. *The Brig Osceola, Olc.*, 450.

§ 4233. The cross-examination of a witness, when his deposition is taken *de bene esse* under the provisions of the thirtieth section of the judiciary act, does not preclude the party from objecting to the deposition at the trial for interest in the witness, if such interest was not known to him when he cross-examined the witness. *United States v. One Case of Hair Pencils*, 1 Paine, 400.

§ 4234. Oath.—Whether a person is sworn before or after a deposition is reduced to writing is immaterial. *Tooker v. Thompson*,* 3 McL., 92.

§ 4235. Where the order for the taking of a deposition provided that it be taken on the 13th of the month, and it appeared that the oath was not administered till the 17th, it was held that this did not affect the taking of the deposition, and constituted no objection to its admission. *Voce v. Lawrence*,* 4 McL., 203.

§ 4236. In taking depositions *de bene esse*, under section 864, Revised Statutes, the statute must be strictly pursued; the witness must be carefully examined, and must be sworn to tell the whole truth respecting the subject-matter of the controversy, and not merely the whole truth touching the interrogatories propounded. *Wilson Sewing Machine Co. v. Jackson*,* 1 Hughes, 295.

§ 4237. Under the thirtieth section of the judiciary act of 1789, a deposition is inadmissible which shows that the witnesses were sworn to testify to the truth, instead of the "whole truth," or that it was reduced to writing by one of several witnesses, or where it fails to state that the depositions were reduced to writing in the presence of the magistrate. *Rainer v. Haynes*,* Hemp., 689.

§ 4238. When both parties join in a commission to take testimony, and nothing appears from which the court can infer that the proper oath was not administered to witnesses, the depositions will not be ruled out because the commissioners did not set out in their return that the witnesses were required to testify all their knowledge and remembrance of anything that related to the cause. *Keene v. Meade*,* 3 Pet., 1.

§ 4239. Where the magistrate certified that the witness was carefully examined, cautioned and sworn to testify the truth concerning all matters touching which he should be questioned, the deposition was rejected, notwithstanding one interrogatory was, "If you know anything further, material to plaintiff or defendant in the cause, mention it, and conceal nothing." *Garrett v. Woodward*,* 2 Cr. C. C., 190.

§ 4240. Certificate — As to oath and residence of witnesses; reduction to writing; signing, etc.—The act of congress relating to depositions taken without notice must be strictly construed. So where the magistrate failed to certify that the deposition remained in his hands from the time it was taken till it was sealed and directed to the clerk of the court, the deposition was rejected. *Shankwicker v. Reading*,* 4 McL., 240.

§ 4241. An *ex parte* deposition, taken under the act of congress, is inadmissible unless it appears from the certificate of the officer taking it that the witness was cautioned as well as sworn. *Luther v. Schooner Merritt Hunt*,* 1 Newb., 4.

§ 4242. It must affirmatively appear on the certificate of the officer taking an *ex parte* deposition that the cause specified in the act of congress authorizing the taking of such depositions actually existed. So where the officer certified, "and I certify that the reason for taking such deposition is, and the fact is, that the said witness in the city of New York, more than one hundred miles," etc., it was held that the deposition must be suppressed, as it did not appear that the witness resided in New York. *Dunkle v. Worcester*,* 5 Biss., 102.

§ 4243. The certificate of an officer taking a deposition is *prima facie* evidence of his right to take it. *Jasper v. Porter*,* 2 McL., 579.

§ 4244. It is not necessary that a magistrate who takes a deposition under the act of congress certify that he is not counsel for either of the parties. *Peyton v. Veitch*,* 2 Cr. C. C., 123.

§ 4245. If it appears upon the face of a deposition, taken under the provisions of section 30 of the judiciary act, that the person before whom it was taken was an officer authorized by that

act to take depositions, it is sufficient as to the power of the officer, in the first instance. *Ruggles v. Bucknor*, 1 Paine, 358.

§ 4246. The certificate of the person named in the act of congress as having authority to take depositions is received *prima facie*, without further proof of his authority. Thus, if a deposition is certified by a person as mayor, the court will presume that he is mayor, until the contrary is shown. That it is not certified under his seal is no objection, since he may have no seal. *Price v. Morris*, 5 McL., 4.

§ 4247. Where an officer has a seal, he must use it in certifying a deposition; but it seems that his authority may be otherwise proved. *Paul v. Lowry*,* 2 Cr. C. C., 628.

§ 4248. It is immaterial in whose handwriting depositions are. It is no objection to the reading of depositions that the commissioners have not certified in whose handwriting they are. *Keene v. Meade*,* 3 Pet., 1.

§ 4249. Persons skilled in the comparison of handwriting will not be permitted to be examined to prove that the body of the certificate of the magistrate to a deposition is not in his handwriting. *Elliot v. Hayman*, 2 Cr. C. C., 678.

§ 4250. When a deposition has been taken under a commission, it must appear that the commissioner took the oath annexed to the commission. *Frevall v. Bache*, 5 Cr. C. C., 463.

§ 4251. It cannot be objected to a deposition that it does not appear that the commissioner before whom it was taken was sworn. The official acts of a United States commissioner are *prima facie* valid. *Hoyt v. Hammekin*, 14 How., 346.

§ 4252. The certificate of the commissioners taking a deposition that they have taken the oath required by the commission is sufficient evidence of that fact. *Winter v. Simonton*, 3 Cr. C. C., 104.

§ 4253. The statutory form of oath in use at the place where the witness is sworn is the form to be used under section 864, unless the witness expresses conscientious scruples respecting that form, in which case an oath which he regards as binding may be administered, and the notary must state in his certificate the reason for varying from the customary form. *Wilson Sewing Machine Co. v. Jackson*,* 1 Hughes, 295.

§ 4254. Where a deposition is taken upon the solemn affirmation of the witness, the certificate of the magistrate is sufficient evidence that the witness was conscientiously scrupulous of taking an oath. *Elliot v. Hayman*, 2 Cr. C. C., 678.

§ 4255. It is no objection to the admission of a deposition that the magistrate does not certify that he "cautioned" the witness, when he returns that the witnesses were duly "examined and solemnly affirmed." *Brown v. Piatt*,* 2 Cr. C. C., 253.

§ 4256. Where the judge, who took a deposition, certifies that "the said witness, being of full age, and being carefully examined, and cautioned, and sworn to speak the whole truth, says in manner and form following," etc., it is to be understood that the deponent was *by him* (the judge) examined and cautioned, etc. *Edmondson v. Barrell*, 2 Cr. C. C., 228.

§ 4257. Neither section 866, Revised Statutes of United States, nor title 7 of the Civil Code of Oregon, applies to a deposition taken on a *dedimus*, to be used in a federal court in that state, and it is not necessary, in case of a deposition so taken, that the witness should be cautioned, or that the return should show anything more than that the witness was duly sworn or examined upon his oath duly administered in answer to the interrogatories annexed to the commission; and in such case it seems that an affirmation is equivalent to an oath. *Jones v. Oregon Cent. R'y Co.*,* 3 Saw., 523.

§ 4258. A deposition rejected because the judge did not certify that the witness was cautioned and sworn to testify the whole truth, nor whether the adverse party was notified, nor the precise place of caption. *Pentleton v. Forbes*,* 1 Cr. C. C., 507; *Jones v. Knowles*,* 1 Cr. C. C., 523.

§ 4259. In case of a deposition taken under the act of congress, it is not necessary for the magistrate's certificate to show that he cautioned the witness when he certifies that "he was sworn in pursuance of the act." *Moore v. Nelson*,* 3 McL., 383.

§ 4260. The magistrate's certificate must state the reasons for taking a deposition. *Woodward v. Hall*,* 2 Cr. C. C., 235.

§ 4261. It is fatal to a deposition that the officer who took it does not, in his certificate, assign any reason for taking it, provided the other party has not waived his right to raise the objection. *Sage v. Tauszky*,* 6 Cent. L. J., 7.

§ 4262. Where the certificate of the magistrate, taking a deposition, specifies a cause which is insufficient, the deposition will not be received; nor will a party be allowed to vary the magistrate's return by showing by parol a different cause from that specified. *Wheaton v. Love*,* 1 Cr. C. C., 451.

§ 4263. The magistrate is not required to state the reason why notice was not given, and, if he does, it is not conclusive. *Smith v. Coleman*,* 2 Cr. C. C., 237.

§ 4264. As the certificate of the notary stated the existence of facts which, under the act of

1789, made it unnecessary to give any notice, it was not necessary that the certificate of the notary should state that those facts were the reason why no notice was given. *Dinsmore v. Maroney*,* 4 Blatch., 416.

§ 4265. The magistrate need not certify that the witness signed the deposition in his presence. *Centre v. Keene*,* 2 Cr. C. C., 198.

§ 4266. A deposition taken under the act of congress of 1789 was rejected because the magistrate certified that the form (not "the same," as the act reads) was reduced to writing by him and signed by the witness. *Thorpe v. Simmons*, 2 Cr. C. C., 195.

§ 4267. It was objected to the admission of a deposition that the certificate of the magistrate before whom it was taken did not state that it was signed by the witness. The certificate stated that the deposition was taken before the magistrate and reduced to writing by him. The court held that the whole was therefore done in the magistrate's presence, and inasmuch as there could be no deposition till it was signed, it must have been signed by the witness. *Voce v. Lawrence*,* 4 McL., 203.

§ 4268. It is not necessary that it should appear in a deposition taken under the act of congress, or in the certificate, that the witness is not a resident of the place of trial; this may be made to appear on the trial of the cause. *Sage v. Tauszky*,* 6 Cent. L. J., 7.

§ 4269. The certificate of the person taking a deposition that the witnesses live more than one hundred miles from the place of holding the court, and that the opposite party has no agent known to the commissioner residing within one hundred miles of the place of taking the depositions, is, as to these particulars, in proper form. *Tooker v. Thompson*,* 3 McL., 92.

§ 4270. It was held sufficient for the magistrate who took the depositions to certify that it appeared to him that the adverse party lived more than one hundred miles from the place of taking the depositions. *Banks v. Miller*,* 1 Cr. C. C., 543.

§ 4271. The certificate of the magistrate, before whom a deposition is taken under the act of congress, that the witness lives more than one hundred miles from the place of trial, is *prima facie* evidence of the fact. *Patapsco Insurance Co. v. Southgate*, 5 Pet., 604.

§ 4272. Where a deposition is taken according to the acts of congress, more than one hundred miles from the place of trial, no notice is required. And the certificate of the magistrate who took the deposition, that the witness lives more than one hundred miles from the place of trial, is competent evidence to establish that fact. *Merrill v. Dawson*, Hemp., 563.

§ 4273. Where the judge who takes a deposition does not certify that it was reduced to writing in his presence, as required by the thirtieth section of the judiciary act of 1789, the deposition will be rejected. *Edmondson v. Barrell*, 2 Cr. C. C., 228.

§ 4274. That the magistrate does not certify that he reduced the testimony to writing, or that it was done by the witness in his presence, is fatal to a deposition taken under the thirtieth section of the judiciary act. *Cook v. Burnley*, 11 Wall., 659.

§ 4275. A deposition taken under section 30 of the judicial act of 1789 cannot be read in evidence, unless the judge certifies that it was reduced to writing, either by himself, or by the witness in his presence. *Pettibone v. Derringer*,* 4 Wash., 215.

§ 4276. A deposition taken under the act of congress of September 4, 1789, is not admissible in evidence, if it is not positively shown by the certificate thereto, or by other evidence, that it was reduced to writing in the presence of the magistrate. This fact cannot be presumed from the certificate, where every word in the certificate may be true, and yet the deposition may not have been reduced to writing in the magistrate's presence. *Bell v. Morrison*, 1 Pet., 351.

§ 4277. When the magistrate certified that the deposition was written in his presence, without stating by whom, and it appeared that the substance of it was copied by the deponent from a paper which he had written several days previously, the deposition was rejected. *United States v. Smith*,* 4 Day (Conn.), 126.

§ 4278. The magistrate need not certify that the deposition was reduced to writing by him in the presence of the witness; that a deposition was written by the witness in presence of the magistrate may be proved by evidence *aliunde*. *Vasse v. Smith*,* 2 Cr. C. C., 31.

§ 4279. And the certificate of the magistrate is sufficient to prove his authority. *Ibid.*

§ 4280. A deposition taken under the act of congress will not be rejected because the notice to the opposite party to attend at the time and place of caption did not require him "to put interrogatories if he should think fit;" nor because the certificate of the caption accidentally omits a word; nor because the magistrate has not certified that the witness was sworn to testify the whole truth "in the matter in controversy;" nor because he has not certified that that part of the testimony of the witness which was reduced to writing by the witness himself, was so reduced in the presence of the magistrate, it being certified that the testimony was reduced to writing by the witness and the magistrate. *Bussard v. Catalino*, 2 Cr. C. C., 421.

§ 4281. It was objected to the admission of a deposition taken under a commission that the return did not show (1) that the magistrate himself examined the defendant; (2) that he reduced, or caused to be reduced, to writing the deponent's answer; and (3) that he reduced, or

caused to be reduced, to writing the answers of the deponent in his presence. In answer to the first objection the statement of the return that "an examination on oath of the deponent was had and taken before me" was held sufficient. Interrogatories and cross-interrogatories accompanied the commission, and the return stated that "the following are the answers" of the deponent to the several interrogatories and cross-interrogatories thereto annexed, and also stated in conclusion that "the signatures of the deponent affixed to this deposition are in his handwriting and made in my presence." The magistrate having been directed to permit no person other than the clerk to be present during the examination, except the deponent himself, and it not appearing that any clerk had been appointed, it was held to be presumed that no other person except the magistrate and the deponent was present at the examination, and also to be further presumed that the answers were reduced to writing by either the one or the other, it being sufficient in either case. This was held to be an answer to the second objection. The fact that the return stated that the signatures affixed to the deposition were in the handwriting of the deponent, and that they were made in the presence of the magistrate, was held to be an answer to the third objection. *Stockwell v. United States*, 3 Cliff., 284.

§ 4282. It is no objection to the reading of a deposition that the caption does not state in which county in the District of Columbia the cause is pending; nor that the name of the defendant is misspelled; nor that the deposition is not certified by the magistrate to have been written in the presence of the witness, nor to have been signed by the witness in the presence of the magistrate. *Van Ness v. Heineke*, 2 Cr. C. C., 259.

§ 4283. A deposition is admissible in evidence notwithstanding the fact that the commissioners taking it have not certified that it was taken down by them or their clerk or by the witness. *Meade v. Keane*,* 3 Cr. C. C., 51.

§ 4284. An objection to a deposition that the mayor, before whom it was taken, did not certify that the parties were not present, was overruled, where he had certified that the defendant was not present. *Curtis v. Central Railway*, 6 McL., 401.

§ 4285. Where a deposition came through the mail addressed to the clerk of the court in which it was to be used, marked with the style of the case, and with the usual indorsements across the seal, it was held immaterial that the officer before whom it was taken failed to certify that he delivered it to the court, or sealed it up and deposited it in the postoffice. *Egbert v. Citizens' Ins. Co.*,* 2 McC., 386.

§ 4286. When commissioners to take testimony certify that they had administered the oath annexed to the commission to James M'Cann, the clerk they were going to employ, it was held that the objection that they had not certified that they had employed a clerk was not well taken. *Keene v. Meade*,* 3 Pet., 1.

§ 4287. The commission under which a deposition was taken named the plaintiff R. M. M. instead of R. W. M., but the commissioners certified that the deposition was taken in the case wherein R. W. M. was plaintiff; *held*, that the deposition was admissible and that the error was a clerical one only. *Meade v. Keane*,* 3 Cr. C. C., 51.

§ 4288. *Directing*.—It is no objection that a deposition has been inclosed in an envelope directed to the chief judge of the court, when by the commission the commissioner was directed to "send the same to the judges." *Frevall v. Bache*, 5 Cr. C. C., 463.

§ 4289. Objection that the deposition was directed to the judges of the court, and not to the court; and that it did not appear that it was sealed up by the judge who took it, the envelope being sealed with two seals, and the name of the judge written over each. Objections overruled. *Thorp v. Orr*,* 2 Cr. C. C., 335.

§ 4290. *Returning*.—The act of congress as to depositions *de bene esse* requires that the deposition be retained by the magistrate taking it until he deliver the same with his own hands into the court for which it is taken, or be by him sealed up and directed to such court. Where this part of the act had not been observed, it was held that the deposition could not be read. *Jones v. Neale*,* 1 Hughes, 268.

§ 4291. It is no objection to a deposition, duly taken and certified, that it was returned into court by the plaintiff on whose behalf it was taken, on the second day of the term several months after it was taken — there being no rule of law limiting the time for return of a deposition into court or directing by whom it shall be delivered. *Doty v. Strong*,* 1 Burn. (Wis.), 158.

§ 4292. *Opening*.—A deposition opened out of court without consent of the parties will not be received in evidence, and when opened by consent, an indorsement to that effect should be indorsed on the deposition by the clerk. *The Roscius*,* 1 Brown, 442.

§ 4293. Under chapter 20, section 30 of the judiciary act of 1789, a deposition not opened in open court is inadmissible in evidence. *Beale v. Thompson*,* 8 Cr., 70.

§ 4294. A commission to take depositions was returned executed, and was set aside on motion, having been opened by government officers before coming to the hands of the clerk. *United States v. Price*,* 2 Wash., 356.

§ 4295. Depositions *de bene esse*, under section 865 of the Revised Statutes, may, on motion, be opened and filed in open court in the presence of the parties or their attorneys before the trial. *United States v. Tilden*,* 10 Ben., 170.

§ 4296. Filed after the trial.—On the appeal of a case to the supreme court, the record of the circuit court contained the deposition of Thomas Oldham, with a certificate of the clerk annexed to it, in these words: “N. B. The deposition of Thomas Oldham was filed after the trial of the case, by order of the court.” *Held*, that the deposition formed no part of the cause in the circuit court, and is liable to every exception which could be made to it, if it was not found in the circuit court record, and was now offered for the first time to the supreme court. *The Samuel*,* 1 Wheat., 9.

§ 4297. Objections.—The objection to the admissibility of a deposition as evidence in a cause should be made by motion to suppress it before going to trial. If not objected to until offered to be read at the trial, the objection comes too late. *Claxton v. Adams*,* 1 MacArth., 496.

§ 4298. An objection to a deposition should be made before the trial, by motion to suppress it. At the trial it is too late. *Blackburn v. Crawfords*, 3 Wall., 175.

§ 4299. A deposition cannot be objected to on a new trial for want of formality, where all objections to it were waived at the former trial. *Edmondson v. Barrell*, 2 Cr. C. C., 228.

§ 4300. Although a motion was made before the trial to suppress a deposition and exception taken, yet if it was offered at the trial, and read without objection and without exception, it cannot be objected to in the supreme court. *Ray v. Smith*, 17 Wall., 411.

§ 4301. Objection made at the trial to the reading of a deposition will not be sustained when there was full time and opportunity to move for a suppression of the deposition, or a re-examination of the witness, before the trial. *Winans v. New York & Erie R. Co.*,* 21 How., 88.

§ 4302. Where a deposition is taken under a commission, all objections of a formal character, and such as might have been obviated if urged on the examination of the witness, must be raised at such examination, or upon motion to suppress the deposition. So, if a copy of a bill of lading is annexed to a deposition, it is too late at the trial to object to the admission of the copy without producing the original or showing its loss. *York Company v. Central Railroad*, 3 Wall., 107.

§ 4303. Objections to a deposition which relate to defects and irregularities which might be obviated on retaking it come too late if not made when the deposition was taken, and made without notice to the opposite side, and for the first time on the trial of the action. *Doan v. Glenn*,* 21 Wall., 33.

§ 4304. An objection to a deposition is waived if not taken advantage of at the trial. A deposition, objected to at a previous term for irregularity in taking it, which objection was overruled, and admitted at the trial without objection, cannot be objected to in the supreme court. *Brown v. Tarkington*, 3 Wall., 378.

§ 4305. A deposition read in evidence without objection cannot be rejected because the court afterwards makes a ruling on the admission of another deposition, which would have excluded the one in question if objection had been made. *Evans v. Hettick*, 3 Wash., 408.

§ 4306. A deposition was taken after publication had passed, but the motion to suppress it was not made until the final hearing of the cause. It was taken on written interrogatories filed by leave of the court. After leave was granted, application was made to the court to suspend the commission; but this motion was not pressed to a decision, the counsel agreeing to strike out certain interrogatories. Under these circumstances, the court regarded the objection as waived, and refused to suppress the deposition, inasmuch as the commission issued by special leave of the court after due notice. *Patten v. Darling*, 1 Cliff., 254.

§ 4307. Where no objection was made in the trial court to the proof of the signature of a witness to a deposition, no objection can be made on the hearing of the case on appeal. *Gaines v. Relf*,* 12 How., 472.

§ 4308. When exceptions are intended to be taken to the form of any particular interrogatories or cross-interrogatories, they should be propounded as objections before the commission issues, when they will be referred to a master to settle their form, and if on review the court is in doubt, they will be allowed to stand and the matter will be left till final hearing. If not thus objected to, the exception will be held to be waived. *Cocker v. Franklin Hemp & Bagging Co.*,* 1 Story, 169.

§ 4309. Depositions cannot be suppressed for insufficiency of notarial certificate when the objection is first taken three years after they have been on file. *Bank of Danville v. Travers*,* 4 Biss., 507.

§ 4310. While the formalities prescribed by the thirtieth section of the judiciary act of 1789 must be strictly observed in order to entitle a deposition taken under it to be received in evidence against proper objection, yet such formalities may be waived; and where the opposite party, by his counsel, attends the examination of the witness and cross-examines him, without

making any objection, and remains silent until the witness is dead, all the formalities prescribed by statute for his benefit will be considered as waived by him. *Shutte v. Thompson*,* 15 Wall., 151.

§ 4311. The waiver of objections to a deposition taken *de bene esse* is not a waiver of objections to it as a deposition in chief, and will not authorize the reading thereof as a deposition in chief when it cannot be read as a deposition *de bene esse*. *The Thomas and Henry*,* 1 Marsh., 367.

§ 4312. A party may, after the lapse of several years, specify particular objections to depositions not specified at the time the depositions were returned and opened. *Walker v. Parker*,* 5 Cr. C. C., 639.

§ 4313. Notwithstanding a stipulation waiving objections to the form and manner of taking a deposition, the statutory requisites as to its return must be observed or it will not be admitted in evidence; as where it was delivered by the commissioner taking it to the counsel of the party procuring it, and retained by him several months, and was not filed till the morning of the trial. *Livingston v. Pratt*,* 1 Brown, 66.

§ 4314. If a party agrees that a deposition may be used in a cause as evidence, and does so with a full knowledge of its contents, he cannot have portions excluded as irrelevant when it is read. *Harris v. Wall*, 7 How., 705 (§§ 4039-40).

§ 4315. *Of parties.*—Under section 858 of the Revised Statutes, enacting that “in the courts of the United States, no witness shall be excluded in . . . any civil action because he is a party to or interested in the issue tried,” the deposition of a party may be received. *Railroad Company v. Pollard*, 22 Wall., 341.

§ 4316. A deposition taken without leave of the court is properly overruled because the witness is a party to the suit. *Hoyt v. Hammekin*, 14 How., 346.

§ 4317. The deposition of a deceased witness, not taken by consent, cannot be read in evidence. *Zantzinger v. Weightman*, 2 Cr. C. C., 478.

§ 4318. *Administrator a party.*—Under section 858, Revised Statutes of the United States, a deposition of defendant in a cause in equity where the plaintiff is an administrator is inadmissible so far as it relates to conversations or transactions with the deceased. *Rhode Island Hospital Trust Company v. Hazard*,* 6 Fed. R., 119.

§ 4319. *Misnomer.*—The mistake of the clerk issuing a commission to take a deposition *de bene esse*, in misnaming one of the parties, may be corrected by amending the commission, in case of the death of the witness before the trial. *Boone v. Janney*, 2 Cr. C. C., 312.

§ 4320. It is no objection to the admission of a deposition taken under a commission, that the commission purports to be in a cause between Richard M. Meade, plaintiff, and Richard R. Keene, defendant, where the name of the plaintiff is Richard W. Meade, and so appears in all process and proceedings in the case and under the commission. *Keene v. Meade*,* 3 Pet., 1.

§ 4321. *Miscellaneous.*—Under the thirtieth section of the judiciary act of 1789 a deposition must be reduced to writing by the magistrate himself, or by the deponent in his presence. *Marstin v. McRea*,* Hemp., 688.

§ 4322. An objection to a deposition that it was not committed to writing under the sanction of an oath, but written and signed by the witness many days before the oath was administered, was considered by the court in this case to be of great weight, but whether it was fatal to the deposition was not determined. *Dodge v. Israel*,* 4 Wash., 323.

§ 4323. Depositions which were not read over to, and signed by, the witness, but were written out by the commissioner from phonographic notes, and a loose sheet attached bearing the witness' signature previously obtained, will be suppressed on the court's own motion. *Martin v. United States*,* 3 Ct. Cl., 384.

§ 4324. Where a deposition is taken under a *dedimus*, it is not a good objection that it is in the handwriting of counsel. *Nicholls v. White*,* 1 Cr. C. C., 58.

§ 4325. It seems that a deposition may be read in evidence without being signed by the witness. *Ketland v. Bissett*, 1 Wash., 144.

§ 4326. A deposition will not be suppressed because the form of instructions annexed to the commission is not signed by the clerk and the opposite party's counsel, when it appears that the commission was properly executed. *United States v. Pings*,* 4 Fed. R., 714.

§ 4327. Where a deposition was taken by a person who was both commissioner and clerk of the court, and the proctor of the opposing party knew that the deposition had been taken, it cannot be ruled out on the ground that it was not sealed up, that the preliminary proof of materiality was not made, or that notice of its being filed was not given. *Nelson v. Woodruff*, 1 Black, 156.

§ 4328. The deposition of a bankrupt annexed to an account against the bankrupt estate, in which he states that he has examined it and believes it to be correct, although he has not compared it with the books, but thinks that the clerk would not draw it off otherwise, may be read in evidence. *Cambioso v. Maffet*, 2 Wash., 98.

§ 4329. Where the plaintiff had taken depositions with the consent of the defendant, the

court refused to compel him to produce them on motion of the defendant, there being no consent entered on the record. *Moore v. Dulaney*, 1 Cr. C. C., 341.

§ 4330. Where an instance case was ordered to further proof at a former term, a witness was produced for *viva voce* examination, but the court for the sake of convenience ordered his deposition taken in writing out of court. *The Samuel*,* 3 Wheat., 77.

§ 4331. A deposition taken by defendant must be competent evidence for plaintiff to authorize him to use it. *Reid v. Hodgson*,* 1 Cr. C. C., 491.

§ 4332. A deposition will not be suppressed because the witness was shown the interrogatories prior to giving his testimony. *North Carolina R. Co. v. Drew*, 3 Woods, 692.

§ 4333. That the answers of a witness were prepared in writing by counsel and given to him in advance of the examination is fatal to a deposition. *Ibid.*

§ 4334. The fact that a witness has given one deposition in a cause, under section 30 of the act of 1789 (1 Stat. at Large, 89), does not prevent his giving another in the same cause. *Cornett v. Williams*, 20 Wall., 244 (§§ 798-803).

§ 4335. If the depositions of witnesses examined at the trial have been previously taken in the cause, the court, being apprised that they are on file, may call for them, although they have not been introduced. *The Indiana and Buffalo*, Newb., 115.

§ 4336. A commissioner of the circuit court has no power to issue a writ of *habeas corpus* to take from jail a person committed by authority of the United States and bring him before the commissioner for the purpose of giving his deposition before such commissioner, to be used in a cause pending in the district court. *Ex parte Barnes*, 1 Spr., 133.

§ 4337. Section 30 of the judiciary act does not give power to take prisoners from jail and bring them before the magistrate merely for the purpose of giving depositions. *Ibid.*

XXXI. IN CRIMINAL CASES.

[See CRIMES; INSANITY. Also, see §§ 1475, 1972, 2162, 2920, 3315.]

SUMMARY — *Defense of insanity; evidence in rebuttal*, § 4338.

§ 4338. When, in a criminal case, insanity is relied on as a defense, and specific acts tending to show insanity are put in evidence, the prosecution may show the acts, declarations and conduct of the prisoner, both before and after the time of the criminal act, in order to rebut the defense. *United States v. Holmes*, §§ 4339-51.

[NOTES.— See §§ 4352-4552.]

UNITED STATES *v.* HOLMES.

(Circuit Court for Maine: 1 Clifford, 98-125. 1858.)

§ 4339. *Practice in motions for new trial.*

Opinion by CLIFFORD, J.

Motions for new trials in the federal courts are not always exhibited to the court for verification before they are filed. Usually they are prepared by the party objecting to the verdict, within the time prescribed by the twenty-sixth rule, and not unfrequently are filed with the clerk of the court without any examination by the opposite side, where they sometimes remain upon the files until the argument, without any revision whatever. Drawn from the minutes of the counsel or from recollection, it not unfrequently happens that they require some correction in order that they may accord with the actual rulings and instructions of the court at the trial. No inconvenience results from the practice, as the whole subject is one entirely within the control of the court, whose undoubted province it is to revise such motions if any error has intervened, either at the time of the argument or when its opinion is finally delivered. *United States v. Gibert*, 2 Sumn., 37.

Two classes of complaints are embraced in the motion, each containing several distinct objections to the action of the court. One class has respect solely to the rulings of the court in admitting or rejecting evidence in the course of the trial. Another and a distinct class has respect to the instructions given to

the jury when the case was finally submitted to their determination. Those appertaining to the rulings of the court in admitting and rejecting evidence will first be considered, for the reasons that they were made in the progress of the trial, and that the weight of such objections cannot be satisfactorily determined without some reference to the circumstances of the case under which the evidence was offered. In considering this class of objections, therefore, it becomes necessary to recur to the proceedings in the trial, and somewhat to the evidence, as it was developed at the trial, in order that the exact circumstances under which each particular ruling was made may be fully and clearly understood.

STATEMENT OF FACTS.— According to the record, the indictment was filed in court on the 25th of September, 1858. It alleges to the effect that the prisoner, on the 22d of January, 1858, upon the high seas, out of the jurisdiction of any particular state, and within the admiralty and maritime jurisdiction of the United States and of this court, in and on board a certain American vessel called the *Therese*, in and upon one George W. Chadwick, piratically, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the prisoner with a certain instrument called a belaying-pin, in and upon the head, neck, back and left side of him, the said George W. Chadwick, then and there on the high seas, in the vessel aforesaid, did strike, giving to him, the said George W. Chadwick, then and there, several mortal wounds, blows and bruises, to wit: one mortal wound on the head of him, the said George W. Chadwick, of the length of three inches and of the depth of one inch; one mortal bruise and wound on the neck of him, the said George W. Chadwick, of the length of three inches and of the depth of one inch; one mortal bruise on the back of him, the said George W. Chadwick, of the length of six inches and of the depth of one inch; one mortal bruise on the left side of him, the said George W. Chadwick, of the length of four inches and of the breadth of two inches, of which mortal wounds and bruises the said George W. Chadwick then and there instantly died. It contains two counts, and in each there is the usual conclusion, charging that the prisoner piratically, feloniously, wilfully, and of his malice aforethought, him, the said George W. Chadwick, in manner and form aforesaid, did kill and murder.

He was arraigned on the 28th of September, 1858, and pleaded that he was not guilty. His trial was commenced on the 5th of October following, pursuant to an assignment previously made at the request of his counsel. No objection is made to any of the proceedings at the trial, except what are contained in the motion under consideration. In opening the case, the district attorney confined his remarks to the discussion of the principles of law applicable to the charge made in the indictment, and to a brief statement of the evidence to be introduced to prove it. He called some seven or eight witnesses in the opening to prove the necessary allegations, to show the jurisdiction of the court, the act of killing, as laid in the indictment, and all the material elements of the crime.

[Here the court stated the testimony.]

Such is the substance of the testimony produced by the government in the opening, so far as respects the jurisdiction of the court, the fact of homicide, and all the material elements of the crime charged in the indictment. Many other facts and circumstances material to the question whether the prisoner was sane or insane when the act was committed were elicited in the cross-examination, which it is unnecessary to reproduce in this investigation.

The testimony of the witnesses for the defense varied in several important particulars from the narration previously given by the government witnesses. Many new facts were also stated, which had more or less bearing upon the question of sanity or insanity presented by the defense. That remark is more particularly applicable to the testimony of the second mate, who was examined as to all the circumstances attending the homicide, as well as to those which followed, and in many particulars his statements differed widely from the statements of the seamen previously examined; but as those discrepancies and contradictions do not give rise to any legal question, they will not be specified. One part of his testimony, however, is material in this investigation, and that part only will be particularly stated. Speaking of the efforts to resuscitate the deceased while he lay on the deck, and before the prisoner retired from the scene, the witness says he went to the cabin to get some hartshorn, thinking that hartshorn would revive the deceased if he had any life in him; and as he went, he says, he looked into the mate's room, and said to him, "For God's sake, come on deck, for I believe the captain is crazy, and is going to kill us all." This statement of the witness was made in the examination in chief, and was given as a part of the circumstances which took place while the prisoner was standing over the dead body, and before the mate came on deck, as stated by the government witnesses. Both of those witnesses were fully examined as to the acts, conduct and declarations of the prisoner throughout the voyage, both before and after the homicide, up to the time the ship arrived at Pernambuco, and while she remained in that port. It appeared from their testimony, as well as from the testimony of the master of the ship *Andalusia*, who was also examined as a witness for the defense, that the prisoner was sick at the Chincha Islands, in consequence of an injury he received in the head while on shore; and the latter gave a particular description of the injury, and a minute statement of his acts, conduct and declarations during his sickness. His acts, conduct and declarations immediately after the homicide, and during the five days that elapsed before the ship arrived at Pernambuco, were also very fully narrated by the second mate, in whose charge the prisoner remained ever after he retired to the cabin on the day the homicide was committed, until he arrived in New York in the bark *Emparador*, about the middle of March following.

Many other witnesses were also called, and examined as to his prior and subsequent acts, conduct and declarations when not at sea, covering nearly the whole period of his life, from early youth to the time of his arrest. The brother-in-law of the prisoner, Joseph A. Cargill, was examined upon this point, and testified to certain attacks of pain in the head which the prisoner had suffered on a voyage previous to the one during which the homicide was committed, and to his violent conduct and language during those attacks. Near the close of his examination in chief, after the witness had stated the time of his return and his arrival at the house of his father in Newcastle, in this state, he was asked by the counsel for the prisoner whether he mentioned these occurrences during the voyage to any of his family, or to any of the family of the prisoner. That question was objected to by the district attorney, and ruled out by the court, upon the ground that the inquiry was irrelevant to the issue, and that it was incompetent for the prisoner to fortify his own witness by declarations made out of court, and not under oath. This ruling presents the first question to be determined at the present time. In the motion, as filed in the case, it is numbered five in the list of causes assigned for a new

trial; but it is in fact the first cause of complaint when considered in the order of events as they occurred at the trial. As before remarked, the question was asked in the examination in chief, and, of course, before the witness was cross-examined.

§ 4340. *Testimony to support credit of witness, when allowed in chief.*

No principle in the law of evidence is better settled than the one enunciated in the rule that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it. *Jackson v. Etz*, 5 Cowen, 320; 2 Cowen & Hill's Notes, 776. When this question was asked and excluded, nothing had been given in evidence by the other side to impeach the credit of the witness, and it was for that reason that it was ruled out as incompetent and immaterial. Tested by the circumstances under which the testimony was offered, it is clear it could have had no tendency to prove the issue, and in fact and truth could have had no other effect except to fortify the credit of the witness. Evidence to confirm a witness, by proving that he has given the same account out of court, is not admissible, even although it has been proved, in order to contradict him, that he has given a different account. *Rex v. Parker*, 3 Doug., 242; *Robb v. Hackley*, 23 Wend., 55; *Ware v. Ware*, 8 Greenl., 55; 1 Greenl. Ev., 469.

It was suggested at the argument that the testimony called for by the question was offered, not to fortify the credit of the witness, but to prevent any misconstruction of his conduct arising out of the circumstance that the prisoner married his sister shortly after his return from that voyage. Admit the fact to be as stated, and it is not perceived that it changes the aspect of the question in any degree, as the difficulty still remains in all its force, that at the time the question was asked and ruled out there was nothing in the case to which the answer, whether given in the affirmative or negative, would apply as rebutting evidence. At that time the question whether the witness objected to the marriage of his sister had not been asked, and certainly it cannot be maintained that testimony merely rebutting is admissible in anticipation of the matters to be contradicted or explained. Such a rule would be a very inconvenient one, and finds no support either in the decided cases or in the practice of the federal courts. But suppose the answer, had it been admitted, would have been accompanied by the statement, as assumed by the counsel, that he did object to the marriage of his sister, or that he did not. Still the testimony would not have been admissible, for the plain reason that it would not have afforded any explanation of his conduct in the particular under consideration, except so far as it disclosed, either directly or indirectly, his opinion as to the sanity or insanity of the prisoner at the time the occurrences took place. Testimony in general is limited to matters of fact within the knowledge of the witness, and it is only when the subject-matter of the controversy is such as to require peculiar experience, study or skill to understand it, that persons professionally acquainted with the trade, science or practice are permitted to give their opinions, showing conclusively that two prerequisites are essential to the admissibility of such testimony: first, that the inquiry be one appertaining to a matter of trade, skill or science; and secondly, that the witness called be one qualified to speak upon the subject. Tested by this rule, it is clear that the opinion of this witness was not admissible, as he was in no proper sense qualified to speak upon the subject of diseases of the mind. 1 Greenl. Ev., § 440.

In every point of view, therefore, we are satisfied that this ruling was correct, and that it affords no ground whatever for a new trial.

Inquiries were made of this witness, in his examination in chief, not only as to the acts, conduct and declarations of the prisoner during the attacks, but on other occasions throughout the voyage. It appeared from his testimony that the prisoner also had an attack of sickness while the ship lay at Acapulco, in the republic of Mexico, and particular inquiry was made of him as to the acts, conduct and declarations of the prisoner during that attack. Among the incidents of this occasion, the witness says he saw the prisoner carried from the cabin up the companion-way to the deck by the mate, carpenter, steward and cook, and that afterward he saw them holding him on the deck. At one time, he says the prisoner got away from them and made an attempt to jump over the rail of the vessel, when they caught him and brought him back to the house of the ship. All these particulars, and many others of a kindred character during the voyage, were stated by the witness in his examination in chief. He was then cross-examined by the district attorney. In the course of the cross-examination, he was asked whether any difficulty occurred during the voyage between the prisoner and the mate. That question was objected to by the counsel for the prisoner, and was admitted by the court. Considered in the order of events as they occurred at the trial, this ruling constitutes the second cause of complaint. In answer to this question the witness stated that he had heard the prisoner and the then mate have loud talk, but could not state the conversation or what it was about. Corresponding questions were then put to the witness, in answer to which he stated that the then mate left the ship at Acapulco, after she had been there about two weeks, and that he was succeeded by another, who went to Callao, and there left the ship. Some difficulty took place between him and the prisoner about bending the topsail. A third was then appointed, who was discharged shortly afterward on account of his intemperate habits. At the Chincha Islands a fourth was appointed, who continued to fill the place until the ship arrived at Hampton Roads, when he ran away. Difficulty occurred between the prisoner and the mate last appointed on two occasions; one during the passage, and the other the night before he left the ship. Various acts, conduct and declarations of the prisoner, during those difficulties, were stated by the witness in answer to the questions propounded by the district attorney. It is insisted by the counsel for the prisoner that the question objected to should have been ruled out, and that all the testimony of this witness, so far as respects the acts, conduct and declarations of the prisoner during these difficulties, was improperly admitted.

1. They contend that the effect of the rulings was to allow the government to establish the offense charged against the prisoner, by proving that he had committed other acts of violence of a like kind.

2. In the second place, they insist that the rulings authorized an illegal attack upon the character of the prisoner, when in fact and in truth he had offered no evidence putting his character in issue.

3. And lastly, they contend that the evidence was a surprise upon the prisoner, who could not be expected to come to trial on the charge in the indictment prepared to defend his whole life.

§ 4341. *Where insanity is made the defense, and special acts given in evidence, it is competent for the prosecution to rebut this by evidence of other acts showing sanity.*

All the answer that need be given to the first proposition is to state that the

theory of fact on which it is based is not correct, and to refer to what has already appeared in verification of the statement. It is a mistake to suppose that the evidence in question, or any part of it, was admitted or even offered as having any bearing whatever upon the question whether the prisoner was the guilty agent who committed the act of homicide charged in the indictment. His agency in that behalf had been admitted by his counsel in the opening of his defense, and was no longer a matter in question at the trial. In the opening of the defense his counsel stated, in effect, that they did not controvert the fact that the deceased came to his death by violence, or that the violence was committed by the hands of the prisoner; but insisted, as before stated, that the prisoner was so far insane at the time he committed the homicide that he was not criminally responsible for the act. Much of the time occupied in the trial was spent on this new issue, very properly raised by his counsel at the opening of the defense. It was upon this ground that the trial proceeded; and after the defense was opened it was to this point that the efforts of counsel on both sides were directed.

On the part of the prisoner many witnesses had been called and examined, and his acts, conduct and declarations, not only throughout this voyage, but throughout his whole life, from early youth to the time of his arrest, had been introduced into the case. His counsel, in offering his acts, conduct and declarations, called the attention of the witnesses to such occurrences and incidents in his life and conduct as they supposed were material to support the defense set up by the prisoner. That examination extended to his mental, moral and physical condition at many and different periods of his life, both before and after the homicide was committed. Some of the witnesses referred to particular sicknesses and incidents in the life of the prisoner, and all were allowed to state his acts, conduct and declarations at the particular times and in respect to the particular transactions to which their attention was directed by the examining counsel. Evidence tending to show hereditary insanity in his family had also been introduced; and, in fact and truth, the counsel had claimed and exercised the right to examine the witnesses so called upon all such occurrences, acts and declarations in the life and conduct of the prisoner as tended to show that he was insane, or that there was any tendency, either in his mental or physical condition, to that state of mind. They accordingly selected, as was very properly admitted at the argument, the dark spots in his life, or those most peculiar and least in accordance with the ordinary conduct of men, as best suited to support the defense set up by the prisoner in this case. All of the testimony objected to, and now under consideration, was admitted in reply to that which had previously been introduced by the prisoner to support that ground of defense.

§ 4342. *Proof of hereditary insanity admissible in defense.*

One of the suggestions at the trial in support of the objection was that the government, in attempting to rebut the testimony offered by the prisoner on this point, should have been limited to the explanation or denial of the particular transactions, acts, conduct and declarations introduced by the prisoner to make out his defense. That rule would be a very convenient one if it were the sole purpose of the law to acquit the guilty by establishing this ground of defense upon a partial view of the facts; but so long as it continues to be the purpose of the law, and of those who administer it, to ascertain the truth, the limitation suggested by the counsel for the prisoner cannot be sustained.

Most men in the course of their lives, in times of excitement produced by disease or otherwise, do many strange or peculiar acts, and oftentimes give utterance to eccentric or unusual language; and it is obvious if a person accused of crime may select and offer in evidence all the dark spots of his life, or every peculiar and unusual act and declaration, and be allowed to exclude all the rest, that many guilty offenders must escape, and justice often be defeated, because the means of ascertaining the truth are excluded from the jury. Persons accused of crime have a right to set up this defense, and when proved according to the rules of law to the satisfaction of the jury, upon a view of all the facts, it is a legal and just defense. Beyond doubt the precise question to be tried in all such cases is, whether the accused was insane at the very time he committed the act, and to that point all the evidence must tend. Great difficulties surround the inquiry, and it is for that reason that the rules of law allow a wide range of testimony in the investigation. Proof of hereditary insanity is therefore admissible as affording some ground of presumption that the alleged diseased state of mind may have descended through those from whom the accused derived his existence. *Regina v. Tucket*, 1 Cox, C. C., 193; *Regina v. Oxford*, 9 C. & P., 525.

§ 4343. *Evidence of acts, etc., admissible to show insane state of mind.*

Evidence of acts, conduct and declarations, both before and after the time of committing the act, tending to show an insane state of mind, are also admissible, as having some bearing upon the exact point in controversy. *Lake v. The People*, 1 Park, C. C., 556; *Peasly v. Robins*, 3 Met., 164; *Grant v. Thompson*, 4 Conn., 203; 1 Ben. & H. Leading Crim. Cases, 104. On the trial of this indictment that rule was observed, and every proper latitude was allowed to the counsel to show the acts, conduct and declarations of the prisoner, both before and after the homicide was committed; and it is but just to say that the right was exercised to its fullest extent. Whenever that right is exercised in behalf of the accused, it follows, as a necessary consequence of the rule conferring the right, and as a material and essential part of the rule itself, that the government may offer evidence of other acts, conduct and declarations of the accused within the same period to show that he was sane, and to rebut the evidence introduced for the defense. To that extent, at least, the rule of law is clear and undeniable, and to that extent only was it allowed in this case under the ruling of the court. Another suggestion of the counsel for the prisoner, however, deserves to be considered before leaving this branch of the case. They contend that proof of other acts, conduct and declarations, though within the period of time covered by the inquiry in behalf of the accused, cannot be regarded as rebutting testimony, unless it be first shown that the accused, at the time to which the inquiries for the government refer, was of sound mind and memory. To admit the proposition as stated would be to exclude the evidence in all cases; as the question of sanity or insanity is for the jury, and their opinion cannot be taken during the progress of the trial. All the cases herein cited to the point show that such evidence, tending to prove an insane state of mind, is admissible for the prisoner; and by the same rule of law, and for the same reasons, evidence tending to show that he was sane within the period opened for examination is admissible for the government to rebut the evidence previously introduced for the accused. For these reasons we are of the opinion that the proposition cannot be sustained.

§ 4344. *Prosecution may introduce evidence to show bad character when the accused has put his character in issue.*

Enough has already been said in this case to show that the second objection to the admissibility of the evidence under consideration cannot be maintained. Like the preceding proposition, its great and controlling error consists in the theory of fact on which it is based, as will presently more fully appear. Beyond question, every person accused of crime is presumed to be innocent until he is proved to be guilty; and no circumstance at the trial, except evidence of his good character previously introduced by the accused himself, can justify the court in allowing the government to introduce evidence to show that his character is bad. Such evidence is never admitted until the accused has first put his character in issue, or, in other words, has laid the foundation for its introduction by offering evidence to show that he is of good character; and then the counter-proof is properly admitted as rebutting testimony. These principles are elementary, and perfectly familiar to any one at all acquainted with the criminal law; and they are principles of very great moment to the accused, and as such ought always to be respected, strictly observed and enforced, and constantly applied. No such testimony was admitted in this case, and, what is more, none such was offered by the government. All the evidence under consideration appertained to the acts, conduct and declarations of the prisoner in his intercourse, as master of the vessel, with those under his command, and was admitted as rebutting testimony, in order that the jury might have the appropriate means legitimately before them of comparing the prisoner with himself, and thus be enabled understandingly to determine the question in controversy, whether the prisoner was sane or insane at the time he committed the act of homicide charged in the indictment. Unless it be assumed that evidence pertinent to the issue, and essential to the inquiry, may constitute an attack upon the character of one on trial, there is no foundation to support the argument that the testimony under consideration should be viewed in that light; always bearing in mind that the subject-matter of the inquiry, to which the testimony is applied, was not whether the prisoner committed the act of homicide, but whether he was sane or insane at the time it was committed. Failure to discriminate in this behalf lies at the foundation of a large portion of the error plainly discoverable in the argument for the prisoner.

Two or three observations as to the third proposition will be sufficient, as it was much less relied on at the argument upon the motion for new trial than in the discussion which took place at the bar when the objection was made. Surprise may often arise out of the offer of evidence strictly competent, and yet that circumstance has never been considered as affecting the question of its admissibility. Embarrassments of that sort, which are more or less incident to every trial, are usually remedied by motion to the court for a postponement of the trial to a future day in the term, or for a continuance. Such motions are addressed to the discretion of the court, and, whether granted or refused, are not the proper subjects of exception or error. It is not, however, in that sense that the objection in this case is urged, as no such motion was made, and of course there can be no complaint that it was not granted. In this case the objection is pressed rather as an argument to show that the evidence was not admissible, and as that point has already been considered and determined, further discussion of the subject is unnecessary.

Additional testimony was then introduced. Experts were called and ex-

amined upon the subject of insanity, and they were allowed to give their opinions in answer to such hypothetical questions pertinent to the case on trial, as the counsel thought proper to propound. Rebutting testimony was then introduced by the government. One Joshua R. Trevet was called and examined. In answer to preliminary inquiries, he stated that he resided in Wiscasset, in this state; that he was acquainted with the prisoner, and sailed with him in the year 1855 in the ship Ontario, which was commanded by the prisoner during the voyage. He also testified that a man by the name of Furlong was a seaman on board the ship. At that stage of the examination he was asked by the district attorney to state what occurred during this voyage between the prisoner and that seaman. To that question the counsel for the prisoner objected; but the court ruled that it was admissible, and the witness answered, giving a very full account of certain difficulties that occurred in August, 1855, on the morning after he arrived at Trapani, in Italy. All the acts, conduct and declarations of the prisoner during this occurrence were fully stated by the witness. Much discussion took place at the trial upon the objection made by the prisoner's counsel, but the testimony was ruled to be admissible, upon the same ground and for the same reasons previously given, when the objection was made to the question propounded to his brother-in-law in the cross-examination respecting the events of the succeeding voyage. Both rulings present the same question and involve the same legal considerations; and we are satisfied they were correct, for the reasons already given, which need not be repeated.

§ 4345. *When defense shows acts tending to prove insanity, prosecution may prove acts showing sanity.*

When a person accused of crime relies upon his prior and subsequent acts, conduct and declarations to show that he was insane at the time he committed the act charged against him, and actually offers them in evidence to establish that defense, we entertain no doubt that it is competent for the government to introduce other acts, conduct and declarations of the accused, within the same period, to rebut that presumption, and to show that he was sane. Were it otherwise, it is not perceived how this class of legal investigations can be satisfactorily conducted, as jurors, if the proposition assumed by the counsel for the prisoner be correct, must always be compelled in cases like the present to decide the question of sanity or insanity upon a partial view of the facts, and may often be deprived of the means of ascertaining the truth. Courts of justice have established the principle that such evidence is admissible for the accused, whenever he sees fit to offer it, and so long as that rule continues in force it must of necessity be competent for the government to introduce countervailing proof.

§ 4346. *As to preliminary inquiries on the introduction of evidence; failure to object.*

One other objection only remains to be considered, in connection with the rulings of the court at the trial. That question arises out of the testimony of Daniel Randal, who was called and examined by the government. He stated that he had a conversation with the second mate on the day before the witness went before the grand jury; that he asked him in his shop whether he thought the prisoner was crazy when the affair occurred on board the Therese, and that the second mate replied that the prisoner was no more crazy than he was. This testimony was admitted without objection, and the witness, after the examination was closed, passed off the stand. Another witness was then

called, and upon being examined upon the same subject without objection, gave a similar answer. After his examination had been completed and he had left the stand, a third witness was called by the government, and the question asked to the effect whether he had heard the mate say anything upon that subject. This last question was seasonably objected to by the counsel for the prisoner, and was ruled out by the court upon the ground and for the reason that the mate, in his examination in chief, had not testified to anything connected with the circumstances of the homicide before the prisoner left the deck, which the testimony offered was suited either to rebut or explain. Whereupon the counsel for the prisoner moved the court to strike out the testimony introduced to contradict the second mate, upon the ground that it was not admissible, and had been improperly received. That motion the court refused to grant; and the refusal of the court in that behalf constitutes the basis of the fifth, sixth and seventh causes assigned for a new trial.

Two objections were taken by the counsel at the argument to the ruling of the court in refusing to strike out the testimony. They contend, in the first place, that the testimony had been improperly received, because the foundation for its admission had not been laid in the cross-examination of the second mate. When the second mate was cross-examined, the district attorney did not inquire of him whether he had ever made such a statement to either of the witnesses. That objection goes to the right of making the inquiry, and not to the competency of the testimony; and if the objection had been seasonably made, the question could not have been put. But it was not made until the question was put and answered without objection, and therefore the testimony was legally in the case, if it was competent and relevant to the issue. As a general rule it is not to be expected that the court will interfere *mero motu* to exclude testimony, otherwise competent, merely because the preliminary inquiry has not been made, unless the question is objected to on that ground by the other side; and if not objected to, and the testimony is received, it is not then competent for the court to strike it out if it is legal in form and pertinent to the issue. In the state courts the rule that the preliminary inquiry in such cases must first be made is never enforced, and if testimony is admitted without objection on that ground, in the federal courts, it would not be competent for the court afterward to strike it out merely on that account.

More importance is attached to the second objection, and it deserves to be more carefully considered. In the second place, it is insisted that the testimony of these witnesses was not admissible, because it had no tendency to contradict or rebut any statement made by the second mate. This denial makes it again necessary to refer to his testimony, in order that the exact state of the case may be seen and understood. In relating the circumstances attending the homicide, he testified that he looked into the mate's room and said to him, "For God's sake, come on deck, for I believe the captain is crazy, and is going to kill us all." This statement had been given by the second mate, in his examination in chief, as a part of the *res gestæ*, and as such was clearly admissible, as substantive testimony. Neither its admissibility nor its importance to the prisoner can be denied.

§ 4347. *Opinions of witnesses connected with the res gestæ admissible, and contradictory statements may be shown.*

As a general rule, the opinions of witnesses not qualified to speak as experts are not admissible, but it will sometimes happen, as in this case, that their

opinions are so connected with the *res gestæ*, and so interwoven therewith, that they inseparably become a part thereof, and in such cases they are legal testimony, as much as any other part of the transaction; and whenever that is the case, they become as much the subject of contradiction as any other legal and competent testimony, and may be rebutted or explained in the same way. Decided cases have established the rule that, whenever the circumstances of the case are such as to allow evidence of opinions to be received, the opposite party, after laying the foundation, may call other witnesses and prove, for the purpose of contradicting the witness whose opinion has been introduced, that he has expressed an inconsistent opinion out of court. 1 Greenl. Ev., § 449, and cases cited. That principle is applicable to this case, notwithstanding the preliminary inquiry had been omitted in the cross-examination of the second mate, as the questions to the witnesses called to rebut his testimony were allowed to be put, and the testimony in question was received without objection. For all purposes connected with the defense of the prisoner, on the ground assumed by the counsel, the opinion of the second mate had been given in evidence in his examination in chief, and none the less effectually, because it had been recited by him among the circumstances attending the act of homicide. That opinion being thus in the case, it was certainly a proper subject of contradiction; so that the only remaining question on this branch of the case is, whether the evidence in question was of a rebutting character. Rebutting evidence is that which is given by a party in a cause to explain, repel, contradict or disprove the facts given in evidence by the other side. Directness, in the technical sense, is not essential to give the evidence that character, nor is it necessary that the contradiction should be complete and entire, in order to admit the opposing testimony. Circumstances may be offered to rebut the most positive statement, and it is only necessary that the testimony offered should have a tendency to explain, repel, counteract or disprove the opposite statement, in order to render it admissible. Its weight and sufficiency, as in other cases, are for the consideration of the jury. Applying these principles to the matter in question, it is so obvious that the testimony under consideration had a tendency to rebut the prior statement of the second mate, that further discussion of the question is, we think, unnecessary.

§ 4348. *Sanity is presumed in criminal cases.*

All of the questions presented in the causes assigned for a new trial, so far as respects the rulings of the court, having been determined, we will now proceed to the consideration of those arising out of the instructions of the court to the jury. Periodical mania was the form of mental disease set up in this case, and relied on in the defense to excuse the prisoner from the charge against him in the indictment. It was agreed by the experts that the evidence in the case tending to show that the disease was occasioned by any delusion was very slight. One of them testified that the indications of delusion in this case were very few, and added that he was not sure that the prisoner labored under any delusion. Another testified that he did not see any indications of delusion, regarding delusion in its strictest sense. Such of the instructions only as are material to questions raised by the motion for new trial will be reproduced. In effect, the jury were told, that if they came to the conclusion that the government had not made out the whole charge, as laid in the indictment, beyond a reasonable doubt, it would be their duty to find that the prisoner was not guilty. On the contrary, if they found from the evidence that the whole charge was proved beyond a reasonable doubt, pro-

vided the prisoner, at the time he committed the homicide, was in a state of mind to be criminally responsible for his acts, that then they would turn their attention to the principal ground of defense, and in that view of the case they were instructed that, in legal contemplation, every person on trial under a criminal charge was presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, unless the contrary was proved to the satisfaction of the jury; and that to establish a defense on the ground of insanity, it must be clearly proved to the satisfaction of the jury that the party accused, at the time of committing the act, was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing wrong. They were also instructed that a person was not to be excused from responsibility if he had, at the time he committed the act, capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing, a knowledge and consciousness that the act he was then doing was wrong and criminal, and would subject him to punishment; that in order to be responsible he must have sufficient power of memory to recollect the relation in which he stands to others and others stand to him, and that the act he was doing was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty.

§ 4349. *Test of sanity.*

In the same connection, immediately following, the jury were also instructed that although the person was laboring under partial insanity, if he still understood the nature and character of the act and its consequences, and had a knowledge that it was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he did the act he would do wrong and deserve punishment, such partial insanity was not sufficient to exempt him from criminal responsibility. This last instruction, upon the subject of partial insanity, is the one to which exception is taken in the eighth cause assigned for a new trial. Upon this subject two things are certain: first, that the instructions are drawn in strict accordance with the settled law in this court; and, secondly, that the law of this court is the same as the law of England, and in those states in this country whose judicial decisions are entitled to the most respect. Reference is made, in support of the first remark, to the case of *United States v. McGlue*, 1 Curt., 8, decided by Mr. Justice Curtis in 1851 (CRIMES, §§ 3145-54). In that case the learned judge said that the law supplied a test by which the jury is to ascertain whether the accused be so far insane as to be irresponsible. That test is the capacity to distinguish between right and wrong as to the particular act with which the accused is charged. If he understands the nature of his act, if he knows his act is criminal, and that if he does it he will do wrong and deserve punishment, then, in the judgment of the law, he has a criminal intent, and is not so far insane as to be exempt from criminal responsibility. On the other hand, if he is under such delusion as not to understand the nature of his act, or if he has not sufficient memory and reason and judgment to know that he is doing wrong, or not sufficient conscience to discern that his act is criminal and deserving punishment, then he is not responsible. Some of the cases will now be referred to which substantiate the second remark. They are as follows: Case of *McNaghten*, 10 Cl. & Fin., 210, and 1 C. & K., 130; *Regina v. Oxford*, 9 C. & P., 525; *Rex v. Offord*, 5 C. & P., 168; 1 Russ. on Crimes, 13 (ed. 1853); *Rosc. Crim. Ev.*, 953.

Suggestions were made at the argument that the rule in the state courts of this country is different. Our examination of the subject has brought us to a different conclusion. To the extent that our researches have been prosecuted, we find that the great majority of the well-considered cases decided in the law tribunals of the states conform in principle, and in some instances in the exact language employed, to the rule laid down in the first case cited from the English reports. As examples, we refer to the case of *Freeman v. The People*, 4 Den., 28; and to the case of *Commonwealth v. Rogers*, 7 Met., 501. In the former case, Beardsley, J., speaking for the whole court, said, where insanity is interposed as a defense to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time when the act was done. In such cases, the jury should be instructed that it must be clearly proved that at the time of committing the act the party was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. Shaw, Ch. J., in the latter case said, in the very language employed in this instruction, that, although a person accused of crime may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. Many other cases of like import might be added to the list of citations, but we think it unnecessary, as those already given are sufficient to demonstrate the proposition that the English and American rules, in the particular under consideration, are the same. The question is concisely but satisfactorily considered by Mr. Wharton, in his valuable treatise upon the criminal law, wherein he remarks to the effect that the courts of this country have not hesitated to apply the rule, that, to establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing wrong; and it is very doubtful whether our language affords the means of stating the proposition in a more satisfactory manner. Those who may desire to examine the cases more fully will find them collected by that learned author under the title appropriately designated as the one where the accused is incapable of distinguishing right from wrong, in reference to the particular act. Whart. Crim. Law, § 16, notes *b*, *c*, *d*.

All of the well-considered cases since 1843, in both countries, are founded upon the doctrine laid down by the fourteen judges, in the opinion delivered in the house of lords at that time. In the debate upon the question, Lord Brougham said, if the perpetrator knew what he was doing,—if he had taken the precaution to accomplish his purpose,—if he knew, at the time of doing the desperate act, that it was forbidden by the law, that was his test of sanity; and he cared not what judge had given another test, he should go to his grave in the belief that it was the real, sound and consistent test. 1 Ben. & H. Lead. Crim. Cas., 94; *Regina v. Vaughan*, 1 Cox, C. C., 80; *Regina v. Layton*, 4 Cox, C. C., 149; *Regina v. Barton*, 3 Cox, C. C., 275. This last case is more particularly applicable to another branch of the present inquiry, arising out of the complaint that the court omitted to instruct the jury in accordance with

the views presented in the opening of the defense, and as enforced in the closing argument. In that case, the defense set up was, that the prisoner had committed the crime under an irresistible impulse. Parke, baron, told the jury that there was but one question for their consideration, and that was, whether, at the time the prisoner inflicted the wounds that caused the death, he was in a state of mind to be made responsible for the crime. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, and, if so, whether he knew he was doing wrong in so acting. In the course of his remarks to the jury he expressed his decided concurrence in the view of the question previously taken by Baron Rolfe, that the excuse of an irresistible impulse, coexisting with the full possession of the reasoning powers, if allowed to be a sufficient defense, might be urged in justification of every crime known to the law; for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. That distinguished judge then went on to say, that something more than this was necessary to justify an acquittal on the ground of insanity, and it would therefore be for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse under which the prisoner had committed this deed was one which altogether deprived him of knowledge that he was doing wrong. *Regina v. Stokes*, 3 C. & K., 185; *Regina v. Allnut*, and *Regina v. Paty*, 1 Ben. & H. Lead. Crim. Cases, 95, 96. Other cases to the same effect might be cited, but we think it unnecessary, as it was admitted at the argument that the two first named are regarded as sound law in the courts of the country where the decisions were made. Such undoubtedly is the fact, and in our view of the matter there is nothing in the opinion of the court in the case of *Commonwealth v. Rogers* inconsistent with that state of the law. On the contrary, we think it is to the same effect, when the different paragraphs of the opinion are carefully compared with each other. In the first place, the learned judge lays down the doctrine that a person accused of crime is not to be excused from responsibility, if he had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing, which is the rule, as before remarked, in all the well-considered cases upon the subject. He then stated the rule by which the jury were to be governed in case they found from the evidence that the accused was laboring under partial insanity.

§ 4350. *As to irresistible impulses.*

That rule, it will be observed, is in the exact language of the instruction in this case, and was adopted by this court at the trial for the reason that it was believed to be correct, and we are still of the same opinion. It does not authorize a jury to convict a person accused of crime, if laboring under partial insanity, unless they find, from the evidence, that the accused, at the time he committed the act, still understood the nature and character of the act he was doing; that he still had a knowledge that the act was wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he did the act he would do wrong and deserve punishment; and we hold, that when a man has capacity and reason sufficient to understand the nature and character of his act and its consequences, and knows that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and deserve punishment, he is so far sane as to be responsible for his criminal acts;

and on that state of facts, and when all those things concur — which was the state of the case supposed in the instruction,—the law assumes that he has the power to refrain from doing the act, and does not acknowledge the doctrine that he may be impelled to commit it by any uncontrollable or irresistible impulse. Every person, on trial under a criminal charge, is presumed to be sane and to possess a sufficient degree of reason to be responsible for his criminal acts, unless, as before remarked, the contrary is proved to the satisfaction of the jury; and whenever partial insanity is set up as an excuse for crime, the question whether the degree of insanity is sufficient to constitute a valid defense is for the consideration of the jury, whose province it is to determine the question, in view of all the evidence in the case; and if it appears from the evidence that the mind of the accused is merely clouded and weakened, but is not incapable of remembering, reasoning and judging between right and wrong, in respect to his own particular act, that he still understands the nature and character of the act and its consequences and has a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and deserve punishment, then the law, on that state of facts, properly regards the accused as a moral agent responsible for his criminal acts and punishable for the crime charged against him; and to admit, in such a case, that the defense may be successfully set up that he was impelled to the commission of the act charged by any uncontrollable or irresistible impulse would be to overlook and disregard the test or criterion of responsibility for criminal acts which the law itself establishes in such a case, and to allow that defense to be urged in justification of every crime known to the law. For these reasons we are of the opinion that the instruction was correct, and that no further instruction in the case upon this subject was necessary.

§ 4351. *Distinction between complete and partial insanity.*

A few remarks in relation to the twelfth cause assigned for a new trial will be sufficient to show that it is entirely without merit. It assumes that the court, in effect, instructed the jury that they could not acquit the prisoner on the ground of insanity, unless it appeared that his reason and mental powers were, at the time of the act, either so deficient that he had no will, no conscience or controlling mental power, or that through the overwhelming violence of mental disease, his intellectual powers were for the time obliterated. Such portions of the charge as are supposed to be referred to in the motion for a new trial will furnish the most satisfactory answer to this ground of complaint. Upon this subject the jury were told, in the first place, that insane delusion may and sometimes does exist to so high a degree that the person under its influence has neither intelligence nor capacity to have a criminal intent, but that such extreme cases were easily distinguishable from the examples of partial insanity, where the mind of the person is merely clouded and weakened, but is not incapable of remembering, reasoning and judging, at the time, between right and wrong, in respect to his own particular acts. Another remark of the court in this connection was to the effect that extreme cases of insane delusion had doubtless occurred where the reason and mental powers of the person were for the time wholly obliterated, so that he had no will, no conscience or controlling mental power, and consequently could not be regarded, in legal contemplation, as a moral agent, and that such persons would not be responsible for criminal acts. They were also told, upon the same subject, that if the testimony of the experts was correct, that form of

insanity could not be successfully set up by the prisoner, as they appeared to negative that theory of his defense; but still, it was for them to determine whether there was any sufficient evidence in the case to support that view of the defense. Towards the close of the charge these propositions, together with some others of like importance, were restated to the jury in a more distinct form, in order to guard their minds against the danger of any mistake. They were then told that if they found that the prisoner did not know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong, then he was clearly entitled to an acquittal.

With the same view they were also told that a person was not criminally responsible if, at the time he committed the act, he had not sufficient capacity and reason to know whether his act was right or wrong, or, to speak more accurately, to know that the act he was doing was wrong and criminal, and would subject him to punishment; and also that he was not responsible, if the act was actually done under a fixed insane delusion that certain facts existed which were wholly imaginary, but which, if true, would have constituted a good defense; and finally, that he was not responsible if he had not intelligence and capacity enough to have a criminal intent, or if his reason and mental powers were, at that time, either so deficient that he had no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power was for the time obliterated. Comment upon this part of the charge is unnecessary. It gives its own construction, and, as we think, affords a demonstration that the theory assumed in the motion for a new trial is erroneous.

All of the questions have been attentively considered, and, after full deliberation, we have come to the conclusion that it is our duty to overrule the motion; and there must be judgment on the verdict.

§ 4352. **Miscellaneous.**—The admission of improper evidence in a criminal case is no ground for a new trial, where, without it, the other testimony in the case was *prima facie* as to the point, and not opposed, and the verdict is clearly right. *United States v. Hartwell*, 3 Cliff., 221.

§ 4353. An affidavit of the master of a ship indorsed on a manifest about a month after the making and filing of the manifest in the custom-house is not admissible for the defense in a criminal action against a third person, though the manifest itself was introduced by the prosecution. *United States v. Graff*,* 14 Blatch., 381.

§ 4354. Where defendants were charged with setting on foot, or preparing the means for, a military expedition against a foreign nation with which the United States were at peace, upon the preliminary hearing, documentary evidence, consisting of the constitution and minutes of the society to which the defendants belonged, and whose object was charged to be the execution of the unlawful undertaking, was held competent in the light of admissions and declarations explanatory of the acts of the defendants which had been proved by other evidence, although not containing any proof in itself of any overt acts. It was also held that those parts of this evidence which admitted of an interpretation favorable to the defendants must be considered, as well as those parts which implied guilt. *United States v. Lumsden*, 1 Bond, 5.

§ 4355. A paper found in a trunk, not addressed to the prisoner, and bearing the signature of another, is not admissible in evidence, until it is proved that the trunk is the property of the prisoner, or the prisoner is in some way connected with the paper. *United States v. Craig*, 4 Wash., 729.

§ 4356. On a motion to quash an indictment, the affidavit of the defendant impugning the conduct and judgment of the grand jury cannot be received. *United States v. Brown*, 1 Saw., 531.

§ 4357. In an indictment charging in one count possession of counterfeit coin with intent to defraud, and another count charging a fraudulent sale of such coin, evidence of fraudulent possession and sale may be retained as supporting the first count, after the second has been withdrawn. *United States v. Biebusch*, 1 McC., 43 (§§ 2601-6).

§ 4358. Upon an indictment for practicing medicine without a license from the medical society, the defendant may show that the charter of the society has been vacated. *United States v. Williams*, 5 Cr. C. C., 62.

§ 4359. Where an indictment for obstructing and retarding the passage of the mail alleged a contract with the postmaster-general in pursuance of which the mail was being carried, although that the mail should be carried in pursuance of such a contract was a qualification not found in the language of the statute under which the indictment was framed, the prosecution were required to prove the contract, one member of the court being of opinion that no prosecution could be sustained without showing the contract with the postmaster-general, and the other thought that as the contract alleged was not impertinent or foreign it must be proved, although an indictment might be so framed as to subject the defendant without proof of the contract. *United States v. Porter*,* 3 Day (Conn.), 283.

§ 4360. It is not admissible to prove what was said before the magistrate, and to which accused made no reply. *United States v. Brown*,* 4 Cr. C. C., 508.

§ 4361. A grand juror may testify as to what the accused testified before the grand jury on the examination of another person; the prisoner need not be cautioned in such case not to criminate himself, as a witness is presumed to know his privilege. *United States v. Charles*,* 2 Cr. C. C., 76.

§ 4362. If the grand jury are satisfied by the evidence adduced on the part of the prosecution that the party accused has committed the unlawful act with which he is charged, they have no right to send for and examine witnesses to prove matter of justification or excuse. *United States v. Lawrence*, 4 Cr. C. C., 514.

§ 4363. **Declarations.**—Where an offense against the law is shown to have been committed the law raises a presumption of guilty intent. This presumption cannot be overthrown by the declarations of the accused, made after the commission of the offense, and such declarations cannot be proved. *United States v. Imsand*, 1 Woods, 581. See §§ 1155, 1830; also VI, *supra*.

§ 4364. Acts, declarations and conduct of a defendant, on the occasion of the commission of an offense, are to be considered as *indicia* of his guilt or innocence. *United States v. Hanway*, 2 Wall. Jr., 139.

§ 4365. It seems that the statements made by a person arrested on the charge of having counterfeit money in his possession at the time of his arrest are admissible in evidence. *United States v. Kenneally*, 5 Biss., 122.

§ 4366. The declarations of a prisoner at the time he was arrested are competent evidence in his favor, not as proof of the facts stated, but as repelling unfavorable conclusions from the prisoner's silence. *United States v. Craig*, 4 Wash., 729.

§ 4367. Where it appears that the defendant in a criminal case has made false statements in relation to the circumstances and subject-matter of the alleged crime, evidence is admissible to show that at the time of making such statements the defendant believed they were true. *United States v. Randall*, Deady, 524.

§ 4368. The assertions of one party of the guilt or innocence of another are not evidence for or against the other. So where three persons are jointly indicted for murder, the conversation of two of them inculcating themselves, and exculpating the third, is not admissible in favor of the third. *United States v. Douglass*, 2 Blatch., 207.

§ 4369. On an indictment for murder it is admissible to show that the defendant stated that he intended to commit murder in a certain way, that he advised the witness to join him in the adventure, and said that he had had experience of it; but the question whether the evidence amounts to an acknowledgment is for the jury. *United States v. Tardy*,* Pet. C. C., 458.

§ 4370. Guilt cannot be fastened on any person by the declarations or statements, oral or written, of others. Guilt must originate within a man's own heart, and it must be established by his own acts, conduct or admissions. So in a prosecution for a conspiracy the acts and declarations of persons other than the defendant are not evidence to show that he was one of the conspirators—for no man's connection with a conspiracy can be legally established by what occurs in his absence and without his knowledge or concurrence. *United States v. Babcock*,* 3 Dill., 615.

§ 4371. A declaration of another party that he is the person guilty of the act charged against the accused is not admissible. *United States v. Miller*,* 4 Cr. C. C., 104.

§ 4372. In a trial for murder, evidence that another person confessed that he killed deceased is not admissible. *United States v. McMahon*,* 4 Cr. C. C., 573.

§ 4373. **Confessions.**—The United States cannot give in evidence against a prisoner what was said in his presence before the examining magistrate, and not denied by him. *United States v. Brown*,* 4 Cr. C. C., 508. See VI, *supra*.

§ 4374. When a party has voluntarily made statements against his own interest, which are always entitled to great weight, he cannot, by subsequently contradicting them, or by varying

his account of the transaction, destroy the effect of such admissions. *United States v. Gleason*, 1 Woolw., 128.

§ 4375. Upon an indictment for libel, after evidence of publication of the libel charged by the defendant within the district, evidence may be given of any confessions or acknowledgments made by the defendant in relation to any of the matters charged in the indictment. *United States v. Crandell*, 4 Cr. C. C., 683.

§ 4376. The court, at the instance of the defense, instructed the jury that certain confessions, reduced to writing and not produced, ought to be disregarded, although they came out upon direct interrogatories of the cross-examining counsel. *Held*, that if there was any error in this instruction it was manifestly favorable to the prisoners. *United States v. Gibert*, 2 Sumn., 19.

§ 4377. Subject to the cautions to be observed in receiving and weighing confessions of guilt, they are among the most effectual proofs in the law. Their value depends on the supposition that they are deliberately made, and on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless when urged by the promptings of truth and conscience. Such confessions, so made by a prisoner, to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before a magistrate, are at common law received in evidence as proofs of his guilt. *United States v. Montgomery*, 3 Saw., 544.

§ 4378. To make a confession evidence, it must be made, so far as can be ascertained, in the absence of any excitement which creates a hope to obtain favor, or to avoid a threatened punishment. But the court in such cases must judge of the motives which induced the confession from the confession itself and the circumstances. *United States v. Nott*, 1 McL., 499.

§ 4379. Confessions of an accused should always be cautiously received. *United States v. Coons*, 1 Bond, 1.

§ 4380. Where the confession of a prisoner, made to the officer who arrested him, has been given in evidence, it is proper to ask the officer whether the confession was made at his solicitation and advice to the accused that it would be better for him to confess. *Territory of Montana v. McClintock*,* 1 Mont. T'y, 394.

§ 4381. Confessions extorted by threats of punishment, or obtained by promise of reward or favor, are not admissible in evidence. *United States v. Pumphreys*,* 1 Cr. C. C., 74.

§ 4382. Confessions made under the influence of hope or fear, and subsequent confessions of the same fact, are not admissible. *United States v. Charles*,* 2 Cr. C. C., 76.

§ 4383. Confessions made under the influence of hope of mitigation of punishment not admissible. *United States v. Pocklington*,* 2 Cr. C. C., 293.

§ 4384. A confession made before a magistrate who tells the prisoner that there is enough evidence to convict him; that he had better confess, and would probably fare better for it, is inadmissible. Declarations made by a witness before the grand jury, on oath, are apparently inadmissible on his trial for the same crime, for the reason that they were induced by hope or fear. *United States v. Negro Charles*,* 2 Cr. C. C., 76.

§ 4385. A confession made under the influence of threats or promises of favor is not admissible; but facts discovered in consequence of such confession may be proved. *United States v. Hunter*,* 1 Cr. C. C., 317.

§ 4386. Where one influenced by hope of pardon confessed that he had stolen certain property, and thereupon produced part of the same with declarations identifying it as that which had been stolen, although the confession is inadmissible, the act and accompanying declarations were held competent. *Berry v. United States*,* 2 Colo. T'y, 186.

§ 4387. Where a prisoner confessed his guilt, and went and identified the stolen property, the latter act was admissible against him apart from the confession. *United States v. Negro Richard*,* 2 Cr. C. C., 439.

§ 4388. Where one indicted, under section 5358 of the Revised Statutes, for plundering a wrecked vessel, made a confession to an agent or detective employed by the underwriters, a wrecking company, and the owners of the vessel, to hunt up the missing goods, and authorized by them to institute criminal proceedings against the guilty parties in the federal courts, which agent or detective was accompanied by a deputy United States marshal, not acting in any way in an official capacity, evidence of the confession was held admissible, although it was made on threats and promises made by the agent, the marshal not having any warrant of arrest, or attempting or threatening to make an arrest, and the agent not being such a person in authority as to render the confession inadmissible. *United States v. Stone*, 8 Fed. R., 232.

§ 4389. If one arrested for larceny confesses to the officer, upon a promise by the officer that he will do what he can for him if he will tell where the goods are, the confession is not admissible in evidence against him. But if, without any promise, he confesses before the magistrate to another larceny, on the trial of the latter the confession to the magistrate may be admitted. *United States v. Kurtz*, 4 Cr. C. C., 682.

§ 4390. Where an assistant in a postoffice, charged with stealing bank-notes from a letter in the mail, confessed to the postmaster and produced one of the bank-notes and the letter, the confession was admitted in evidence, the postmaster having before told the defendant that while he had no vengeance to gratify, the whole matter should be exposed. *United States v. Nott*, 1 McL., 499.

§ 4391. In a criminal prosecution against a negro, her voluntary confession that she is a free woman is competent evidence of that fact as against her. *Jones v. United States*, 5 Cr. C. C., 647.

§ 4392. On a trial for murder, the confession of the defendants is admissible where evidence has been admitted tending to show that a crime had been committed, and that the defendants are guilty. *United States v. Williams*,* 1 Cliff., 5.

§ 4393. A statement freely and voluntarily made by one accused of a crime is not rendered inadmissible as evidence against him by the fact that, after making it, he voluntarily took oath to its correctness. *United States v. Graff*,* 14 Blatch., 381.

§ 4394. A confession made on oath before a magistrate cannot be admitted against the prisoner. *United States v. Duffy*, 1 Cr. C. C., 164; *United States v. Bascadore*,* 2 Cr. C. C., 30.

§ 4395. An admission of a prisoner need not be in writing, or in the words of the prisoner. The witness may relate the conversation as he recollects it. If it is in detached parts, relating to different subjects, he need state only what relates to the matter in issue. If the conversation was one unbroken chain, the whole must be given. *United States v. Wilson*, Bald., 78.

§ 4396. It need not be shown that a witness introduced to prove the admissions and confessions of the accused remembers all that was said by him, before he proceeds to detail such confessions. The recollection of the witness, and his ability to tell all that was said, is usually ascertained by cross-examination. *Yelm Jim v. Washington Territory*,* 1 Wash. T'y (N. S.), 63.

§ 4397. An accused cannot be convicted upon his confession alone. *Territory of Montana v. McLinn*,* 1 Mont. T'y, 394.

§ 4398. Confessions of a prisoner, unsupported by corroborating circumstances, are not of themselves sufficient to prove the *corpus delicti*. There should always be something more than the mere confession of the accused to justify a verdict of guilty. *Dougherty v. The People*,* 1 Colo. T'y, 514.

§ 4399. An offer of a bribe by an accused to the officer to permit him to escape, made in the same conversation with a confession of the crime, is evidence by itself, and independent of the confession. *United States v. Barlow*,* 1 Cr. C. C., 94.

§ 4400. A confession must be given in evidence as a whole, but the jury have a right to judge for themselves of the truth of it or any part of it. *United States v. Prior*, 5 Cr. C. C., 37.

§ 4401. The jury must either believe or reject the whole of a prisoner's confession. *United States v. Barlow*,* 1 Cr. C. C., 94.

§ 4402. If a confession of the accused is given in evidence, the jury must believe or reject the whole of it. *Ibid.*

§ 4403. Confessions brought out upon the cross-examination by the prisoner's own counsel are not to be regarded in any different light than if they had been brought out on the direct examination. *United States v. Gibert*, 2 Sumn., 19.

§ 4404. In a criminal prosecution, confessions of the crime by a third person, made out of court, are not admissible. *United States v. Randall*, Deady, 524.

§ 4405. Upon an indictment for burning the treasury buildings of the United States, evidence that a third person had confessed the burning, in order to prove that the burning was by design, and therefore that the offense had been committed, was refused. *United States v. White*, 5 Cr. C. C., 73.

§ 4406. The admissions of an alleged conspirator, made after the conspiracy has terminated, and not in the presence of the accused, are not evidence against the latter. *In re Martin*, 5 Blatch., 303.

§ 4407. The acts and confessions of persons indicted for a conspiracy, done and made while carrying it out, are evidence against other of the conspirators in a proceeding to which the witnesses are not parties. *United States v. Cole*, 5 McL., 513.

§ 4408. The confessions of one defendant offered merely to prove his own guilt, are not evidence against a co-defendant, unless offered as the declaration of a confederate in the same crime, in which case they are admissible in a joint trial against both. *United States v. Wilson*, 1 Bald., 78.

§ 4409. An officer charged with the safe-keeping, transfer and disbursement of the public moneys was indicted, under the act of August 6, 1846, for loaning such moneys to three other defendants named in the same indictment, the charge against the latter being that they then and there advised and participated in the unlawful and felonious act. Before the jury were impaneled the principal defendant pleaded *nolo contendere*. *Held*, that the confessions of the

principal defendant were admissible for the purpose of proving that he unlawfully loaned certain portions of the public money as alleged in the indictment, but not to prove anything charged against the other defendants. *United States v. Hartwell*, 3 Cliff., 221.

§ 4410. Upon an indictment for robbery on the high seas, where evidence was given of the confessions of *some* of the prisoners, without naming them, it was held that the confessions could not be applied to any of the prisoners in particular as proofs of his guilt, but might be weighed by the jury so far as they went to identify the vessel which committed the robbery. *United States v. Gibert*, 2 Sumn., 19.

§ 4411. It is not the law in the United States that a confession is not sufficient to justify a conviction in a capital case unless the *corpus delicti* is fully proved by independent evidence. All that can be required is that there should be corroborative evidence tending to prove the facts embraced in the confession; and where such evidence is introduced, it belongs to the jury, under the instructions of the court, to determine its sufficiency. *United States v. Williams*,* 1 Cliff., 5.

§ 4412. It seems that confessions, freely and voluntarily made, are admissible to show murder on the high seas, though the *corpus delicti* is not otherwise proved, in cases in which, if the facts confessed are true, the crime must have been committed. *Ibid.*

§ 4413. A written confession, signed by the accused, is sufficient evidence of the commission of the crime to warrant a committing magistrate to hold him for trial, although proof of the *corpus delicti* has not been made. *United States v. Bloomgart*, 2 Ben., 356.

§ 4414. Where one is charged, under section 5480 of the Revised Statutes, with attempting to put counterfeit money into circulation by the use of the mail, the gist of the offense being the abuse of the mail, and the *corpus delicti* the mailing of the letter in execution of the unlawful scheme, the admission of the defendant is competent to prove that he was the sender of the letter, where the letter itself shows its unlawful character, and there is evidence of its being sent by some one. *United States v. Jones*, 10 Fed. R., 469.

§ 4415. On the trial of an indictment of a bankrupt, for fraudulently disposing of his property, his examination under the bankrupt act, to which he is obliged to submit and cannot escape, is not admissible against him: for a confession, in order to be admissible against a defendant, must be voluntary. *United States v. Prescott*,* 2 Dill., 405.

§ 4416. The following is the opinion in the above case rendered by MR. JUSTICE MILLER: It is our opinion that the evidence offered is not competent. The general rule certainly is that evidence given or statements made by a party under compulsion or order of court tending to criminate himself cannot be put in evidence on a criminal proceeding against him. *Regina v. Garbett*, 1 Denison, Crim. Cases, 236. This case falls within this principle. (DILLON, J., concurred.) *Ibid.*

§ 4417. Dying declarations, made in contemplation of death, are admissible in evidence. *United States v. Taylor*,* 4 Cr. C. C., 338.

§ 4418. Dying declarations are admissible only in criminal cases, and when the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations, such declarations, or provisions of a will, which can be considered as nothing more than dying declarations reduced to writing, cannot be received to prove fraudulent acts relied on to set aside a discharge in bankruptcy. *Marionneaux's Case*, 1 Woods, 37.

§ 4419. Where a man beat his wife so that she died, on indictment for murder her dying declarations were admitted in evidence. *United States v. McGurk*,* 1 Cr. C. C., 71.

§ 4420. On the trial of an indictment for murder, evidence is admissible of the dying declarations of the murdered man, made under a conviction of approaching death, as to the facts of the murder, but not as to his opinion of the motives or malice of the murderer. *United States v. Veitch*,* 1 Cr. C. C., 115.

§ 4421. Where dying declarations are offered in a criminal case, the clearness or obscurity of the statements, their consistency with each other, and with the other facts proved in the case; the condition of the declarant's mind for accurate observation, and for correct recital of the things observed; and as well also the fact that he is the only person, except the defendant, whose story or the homicide is known, are all to be considered by the jury. *United States v. Gleason*, 1 Woolw., 128.

§ 4422. Upon an indictment for manslaughter, the declarations of the deceased, made *in extremis*, were held admissible as to facts stated by the deceased, but not as to his opinion of the defendant's motives or malice. *United States v. Veitch*,* 1 Cr. C. C., 115.

§ 4423. In a trial for murder, the declarations of the deceased are not admissible in evidence unless made under a settled conviction that he was about to die. *United States v. Woods*,* 4 Cr. C. C., 484.

§ 4424. Secondary evidence.—In a prosecution for sending a challenge, the contents of the challenge cannot be proved by parol. *United States v. Lynn*,* 2 Cr. C. C., 309.

§ 4425. If, on an indictment for forgery, letters written and notes passed or delivered to

others by the defendant are in the possession of another by his consent, or are destroyed, secondary evidence of them may be given under the same rules which apply to papers in his actual custody. *United States v. Doeblor*,* *Bald.*, 519.

§ 4426. In an indictment for stealing a check on a bank, proof of presentation of the check was objected to unless the check was produced, but the court held that the objection must be overruled unless the defendant could show that it was in the possession or power of the government. *United States v. Wilson*, 1 Cr. C. C., 104.

§ 4427. On the trial of an indictment, under the act of 1835, for endeavoring to make a mutiny on board ship, it is sufficient to prove orally that the vessel was owned by an American citizen. *United States v. Seagrist*, 4 Blatch., 420.

§ 4428. On the trial of an indictment for forging and delivering bank-notes, an accomplice testified that the defendant had forged a large quantity of notes, and had delivered one to him to pass, telling him to write when he wanted more, and that he wrote to the defendant for more and got an answer. On being asked to produce this letter, the witness claimed not to know where it was. *Held*, that parol evidence of the contents of the letter was admissible, without any notice to the defendant to produce, and without producing the letter, to which it was an answer, and also without any search being made for it. *United States v. Doeblor*, 1 *Bald.*, 519.

§ 4429. In a prosecution for stealing bank-notes, the contents of the notes may be proved by parol. *United States v. Lodge*,* 4 Cr. C. C., 673.

§ 4430. **Limitations.**—Evidence of a bar by the statute of limitations may be given under a demurrer to an indictment. *United States v. Watkins*, 3 Cr. C. C., 441.

§ 4431. Under the general issue to an indictment, the defendant may give in evidence the statute of limitations, and the prosecution may show that the defendant was a person "fleeing from justice," and therefore not entitled to the benefit of the limitation. *United States v. White*, 5 Cr. C. C., 73.

§ 4432. **Arrest, commitment and bail.**—One magistrate may commit a person on an affidavit taken before another magistrate. *Ex parte Bollman* and *Ex parte Swartwout*, 4 Cr., 75.

§ 4433. Upon an application to bind over an accused to answer upon a criminal charge, the defendant's witnesses are not generally examined. But the court may examine witnesses who were present at the time when the offense is said to have been committed, to explain what is said by the witnesses for the prosecution. Cross-examination of the witnesses for the prosecution at this incipient stage of the proceedings is improper. *United States v. White*, 2 *Wash.*, 29.

§ 4434. The oath of a person who has been informed by one not upon oath is not legal evidence upon which the court will award process for the arrest of an offender in the first instance. *United States v. Burr*,* 2 *Wheeler*, 573.

§ 4435. **Appointment to office.**—Upon an indictment for assaulting an inspector of the customs while executing the duties of his office, a warrant for the appointment of the inspector, under the hand of the surveyor, is not admissible to prove his appointment, the law requiring the inspector to be appointed by the collector. *United States v. Phelps*,* 4 *Day* (Conn.), 469.

§ 4436. **Bastardy.**—Upon an indictment of the supposed father for not supporting a bastard child, evidence of the likeness of the child to the defendant is inadmissible. *United States v. Collins*, 1 Cr. C. C., 592.

§ 4437. The confession of the defendant being given in evidence against him upon the trial of an indictment for not supporting a bastard child, his declarations made at the same time, that other persons had also had connection with the woman, are inadmissible. *Ibid.*

§ 4438. **Barratry—Notice.**—Upon indictment of an attorney for barratry, no evidence of specific acts can be given without notice; and notice given to the defendant's wife, one day after the trial has begun, is not reasonable notice. *United States v. Porter*, 2 Cr. C. C., 60.

§ 4439. **Bigamy.**—Upon an indictment for bigamy, the declarations and admissions of the defendant are admissible to prove the fact of his first marriage. This fact may be proved like any other fact, and need not be proved by eye-witnesses who were present at the ceremony. *Miles v. United States*, 13 *Otto*, 304.

§ 4440. In a prosecution for bigamy, a marriage *de facto*, solemnized by a preacher, and cohabitation, may be proved. But whether evidence of a marriage *de facto* is evidence of a marriage *de jure, quere?* *United States v. Jennegen*, 4 Cr. C. C., 118.

§ 4441. **Disorderly house.**—Upon an indictment for keeping a disorderly house, evidence that the defendant kept a public faro-table at which there was gambling for money may be given. But an indictment for keeping a common disorderly house is not supported by evidence of keeping a room in which gaming was carried on. *United States v. Milburn*, 4 Cr. C. C., 719.

§ 4442. Proof that a house was kept for illegal and obscene purposes, or for the purpose of

enticing young girls there for debauchery, will support an indictment for keeping a disorderly house. *United States v. Gray*,* 2 Cr. C. C., 675.

§ 4443. **Cheating.**—Upon the trial of an indictment against an attorney for cheating his client, the prosecution for the offense being limited to two years, the defendant's receipts for papers, etc., from his client, dated more than two years before the indictment, may be admitted in evidence, the gist of the indictment being the fraudulent application of, and refusal to account for, the property. *United States v. Porter*, 2 Cr. C. C., 60.

§ 4444. Upon an indictment for cheating by false pretenses, if the false pretenses and the subsequent purchase be proved, the jury may, in the absence of contradictory evidence, infer that the purchase was made upon the faith of such pretenses. *Jones v. United States*, 5 Cr. C. C., 647.

§ 4445. **Conspiracy.**—It is not necessary that an alleged conspiracy be shown to have been formed at the precise time or times stated in the indictment. *United States v. Goldberg*, 7 Biss., 175.

§ 4446. A conspiracy must be proved, before the statements of those engaged in it, but not indicted, can be received in evidence. *United States v. Cole*, 5 McL., 513.

§ 4447. To make the declarations of a conspirator competent evidence against a co-conspirator, the conspiracy must first be proved. *Marionneaux's Case*, 1 Woods, 37.

§ 4448. When a conspiracy is shown to exist, all acts done in furtherance of it by the conspirators, though not in the presence of the others, and all declarations made by any of the conspirators to advance the common cause, or in connection with acts done in promotion of the conspiracy, though not made in the presence of the others, are evidence against all. But they are not evidence to connect any one with the conspiracy not shown by other evidence to be a conspirator. This must be established by independent evidence of the acts, conduct or admissions of the person who is sought to be implicated. *United States v. McKee*,* 3 Dill., 551.

§ 4449. Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others. *American Fur Company v. United States*, 2 Pet., 358.

§ 4450. If two defendants stand charged with the same offense in separate indictments, and not charged with a conspiracy, the declarations of one, made after the supposed accomplishment of the common purpose, cannot be given against the other. *United States v. White*, 5 Cr. C. C., 38.

§ 4451. Upon an indictment, under the act of April 6, 1866, for attempting to defraud the government, by making false affidavits and using them in an application for a pension, the application for the pension is properly admitted in evidence as showing the use to which the false affidavits were applied, and thus to show the intent to obtain a pension improperly and thereby defraud the United States. *United States v. Wentworth*, 11 Fed. R., 52.

§ 4452. Where one is indicted, under the act of April 6, 1866, for making false affidavits with intent to defraud the United States by procuring a pension, the false making named in the statute is an offense in the nature of forgery, and not perjury, and the affidavits mentioned in the indictment are admissible in evidence without allegation or proof that they were made before a magistrate qualified to take affidavits. *Ibid.*

§ 4453. The evidence in proof of a conspiracy will, in general, from the nature of the case, be circumstantial. It is not necessary to prove that the defendants came together and actually agreed, in terms, to have the common design and to pursue it by common means. If it be proved that the defendants pursued by their acts the same objects, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of the same object, the jury may conclude that they were engaged in a conspiracy to effect that object. *United States v. Doyle*, 6 Saw., 612.

§ 4454. The evidence to prove a conspiracy may be, and from the circumstances of the case must be, circumstantial. And a conspiracy may be inferred when it is proved that any two or more of the parties charged aimed by their acts to accomplish the same unlawful purpose or object, one performing one part and another another part of the same, so as to complete it, although they never met together to concert the means or give effect to the design. *United States v. Sacia*, 2 Fed. R., 754.

§ 4455. On an indictment, under section 23 of the act of congress of March 3, 1825, for conspiracy to burn a boat with intent to defraud the underwriters, the burning of the boat is evidence in the case, as it may, in connection with facts, conduce to show a conspiracy. The conspiracy may also be inferred from attempts to obtain the money. The act is not so consummated by the burning of the boat as to exclude evidence of confessions made thereafter. *United States v. Cole*, 5 McL., 513.

§ 4456. In a prosecution under the act of congress of March 26, 1804, for destroying a vessel with intent to prejudice the underwriters, it is not necessary to prove the subscription to the

stock of the company and the payment of the subscription as required by the act of incorporation; all that is necessary to prove is that the company was *de facto* organized under the act authorizing it and acted as an insurance company. And the procurement of a policy by the defendant to be executed by the company is of itself *prima facie* evidence for this purpose. *United States v. Amedy*, 11 Wheat., 392.

§ 4457. The act of congress not having made it an offense for an owner to destroy his vessel to the prejudice of the underwriters on the cargo, no evidence can be given to prove this where the owner is indicted for destroying a vessel to the prejudice of the underwriters of the vessel. But evidence may be given of the cargo being insured, and the value of it, in order to show the motive which might have influenced the defendant to destroy or to save the vessel. *United States v. Johns*, 1 Wash., 363.

§ 4458. In a prosecution for conspiracy to destroy a vessel to defraud the underwriters, the destruction of the vessel by the defendants is strong, if not conclusive, proof of a conspiracy to do so. And if the bills of lading are false, it shows a combination to injure the underwriters. *United States v. Cole*, 5 McL., 513.

§ 4459. In a prosecution for conspiring to destroy a vessel with intent to defraud the underwriters, accounts of the loss of the boat, given to the underwriters by seamen to whom the underwriters had been referred by the defendants, and given in presence of the defendants, were held admissible in evidence. *Ibid.*

§ 4460. **Counterfeiting.**—On the trial of an indictment for passing a counterfeit check, it was proved that the check was counterfeit and was passed by the defendant; it was also proved that a bundle of similar counterfeit checks was found upon one in company with the defendant, and between whom there was evidence of a connection in passing them. *Held*, that the bundle of notes was admissible in order to show the *scienter*. *United States v. Hinman*, 1 Bald., 292.

§ 4461. In a prosecution for the felonious possession of counterfeit treasury notes, the deportment of the accused when arrested is admissible evidence. *United States v. Kenneally*, 5 Biss., 122.

§ 4462. Upon an indictment for passing counterfeit notes, the whole conduct of the prisoner at the time of passing the note, his having in possession or passing other counterfeit notes of the same or a different appearance, is admissible to prove knowledge on his part that the note was counterfeit. But, to justify the admission of evidence of the passing of counterfeit notes at other times, they must be of the same or similar manufacture or appearance with the one for the passing of which he is indicted, and calculated to lead to the belief that they were of the same character. Thus, where the indictment is for passing a counterfeit note of the Bank of the United States, evidence of passing a counterfeit note of another bank, at a different time, is inadmissible. *United States v. Roudenbush*, 1 Bald., 514.

§ 4463. On an indictment for counterfeiting bank-notes, the declarations of the prisoner and another, when apprehended in the room where the counterfeit bank-notes were found, and also upon the examination before the mayor, that he had never been in the room before, were admitted, not to prove the truth of the declarations, but to repel any unfavorable conclusion from his silence and refusal to explain his situation. *United States v. Craig*, 4 Wash., 729.

§ 4464. In counterfeiting bank-notes there are, or may be, many acts to be performed, and, after a foundation is laid by proof of a connection between two or more persons in the general transaction, evidence may be given upon the separate trial of each that some of the instruments employed in counterfeiting were found in the possession of one of the parties, and some in the possession of others of them. *Ibid.*

§ 4465. Upon the trial of an indictment for counterfeiting, where the prisoner has been apprehended in the house where the counterfeiting was carried on, his declarations, made to a witness, that he was going to the house for the purpose of obtaining bail for his brother-in-law, are proper evidence for the consideration of the jury. But the weight of such evidence depends very much, if not entirely, upon the accordance of his subsequent conduct with these declarations. *Ibid.*

§ 4466. In a prosecution for counterfeiting, it was proved, without objection, that the defendant had rented the house in which the counterfeiting was discovered to be going on, about ten days before the discovery; and that from this time it was vacated until the end of the month (the rent being by the month, payable in advance), when a stranger brought the key to the landlord. It was held competent to prove that, on returning the key, the stranger said that he was directed to leave it there. *United States v. Tarr*,* 4 Phil., 405.

§ 4467. Upon the trial of an indictment for counterfeiting, the officer who apprehended the prisoner, being examined as a witness, was asked whether the person, in whose house the prisoner was apprehended while sitting on a table on which the counterfeit bank-notes mentioned in the indictment were lying, had told him that if he would come to his house on a certain day, being the day on which the accused was taken, he would have the accused there. An

objection to this was overruled, and the witness permitted to answer, upon the ground that this evidence was important to the defense, by showing or laying a ground for presuming that the prisoner was innocently at the place where the officer found him, and in consequence of an insidious invitation. *United States v. Moses*, 4 Wash., 726; *United States v. Craig*, 4 Wash., 729.

§ 4468. The fact that at the time a man and woman were caught in the act of counterfeiting coin, they called and recognized each other as man and wife, that they had been living together as man and wife, and that they were reported as such among the neighbors, is competent evidence of marriage, in a prosecution against the woman alone for counterfeiting. *United States v. De Quilfeldt*, 5 Fed. R., 276.

§ 4469. **Forgery.**— Upon an indictment for uttering as true a forged letter, if the prisoner, knowing the contents of the letter, presented it to a person whom he supposed was authorized to open it, and with intent to obtain money thereon, it is evidence of uttering it. *United States v. Carter*, 2 Cr. C. C., 243.

§ 4470. Upon an indictment for uttering forged bank-notes of a certain bank, evidence may be given by the United States that a parcel of counterfeit checks and drafts on other banks, and others printed on bank-paper and not filled up, were found in the defendant's possession. *United States v. Noble*, 5 Cr. C. C., 371.

§ 4471. Upon an indictment for forging a bill of exchange in the name of a fictitious drawee, the indorsement of the bill by the prisoner is evidence to show his intent to defraud. *United States v. Peacock*, 1 Cr. C. C., 215.

§ 4472. On the trial of an indictment for forgery and delivery of bank-notes, after the act of forging and delivering notes similar to those charged in the indictment has been proved, evidence of the forging and passing of notes on the same bank, which notes are not the subject of any indictment, is admissible in evidence, in order to show the *scienter*. It is immaterial by what proof this fact is established so it conduces to prove the *scienter*. No notice to the defendant of the introduction of such evidence is necessary, as the indictment itself, in all such cases, is notice to the defendant that all competent evidence will be introduced, and the whole conduct of the defendant is evidence of his knowledge of the forgery. *United States v. Doeblor*,* 1 Bald., 519.

§ 4473. **Larceny.**— Possession is competent evidence of property in a trial for stealing. *United States v. Duffy*, 1 Cr. C. C., 164.

§ 4474. The execution of a draft on the Bank of the United States, and intended to circulate as money, need not be proved by a person who has seen the drawer write; especially where the charge is the stealing of the draft from the mail. *United States v. Keen*, 1 McL., 429.

§ 4475. Upon an indictment for stealing a bank-note, the fact that the defendant passed it for a bank-note is evidence to go to the jury to prove that it was a bank-note. *United States v. Foye*, 1 Curt., 364.

§ 4476. In a prosecution for stealing a bank-note, it is not necessary to prove that it is a genuine note of the bank; the note, being proved to be the one stolen, is *prima facie* evidence of what it purports on its face to be. *United States v. Byers*, 4 Cr. C. C., 171.

§ 4477. **Libel.**— In a prosecution for libel, it may be proved that the defendant was found in possession of printed copies of the libel charged in the indictment, of the publication of which in the district some evidence has been given. *United States v. Crandell*, 4 Cr. C. C., 683.

§ 4478. Where pictures are charged in an indictment as libels, pamphlets attached to the pictures, but not themselves charged as libels, cannot be read to the jury to show the evil intent with which the pictures were published, where pamphlets constitute in themselves a libel. *Ibid.*

§ 4479. In a prosecution for publishing libels tending to incite sedition among slaves, in order to show the evil intent of the defendant in publishing the libels, and the sentiments which the defendant had already alluded to as those which he approved, evidence was permitted to show that the defendant had been a subscriber for an anti-slavery paper called the *Emancipator*, and several numbers of the paper were also admitted. But the court refused to permit to be read to the jury the publications advertised for sale by the anti-slavery society, in the *Emancipator*, although evidence had been given tending to prove that the defendant was a member of that society. *Ibid.*

§ 4480. Upon the trial of an indictment for libel, the fact that the papers found upon the person of the defendant have been seized under an illegal warrant will not prevent the prosecution from giving in evidence the fact that the defendant had in his possession some of the libels charged, of the publication of which in the district evidence has been given. *Ibid.*

§ 4481. In a criminal prosecution for libel in the District of Columbia, the printing and publishing of pamphlets in New York, relating to the same subject-matter as those charged in the

indictment, is not evidence of their publication in the District of Columbia, so as to fix upon the defendant such a knowledge of their publication as to make his possession alone, even with the words "read and circulate," written upon them, evidence of a publication of them by him within the district. *Ibid.*

§ 4482. In order to show the evil intent with which the defendant published the paper charged in the indictment to be a libel, it is not competent to give in evidence other unpublished papers or pamphlets, found in the defendant's possession, unless accompanied by evidence of some acknowledgment or admission of the defendant that he knew and approved of them. *Ibid.*

§ 4483. Upon the trial of an indictment for seditious libel, the United States cannot, for the purpose of proving the intent of the defendant in publishing the libel stated in the indictment, give in evidence to the jury any papers subsequently published by the defendant, or found in his possession unpublished by him, which would be libels, and might be the substantive subjects of public prosecutions, if published. *Ibid.*

§ 4484. Upon an indictment for libel, the prosecution may give evidence of the publication, within the district, of any copies of the libels charged in the indictment. They may then show that other copies of the same libels were found in the possession of the defendant. It may also be shown that other pamphlets and papers, together with the copies of the libels charged and proved to have been published in the district, were found in the possession of the defendant. But it is not permitted to prove the contents of any of the papers other than those charged as libels, unless such other papers have relation to the libels charged, and would not in themselves be substantive ground of prosecution. *Ibid.*

§ 4485. **Postoffice.**— In a prosecution under section 3894, Revised Statutes, for sending a letter and circular concerning a lottery in the mail, a witness was allowed to testify that he visited the place of business referred to in the letter set forth in the indictment, a few days after the time the letter was alleged to have been mailed, that he saw there several papers bearing the same device or monogram as were on those inclosed with the letter mailed, that he saw the defendant there making the same impression with a stamp on a slip of paper, that he saw lottery tickets sold there by the defendant's clerk, that the defendant said that the clerk was in his employ, that the defendant tried to prevent a deputy marshal who was with the witness from entering the place, and that he found in the front office a place for the sale of lottery tickets, and in the back room a policy shop. *United States v. Noelke*, 17 Blatch., 554.

§ 4486. In a prosecution for sending lottery matter through the mails, the passage of the act incorporating the lottery, the occupation of the defendant as a dealer in lottery tickets, and other extrinsic circumstances, are proper to be considered by the jury on the question whether the letter mailed related to a lottery. *Ibid.*

§ 4487. On the trial of an indictment, under section 3894, Revised Statutes, for sending a lottery circular through the mail, it was proved that the defendant, Duff, was accustomed to use the name of John Duff & Co., and sold lottery tickets under that name; that he personally received the letter which contained the order for the circular in question, and also the money to pay for two lottery tickets. *Held*, that, although the circular was sent in reply to a letter addressed to John Duff & Co., it was competent for the jury to infer from these facts that the defendant was the person who remitted the circular and tickets, especially when it appeared that they were addressed to a fictitious name known only to the defendant and the sender of the order. *United States v. Duff*, 19 Blatch., 9.

§ 4488. In a prosecution against a postmaster charging him with abstracting a letter from the mail, it cannot be proved that the postmaster at the next office on the route of the letter was suspected, and had at one time been charged with passing counterfeit money, such postmaster not being called as a witness. *United States v. Whitaker*, 6 McL., 342.

§ 4489. Upon an indictment, under section 21 of the postoffice law of 1825, for stealing bank-notes from the mail, some evidence of the value of bank-notes must be given. It is not necessary to prove the handwriting of the persons whose signatures appear on the face of the notes. They may be proved to be genuine by any one whose business leads him to an acquaintance with such notes. *United States v. Nott*, 1 McL., 499.

§ 4490. **Murder.**— An accused may be convicted of murder, though the body of the deceased is not found. *United States v. Gibert*, 2 Sumn., 19.

§ 4491. In cases of murder, where the discovery of the body after the crime is impossible, the fact of death may be proved by other means; that is, either by direct evidence, or, where such does not exist, by cogent circumstances sufficient to exclude every reasonable doubt. *United States v. Williams*,*1 Cliff., 5.

§ 4492. When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, evidence that the accused was in such a condition of mind on account of drunkenness as to be incapable of premeditation is competent for the consideration of the jury. *Hopt v. People*, 14 Otto, 631.

§ 4493. In a trial for murder, where it is doubtful whether the defendant or the deceased begun the assault which resulted in the killing, recent threats made by the deceased against the life of the defendant are admissible to show the attitude of the deceased toward the defendant at the time of the assault, although they were not brought to the knowledge of the defendant. *Wiggins v. People, etc., in Utah*, 3 Otto, 465.

§ 4494. Upon the trial of an indictment for murder alleged to have been committed on board of an American vessel, by a member of the crew, upon a member of the crew, it is not usual to call upon the government to offer direct evidence that the prisoner was first apprehended within the district where the trial is taking place. Evidence that the ship was bound to Boston, a port within the district, and that the prisoner is in custody in Boston, is sufficient to warrant the jury in finding the fact. *United States v. Mingo*, 2 Curt., 1.

§ 4495. **Mutiny.**—Where seamen indicted for confining the master attempted to justify by evidence that the master was insane, the journal kept by the master in which he made entries every day was admitted in evidence to disprove this charge by the style in which it was kept, but not as evidence of any other fact. *United States v. Sharp*, Pet. C. C., 118.

§ 4496. A protest, not offered for the purpose of discrediting any one who had signed it, and who had given evidence in the cause, was rejected in a prosecution for revolt and confining the master. *Ibid.*

§ 4497. **Perjury.**—In a prosecution for perjury, the statements of the defendant upon which the action is founded must be disproved by two witnesses, or one witness and corroborating circumstances. *United States v. Coons*, 1 Bond, 1.

§ 4498. An indictment for perjury is barred by a reasonable doubt of the defendant's sanity. *United States v. Lancaster*, 7 Biss., 440.

§ 4499. The rule that a single witness is insufficient to prove perjury rests upon the law of presumptive equality of credit between persons, and can only be arbitrary and peremptory when applied to cases in which oral testimony is exclusively relied on to prove the crime. A living witness to the *corpus delicti* of the defendant may be dispensed with, and documentary or written evidence be relied on to convict, in all cases where a person is charged with a perjury, directly disproved by documentary or written testimony springing from himself, with circumstances showing a corrupt intent. Thus on the trial of an indictment for perjury, under the act of congress of March 1, 1823, for falsely and corruptly taking the owner's oath as to the cost of goods purchased abroad and imported to this country, it is not necessary for the prosecution to produce a living witness, if the jury believe from the evidence contained in the defendant's letters, and other written evidence, that he made a false and corrupt oath as to the value of the goods imported. *United States v. Wood*, 14 Pet., 430.

§ 4500. **Piracy.**—A maritime commission of a government not recognized by our government is not admissible in evidence as a defense to an indictment for piracy. *Fourth-of-July Privateer*,* 1 Op. Att'y Gen'l, 249.

§ 4501. On an indictment for piracy, the national character of the vessel plundered may be proved by other evidence than the register or other documentary papers. *United States v. Pirates*, 5 Wheat., 184.

§ 4502. **Rescue.**—On the trial of an indictment for rescue, the words used by the accused accompanying his actions may be proved to show his intent. *United States v. Omeara*,* 1 Cr. C. C., 165.

§ 4503. **Internal revenue.**—In prosecutions for criminal violation of the internal revenue laws, proof of facts occurring subsequent to the time of the commission of the offense may be received as explanatory of the prior facts charged; but they are not of themselves sufficient to convict. *United States v. Harries*, 2 Bond, 311.

§ 4504. **Trade with Indians.**—If an Indian-trader carries ardent spirits into the Indian country, and the same are found therein among any part of his goods, it is *prima facie* evidence of his having violated the acts of congress of March 30, 1802, and May 6, 1822, chapter 58, for regulating trade and intercourse with the Indian tribes. *American Fur Company v. United States*, 2 Pet., 358.

§ 4505. **Riot.**—In a prosecution for riot, the intent may be inferred from the riotous acts, and ought to be inferred, in the absence of contradictory evidence. *United States v. Fenwick*, 4 Cr. C. C., 675.

§ 4506. Upon an indictment for riot, the defendants were allowed to prove the declaration, recently made, of a person whose sign was alleged to have been pulled down by the mob, to the effect that the sign was cut down by himself to prevent further excitement. *Ibid.*

§ 4507. Upon an indictment for riot, the jury may infer, and in the absence of contradictory evidence ought to infer, from the doing of the unlawful act by the defendants and their declarations of their intent to do it while engaged in it, that there was a previous intent and agreement on the part of the defendants to do the unlawful act, and to assist each other in doing the same. *United States v. Stockwell*, 4 Cr. C. C., 671.

§ 4508. **Slavery and slave trade.**—Where an indictment alleges that a certain person was held to service and labor by a certain other person, under the laws of the state of Virginia, the fact of slavery under the laws of Virginia may be proved by such evidence as upon the principles of the common law is competent and sufficient; and evidence that the person, in point of fact, was held and treated as a slave in Virginia is admissible, and sufficient, if not controlled, to establish the fact. *United States v. Morris*, 1 Curt., 23.

§ 4509. In a prosecution for violation of the act of congress for the suppression of the slave trade, the registry of the vessel is evidence to show under what public character she appeared and acted. *United States v. Darnaud*, 3 Wall. Jr., 143.

§ 4510. In a prosecution under the slave trade act of April 20, 1818, where evidence has been offered of the authority of the master, the nature of the fitments, and the object and accomplishment of the voyage, the acts of the master in proposing to the witness to engage him as mate for the voyage, describing it as a voyage for slaves, and offering him so much per head for every slave brought back, and saying that the defendant would see the crew paid in the event of a disaster, are admissible in evidence against the defendant, the owner. *United States v. Gooding*, 12 Wheat., 460.

§ 4511. Upon an indictment, under the act of congress declaring that any person, being of the ship's company of a vessel owned wholly or in part by any citizen of the United States, who shall aid and abet in confining any negro, etc., with intent to make such negro a slave, shall be adjudged a pirate, the registry of the vessel is not even *prima facie* evidence of its ownership. The fact must be proved as any other fact is proved. *United States v. Brune*, 2 Wall. Jr., 264.

§ 4512. Upon the trial of an indictment against the master of a vessel for receiving on board, on the coast of Africa, a negro, with intent to make him a slave, it was ruled that anything done by the defendant, or those who chartered the vessel during the voyage, and near the time when the negro was taken on board, might be shown, in order to prove his knowledge and intents, but nothing of a separate and independent character, transacted at a different place and on a different voyage, and so distant in time as not to bear on the transaction, and which the accused would not likely come prepared to rebut. On this principle, it was held that questions could not be asked as to what became of some slaves put on board of a vessel called the Kentucky that sailed to Brazil from that part of the African coast while the defendant was there, unless the government proved first some connection in interest and business between the Kentucky and the defendant, or between those slaves and the receiving of the negro upon the defendant's vessel. Letters written by the owner of the vessel and his consignees to the defendant, before the negro was taken on board, giving instructions as to the objects and character of the voyage, were admitted as a part of the *res gestæ* to show the design with which the vessel was sent from this country and chartered. For the purpose of showing the knowledge of the defendant of the illegal objects of the hirers of the vessel and the slave character of the negro, the government having proved the receiving on board by the defendant of other negroes, letters of freedom to these other negroes, made before persons styling themselves Portuguese notaries, with their seals annexed, were allowed to be given in evidence to the jury; and the defendant was permitted to offer any evidence in his power of their genuineness, and as to his having possession of them and believing them to be genuine at the time the negroes were received on board. *United States v. Libby*, 1 Woodb. & M., 221.

§ 4513. Under the fugitive slave law of September 18, 1850, the certificate authorizing the removal of the fugitive, delivered to the claimant, was conclusive evidence of the right to remove the fugitive. And upon an indictment for an attempt to rescue the slave after the delivery of the certificate, its production in evidence rendered independent proof of the relation of the claimant and the fugitive, and the fact of the latter's escape, unnecessary; and this was so, although the indictment should contain allegations that the fugitive owed service or labor, and had escaped. *United States v. Buck*,* 4 Phil., 161.

§ 4514. Under the fugitive slave law of 1850, the record showing the *status* of the fugitive need not be produced to establish the right of the claimant. This right may be established by other evidence. *Miller v. McQuerry*, 5 McL., 469.

§ 4515. **Treason.**—Of the overt act of treason there must be proof by two witnesses. *United States v. Mitchell*, 2 Dall., 348.

§ 4516. The constitutional provision that no person shall be convicted of treason except upon the testimony of two witnesses to the same overt act, or on confession in open court, does not apply to preliminary trials. *United States v. Greiner*,* 4 Phil., 396.

§ 4517. Whether, upon a motion to commit a person for treason, an affidavit stating the substance of a letter in the possession of the affiant is admissible in evidence is not determined in this case. *Ex parte Bollman* and *Ex parte Swartwout*, 4 Cr., 75.

§ 4518. A copy of a circular letter proved to have been one of those circulated inciting the

insurrection is admissible in evidence on a trial for treason. *United States v. Mitchell*, 2 Dall., 348.

§ 4519. In a prosecution for treason, the declarations of the accused of his intention as to any of the overt acts charged may be proved, although no evidence of overt acts has yet been offered; and the declarations of the prisoner, accompanying the overt act laid, may be proved to show intent, but his confession of having committed the overt act charged is not admissible. *United States v. Lee*,* 2 Cr. C. C., 104.

§ 4520. Upon the trial of an indictment for treason, evidence that the prisoner, during the insurrection, joined in a substantive and independent felony, not done with a treasonable intent, and with which he is charged in another indictment, cannot be given. *United States v. Mitchell*, 2 Dall., 348.

§ 4521. Upon an indictment for treason in resisting "the Fugitive Slave Law," it was held that it was competent for the defendant to show that kidnappers had been about the neighborhood, and that there was a degree of insecurity among the free negroes, as bearing upon the intent with which the alleged treasonable acts were done. *United States v. Hanway*, 2 Wall. Jr., 139.

§ 4522. Upon an indictment for treason in resisting a law of the United States, everything tending to show that there was an intention to make a public resistance to a particular law is evidence in chief and not in rebuttal. Evidence tending to prove the existence of a regular organization for the purpose of resisting the law in the neighborhood upon all occasions is evidence of this nature, and cannot be introduced in rebuttal, and given by witnesses whose names and residences have not been furnished to the defendant according to the act of congress. *Ibid.*

§ 4523. **Accomplices — Co-conspirators.**— Upon an indictment against one of several who had been concerned in a joint assault, the actions of each one of the participants are evidence against the prisoner. *United States v. Johnston*, 1 Cr. C. C., 237.

§ 4524. It seems that the acts, conduct and declarations of each confederate, made and done during the pendency of a criminal enterprise, are competent evidence against all engaged in it, as part of the *res gestæ*, as each is supposed to approve and sanction all that was done or said in furtherance of the common object. *United States v. Hartwell*,* 3 Cliff., 221.

§ 4525. Though the acts, conduct and declarations of one of the persons engaged in a criminal transaction, made and done during the pending of the offense, are admissible against each, as being part of the *res gestæ*, and presumably done in pursuance of the common design, yet it seems that subsequent narrations, confessions or admissions are inadmissible against any but the person making them. *Ibid.*

§ 4526. The record proof of the conviction of the principal is *prima facie* evidence against the accessory sufficient to put him upon his defense. It is presumed to be regular and proper, but such presumption must give way to facts manifestly and clearly proved. *Ibid.*

§ 4527. On the trial of an accessory the confessions of the principal are evidence of his guilt where the principal and accessory are indicted together, and the principal has pleaded *nolle contendere*. *Ibid.*

§ 4528. H. was indicted for unlawfully loaning public moneys to A., B. and C., and the latter were charged in the same indictment with having advised and participated in the unlawful act. H. entered a plea of *nolle contendere*, and was allowed to stand aside till the trial of the others. Evidence of his confession of the offense charged was admitted, the court ruling that such confession was admissible to prove his own criminal act, but not to prove anything against the other defendants. *Held*, that the defendants could not complain of the introduction of the evidence under the ruling, which was as favorable to the defendants as they had any right to expect. *Ibid.*

§ 4529. On the trial of one alleged conspirator, evidence of communications between confessed conspirators is of no effect against the defendant unless he is by other evidence connected with the conspiracy. *United States v. Babcock*,* 3 Dill., 571.

§ 4530. Upon the trial of an indictment for conspiracy, a witness not a party to the record cannot by confession charge the defendants, unless it is first shown by *prima facie* evidence that he participated in the conspiracy. *United States v. Cole*, 5 McL., 513.

§ 4531. It is presumed that an accomplice would destroy a letter which would inculcate him, and no search is necessary in order to admit secondary evidence of its contents. *United States v. Doeblor*,* Bald., 519.

§ 4532. Unless it has been impeached, evidence to support the credit of an accomplice is inadmissible. *United States v. Wilson*, Bald., 78.

§ 4533. The testimony of an accomplice which has not been impeached cannot be corroborated by statements of the same facts made by him at another time. *Ibid.*

§ 4534. The testimony of an accomplice is admitted as competent, and his credibility rests entirely with the jury, who may convict upon his testimony, though unsupported, if they con-

scientiously believe him. This, however, is seldom the case, and it is usual for the court to advise the jury to reject such testimony, unless confirmed in some parts by unimpeachable evidence. If he is confirmed in material parts, he may be credited in others; and the jury will decide how far they will believe him, from the confirmation he receives from other testimony and from other circumstances. *United States v. Kessler*, 1 Bald., 15.

§ 4535. An accomplice is a competent witness in all cases, but in all cases his evidence is to be received with caution, and unless corroborated by circumstances, or by the testimony of other witnesses, it may be rejected, especially in felonies. *United States v. Harries*, 2 Bond, 311.

§ 4536. The fact that a person is an accomplice affects his credibility as a witness. His testimony must be received with great caution, and unless sustained and corroborated in the material facts stated by him, by credible witnesses, his testimony should be wholly rejected. *United States v. Smith*, 2 Bond, 323.

§ 4537. It is unsafe to convict upon the testimony of an accomplice, uncorroborated upon material points by evidence to which no suspicion attaches. *United States v. Whalen*,* 7 Int. Rev. Rec., 161.

§ 4538. It is unsafe to convict upon the testimony of an accomplice unless corroborated by other evidence. *United States v. Brown*, 4 McL., 142.

§ 4539. An accomplice is a competent witness, and the defendant may be convicted on his testimony if believed to be true. But such testimony should be received with great caution, and if uncorroborated is entitled to little weight. *United States v. Lancaster*, 2 McL., 431.

§ 4540. It is a rule of practice for a judge to instruct the jury not to convict solely on the uncorroborated testimony of an accomplice. *United States v. Whalen*,* 1 Am. L. T., 65.

§ 4541. The testimony of an accomplice should be received with great caution, and if uncorroborated should have little weight. But the jury may convict on his testimony if they believe him. *United States v. Lancaster*, 2 McL., 431.

§ 4542. Accomplices are competent witnesses, and their credibility is for the jury. Corroborative facts are not necessary. The jury may base their decision upon the unsupported testimony of the accomplices. *United States v. McKee*,* 3 Dill., 551.

§ 4543. An accomplice is a competent witness, and it is not an error for the court to tell the jury that they may convict on his unsupported and uncorroborated testimony if they believe him. *Steinham v. United States*, 2 Paine, 168.

§ 4544. As a general rule, the testimony of an accomplice must be received with great caution, and unless sustained and corroborated, in the material facts stated by him, by credible witnesses, his testimony should be wholly rejected. But it is the exclusive province of the jury to pass upon the credibility of such a witness. *United States v. Smith*, 2 Bond, 323.

§ 4545. There is no rule of evidence which excludes the testimony of an accomplice, or prevents the jury from giving credence to it, where it has been corroborated in material particulars. *United States v. Greathouse*, 2 Abb., 364.

§ 4546. In felonies, the testimony of an accomplice is more open to impeachment than in misdemeanors. In the former class of crimes the jury ought not to convict on his testimony uncorroborated. But this rule does not apply with the same force to smaller offenses. Such testimony should, however, always be received with caution. If corroborated, there is no reason why it should not be received as truthful. *United States v. Harries*, 2 Bond, 311.

§ 4547. The testimony of an accomplice, though competent, is to be received with great caution, and where the accusation is for a felony, it is unsafe to return a verdict of guilty upon such evidence alone. If corroborated in material points, there is no reason why he should not be believed. *United States v. One Distillery*, 2 Bond, 399.

§ 4548. It is never safe to convict on the uncorroborated testimony of a single accomplice. But this rule loses its force very much when the number of witnesses is very large, and they all testify to the same state of facts, under circumstances where the jury can see that they must have had an opportunity for observing what they testify to, and particularly when some of the material circumstances in the case are corroborated by the unimpeachable testimony of persons not concerned as accomplices. *United States v. Blaisdell*,* 3 Ben., 132.

§ 4549. The fact that a witness in a conspiracy trial is a co-conspirator affects the credibility of his testimony, and the jury have a right to regard the question of credit if it stands alone, but if it is corroborated, then the jury is bound to credit it. *United States v. Callicott*,* 7 Int. Rev. Rec., 177.

§ 4550. Upon the trial of an indictment for conspiracy, the testimony of an accomplice in the conspiracy is competent evidence against his co-conspirators. If supported in material respects, the jury are bound to credit it; but they are not to rely upon it if unsupported, unless, after the exercise of extreme caution, it produces in their minds a most positive conviction of its truth. *United States v. Sacia*, 2 Fed. R., 754.

§ 4551. Conspirators are competent witnesses against a co-conspirator. But such testimony

should be received with great caution, and weighed and scrutinized with great care by the jury, who should not convict upon it unsupported, unless it produces in their minds the fullest and most positive conviction of truth. *United States v. McKee*,* 3 Dill., 551.

§ 4552. Though the testimony of accomplices is always admissible, still their testimony is always to be received with caution, and weighed and scrutinized with great care by the jury, who should not rely on it unsupported, unless it produces in their minds the most positive conviction of its truth. It is proper to search for corroborating evidence, but such evidence is not indispensable if the jury are otherwise fully convinced. *United States v. Goldberg*, 7 Biss., 175.

XXXII. IN EQUITY.

SUMMARY — *Reasons which will allow the admission of evidence after publication*, § 4553.

§ 4553. Only in exceptional cases will new evidence be admitted in a cause in equity after publication. It may be, when it goes merely to the credit of another witness, as when a new witness is asked whether he would believe the other on oath, or when the time for publication has passed but no publication has in fact been made, or when it is merely proof of exhibits, or when a new deposition is allowed, the first one being suppressed because its interrogatories are leading. In other cases no new evidence will be allowed. *Wood v. Mann*, §§ 4554-62.

[NOTES.— See §§ 4563-4581.]

WOOD v. MANN.

(Circuit Court for Massachusetts: 2 Sumner, 316-336. 1836.)

PETITION to take additional testimony after publication. The facts appear in the opinion.

Opinion by STORY, J.

Of the materiality of the testimony now proposed to be taken no doubt can be entertained. It goes to establish many of the leading points of fact in controversy between the parties; and if not vital in the cause, it is on all sides admitted to have a most stringent force and pressure. It is under circumstances so rare and so novel that this court is called upon to decide one of the most important and delicate questions of practice; than which, indeed, few, if any, can be presented better deserving of deliberate consideration and striking deeper into the foundations of equity jurisprudence. It is upon this account that I have taken time to examine the whole subject with all the aids which could be derived from the labors of counsel and my own auxiliary researches, feeling, as I do, an anxious desire to perform on the present occasion exactly what, upon the most careful survey of principles and authorities, it is my duty judicially to perform.

§ 4554. *In equity, after publication of the testimony, no new evidence can be taken as a general rule.*

The general rule in equity proceedings is, that, after publication of the testimony, no new witnesses can be examined and no new evidence can be taken. This rule is at least as old as the time of Lord Bacon, among whose ordinances in chancery we find the following: "No witnesses shall be examined after publication, except by consent or by special order *ad informandum conscientiam judicis*; and then to be brought close sealed up to the court to peruse or publish as the court shall think good." The true exposition of the latter qualification of this rule would seem to be that the new evidence to inform the conscience of the judge should not be taken but upon or after the hearing, when the judge himself entertains a doubt, or when some additional fact or inquiry is indispensable to enable him to make a satisfactory decree. So was the doctrine held in *Newland v. Honeman*, 2 Ch. Cas., 74; and it is strongly fortified by what fell from Lord Manners, in *Savage v. Carroll*, 2 Ball & Beatt.,

444, and by the master of the rolls in *Parken v. Whitby*, 1 Turn. & Russ., 366. Except for such purposes and under some special order of the court itself at or after the hearing, no such testimony, taken after publication, is now deemed admissible, at least unless under extraordinary circumstances, under the rules. The practice of taking such testimony before the hearing, and keeping it sealed up to be used by the court at the hearing, if it should be deemed meet, is said by the text-writers to have fallen into disuse, and not to have been in practice for more than a century. *Hinde's Practice*, 316; *Beames' Orders in Chanc.*, 33, notes 117 and 118; *Dalby v. Mace*, Tothill, 191; *Carey's R.*, 83; *Wyatt, Pract. Register*, 354, 355; *Willan v. Willan*, 19 Ves., 592.

There is an old case reported in *Carey's Rep.*, 83, which shows what the old practice was; and I quote it in the very words of the report. "Upon affidavit made by the plaintiff, that since publication granted he had divers witnesses (setting down their names) come to his knowledge; therefore ordered he may examine them before the examiner *ad informandum conscientiam judicis*." No other circumstances are stated; and therefore it is impossible to know what the facts were, or whether the other testimony taken had been actually seen by the plaintiff.

The general rule is founded in the obvious public policy of suppressing perjury, and the fabrication of evidence, to meet the exigencies of the cause, after the full bearing and weight of the testimony are understood by all the parties. If, under such circumstances, the parties were permitted to supply the actual deficiencies of the evidence from time to time, as they should be found out, there would be strong temptations to corrupt, and insidious practices to obtain new evidence; and there would be a premium held out for delays and omissions of diligence in taking the evidence, until the whole strength of the adversary's cause was disclosed. Courts of equity, from considerations of this sort, have always been disposed to uphold the rule with a firm and rigid exactness.

Lord Eldon, in *Whitelocke v. Baker*, 13 Ves., 511, said: "This court will not enlarge publication, without a very special case made. The party's want of knowledge of the rules of proceeding, and want of attention in his solicitor, are not sufficient. The rules of justice are founded in great general principles, not to be broken down by such circumstances." Lord Macclesfield, in *Cann v. Cann*, 1 P. Will., 727, laid down the doctrine in more emphatic terms. "The precedent methods (said he) of this court were that, after publication is passed, and the purport of the examinations known to the parties, neither side is allowed, though they come recent, to enter into part examination of the matters in question, since otherwise there would be no end of things, and such a proceeding would tend to perjury, as well as vexation."

Exceptions, however, have been admitted to the general rule; and to these our attention will now be directed, in order to ascertain how far they are applicable to the circumstances of the case before the court. The exceptions will be found for the most part to turn upon grounds entirely consistent with the policy of the general rule, and in no manner trenching upon its justice or inconvenience. At the same time they exhibit in a marked manner the reluctance of the court to break in upon the general uniformity of the practice, except under very special circumstances.

It will not be necessary to go over the authorities at large; for they do not present any general diversity of judgment, requiring comment or criticism. They rather arrange themselves into classes, in each of which every successive

judge has shown a solicitude to keep within the limits prescribed by his predecessors.

§ 4555. *Witnesses may be examined as to the credit of other witnesses, after publication.*

The first class of exceptions is that of the examination of witnesses to the mere credit of the other witnesses whose depositions have been already taken in the cause. This is the ordinary practice, and is done upon articles or objections filed. Beames' Ord. in Ch., p. 32, § 72; id., p. 187, § 80. But then, in these cases, the general interrogatory only, whether he (the proposed witness) would believe the other on his oath (which is the usual form of putting the interrogatory in England, and differs widely from that in which it is usually put in America,—see 1 Starkie on Ev., 182, 2d ed., London, 1833; *Watmore v. Dickenson*, 2 Ves. & B., 267, 268; *Carlos v. Brook*, 10 Ves., 50), is that upon which the new examination is allowed, unless under very special circumstances. And there is this close limitation upon such special circumstances, that the interrogatory shall not be to any facts put in issue in the suit, but only to such facts as merely touch the credit of the witness. This doctrine was expounded very fully by Lord Eldon in *Purcell v. McNamara*, 8 Ves., 324, 326, and *Wood v. Hammerton*, 9 Ves., 145; *Carlos v. Brook*, 10 Ves., 50, and *White v. Fussell*, 1 Ves. & Beam., 153; and it was recognized and acted upon by Mr. Chancellor Kent in *Troup v. Sherwood*, 3 John. Ch., 558, where he critically examined the leading authorities. But, what is most important in its bearing on the present case, is the absolute refusal of the court in these cases to allow the witness to be contradicted as to any fact which he had sworn, touching the merits of the matters in issue between the parties. "If (said Lord Eldon in *Purcell v. McNamara*), for instance, the fact is material to the merits of the case, and the witness has sworn to it, there is great danger of bringing other witnesses, under color of discrediting that witness, to prove or disprove such fact." See *Gilb. For. Rom.*, 147; *Smith v. Turner*, 3 P. Will., 413.

§ 4556. *Time for publication may be enlarged on good cause shown.*

Another class of exceptions is where the application is made to enlarge the time for publication, or more frequently to enlarge the time for taking the testimony after publication has been, in form, though not in fact, made, according to the rules of the court. To such applications, whenever they will cause any delay in the cause, the court does not listen without some good cause shown upon affidavit; such as surprise, accident, or other circumstances which repel any imputation of laches. See *Gilb. For. Rom.*, 124; 1 Harris. Ch. Pr. by Newland, ch. 43, pp. 285, 287; see, also, *Watmore v. Dickinson*, 2 Ves. & B., 267, 268; *Cutler v. Cremer*, 6 Madd., 254. And in all cases of this sort before the application is allowed, the party and his clerk in court, and solicitor, are required to make oath "that they have neither seen, heard, read, nor been informed of any of the contents of the deposition taken in that cause; nor will they see, hear, read or be informed of the same till publication is duly passed in the cause." *Gilb. For. Rom.*, 146; see, also, *Anon.*, 1 Vern., 253; *Hinde's Prac.*, 384, 385. And this affidavit is so important, that the court will never dispense with it except in a case of fraud practiced by the other party to evade the rule; as was the case in a memorable instance in Lord Somers' time, stated by Ch. Baron Gilbert (*Gilb. For. Rom.*, 146).

Lord Eldon, in commenting on the affidavit, and the strictness of the rule requiring it, said: "That it is founded upon this: that no more dangerous mode of proceeding can take place than permitting parties to make out evidence by

piecemeal, and to make up the deficiency of original depositions by other evidence." *Whitelocke v. Baker*, 13 Ves. R., 512. In the same case, where a motion was made, the effect of which was to introduce new evidence to be taken after the cause had been set down for a hearing, he added: "The next ground for this motion is the materiality of the farther evidence, which it is supposed can be given. If that could be represented as most highly material, I dare not trust myself with laying down a precedent that would authorize attempts to bring forward an application in every case, where, even after a cause had been set down, the party might see that it would not be convenient to hear the cause upon the evidence on which he originally intended to put it. The danger from that would be enormous." *Whitelocke v. Baker*, 13 Ves. R., 512. The only material abatement of the force of this language, as applied to the present case, is that it was spoken in a case not of newly discovered evidence, but of known evidence alleged to have been improperly and irregularly taken. Mr. Chancellor Kent, in *Hamersly v. Lambert*, 2 John. Ch. R., 432, reviewed the authorities, and sustained the doctrine, as above stated, with all the weight of his own great opinion.

§ 4557. *Proof of exhibits may be made after publication.*

Another class of exceptions is the proof of exhibits in the cause after publication, and even *viva voce* at the hearing, where there has been an omission of the proof in due season, and they are applicable to the merits. Gilbert, in his *Forum Romanum*, page 183, takes notice of this practice, and says: "Upon this rehearing any exhibit may be proved *viva voce*, as upon the original hearing. But no proof can be offered of any new matter without special leave of the court, which is seldom granted." The like doctrine is fully supported in many cases. See *Wight v. Pilling*, Prec. Ch., 496; *Dashwood v. Lord Bulkeley*, 10 Ves. R., 238; *Buckmaster v. Harrop*, 13 Ves., 458; *White v. Fussell*, 1 Ves. & B., 153; *Higgins v. Mills*, 5 Russ. R., 287; *Wyld v. Ward*, *Younge & Jer.*, 384; *Williams v. Goodchild*, 2 Russ. R., 91; *Dale v. Rosebelt*, 6 John. Ch. R., 256.

§ 4558. *Exceptional circumstances in which a re-examination will be permitted or fresh interrogatories propounded.*

Another class of exceptions is where depositions have been suppressed, from the interrogatories being leading, or for irregularity, or where it has been discovered that a proper release has not been given to make a witness competent; in every such case, from the obvious necessity and in furtherance of justice, fresh interrogatories and a re-examination have been permitted. *Lord Arundel v. Pitt*, Ambl. R., 585; *Perry v. Silvester*, 1 Jacob R., 83; *Curre v. Bowyer*, 3 Swanst. R., 357; *Sandford v. Paul*, 3 Bro. Ch. R., 370; S. C., 1 Ves. Jr., 398; 2 Dick. R., 750; *Spence v. Allen*, Prec. Ch., 493; *Shaw v. Lindsey*, 15 Ves. R., 380; *Cox v. Allingham*, 1 Jacob R., 337, 341, 343; *Callow v. Mince*, 2 Vern. R., 472. In the case of *Sandford v. Paul*, 2 Dick. R., 750; S. C., 3 Bro. Ch. R., 370; and 1 Ves. Jr. R., 398, it appears from Mr. Dickens' Reports that the subject was a good deal examined, and many authorities are cited by the reporter to show that the strictness of the rule had been relaxed in special cases of this nature.

All these classes of exceptions stand upon peculiar grounds and steer wide from any of the just objections which have been urged against the introduction of new evidence, after the pressure of the evidence, as taken, is fully known to both parties. The qualifications and limitations accompanying these exceptions demonstrate, in the most full and satisfactory manner, that the

- design of upholding the policy of the general rule constitutes the main ingredient in the view of the court in acceding to or refusing every application. If the existence of the evidence is fully known at the time of the taking of the depositions, and if it is not purely the case of written evidence, it will be difficult to find any uniform relaxation of the general rule, that, after publication passed, and the depositions have been seen, no new evidence shall be admitted.

§ 4559. *If, upon a rehearing or a bill of review, a party would be entitled to the benefit of evidence, it should be allowed (to avoid circuitry of action) after publication, and even after hearing.*

The question, then, is reduced to this: whether new evidence by witnesses, which has been discovered since publication has passed, and the contents of the depositions been made known, can, consistently with the general objects and purposes of the rule, be allowed? Now, this is partly a matter of authority, and partly of principle. And I fully agree that if, upon a rehearing, or upon a bill of review, or upon a bill in the nature of a bill of review, the evidence of new witnesses ought to be let in, then it ought now to be allowed, to avoid circuitry of remedy and increased expenses in litigation. If, on the other hand, it would not, under such circumstances, be allowed; and if, in analogous cases, it has been rejected; and if no direct authority can be shown in favor of the motion, then, since it must be a case of not infrequent occurrence in practice, each of these considerations will furnish strong objections against the motion.

I have said that if, upon a rehearing or a bill of review, the plaintiff would be entitled to the benefit of this testimony, he ought now to be entitled to it; and, as it is applicable to points already in issue, there is no need of a supplementary bill. In this view of the subject I feel myself strongly fortified by the language of Lord Eldon in *Milner v. Lord Harewood*, 17 Ves. R., 148. "There is," said he, "no recollection of a supplemental bill of this kind; and if a new practice is to be settled, the strong inclination of my opinion is, that when the particular case arises, where either conversation or admission of the defendant becomes material after answer or replication; or, as in this instance, after examination of witnesses in the original cause; or if a new fact happens after publication, which it is material to have before the court in evidence, when the original cause is heard, it is much better, if the examination of witnesses, if required, should be obtained upon a special application for the opportunity of examining, and that the depositions may be read at the hearing; or if discovery is required, that the party should file a bill for that purpose merely; and if relief is required, that the answer comprehending the discovery should be read at the hearing of the original cause."

This language would certainly seem to show that there were cases in which new testimony might be taken after publication, at least as to facts and conversations occurring after the original cause is at issue, and publication passed. Here, however, the application is to admit newly discovered evidence of confessions before the bill was filed. In *Willan v. Willan*, 19 Ves. R., 591; S. C., Cooper Eq. R., 291, the same great judge said: "It is perfectly established that after publication, previous to a decree, and the depositions have been seen, you cannot examine witnesses farther without leave of the court, which is not obtained without great difficulty; and the examination is generally confined to some particular facts. At the hearing of the cause the court sees all the evidence; and if, instead of deciding upon inference, it directs inquiries, the

decree directing these inquiries is, in truth, the leave of the court given for farther examination of witnesses upon the very point." It is difficult to ascertain the precise limitations which ought to be applied to language so general; and whether the learned judge meant merely to advance the suggestion that the court might, to satisfy its own conscience, direct new evidence to be taken at or after the hearing; or whether he meant to state, generally, that new testimony might be taken, upon a case made to the court, at any time after publication and before the hearing. Unfortunately, the case did not call for a more explicit declaration of opinion. But my impression is, that the former was all that was intended by the language.

In *Smith v. Turner*, 3 P. Will. R., 413, the cause was heard, and there appearing to the court some reason to suspect that the defendant had a deed in his custody, it was ordered that he should be examined on interrogatories touching the deed. Upon the examination he denied his having the deed and all the circumstances relating thereto. The master certified, notwithstanding that he thought it reasonable, that the plaintiff, who prayed a commission to examine witnesses to falsify the defendant's examination, should have one. But the court refused it, saying: "At this rate three or four causes might spring out of one, and though there could be no mischief in examining the party himself, yet the examining witnesses, after publication passed, especially where it may relate to the matter in issue, is against the rule of the court, and may be greatly inconvenient and make causes endless." This case certainly affords a strong illustration of the real purport of the general rule, and would make one hesitate in supposing that Lord Eldon meant, in the cases above stated, to maintain a broader doctrine.

In *Ward v. Eyles*, Moseley R., 377, the court would not allow a party in a cross-bill to examine witnesses, after publication passed and the depositions seen, to the matters in issue in the original cause. On that occasion, the lord chancellor said: "There is no rule in this court more sacred than that witnesses shall not be examined in another cause to matters in issue in a former." Yet, certainly, in a cross-bill, the party would be entitled to more favor than upon a mere application in the original cause.

In *The Mayor of London v. Dorset*, 1 Ch. Cas., 228, where a trial of an issue was directed at law, an application was made for a commission to examine a witness eighty years old who was not discovered until that time and was unable to travel. If she was able to travel she would be examinable at the trial, though publication had passed. The court granted the commission, apparently, as it would seem, upon the ground that otherwise the testimony would be lost; and yet the witness might, if living, be examinable at the trial at law.

In *Banks v. Farquharson*, Ambl. R., 145; S. C., 1 Dick. R., 67, where a hearing was adjourned over and it was moved for liberty to examine a witness to prove the handwriting of a witness to a deed, material in the cause, the motion was granted by Lord Hardwicke. So, in *Abrams v. Winshup*, 1 Russ. R., 526, where the evidence proved the execution of the will; but the witnesses had not been examined as to the sanity of the testator; the cause was adjourned at the hearing and liberty given to exhibit an interrogatory to prove his sanity. In each of these cases the object was special to establish the verity of a necessary document in the cause.

In *Blake v. Foster*, 2 Ball & Beatt. R., 457, an application was made upon the hearing for liberty to adduce newly-discovered evidence, partly oral and partly documentary. It was rejected, not upon any ground of the nature of

the evidence, but because it was not in reality newly discovered. The case, therefore, decides nothing to our present purpose.

In *Clarke v. Jennings*, 1 Anst. R., 173, 174, a motion was made after publication for leave to exhibit interrogatories to authenticate an old paper writing material in the cause, and for a commission to prove the same. The motion was opposed as being too late and that exhibits only can be proved after publication. The court of exchequer thought, that though not an exhibit, it was in the nature of one, and granted the rule, so as that it did not delay the hearing of the cause. It is proper to remark that the application was confined to a mere written document.

In *Williamson v. Hutton*, 9 Price R., 194, after a tithe cause had been set down for a rehearing, a motion was made on behalf of the plaintiff for the examination of one or more witnesses, to prove certain accounts or rentals, and a terrier or memorandum, made by a former vicar, and to read the depositions at the rehearing, upon the ground of their having been discovered since the original hearing and were before unknown to the plaintiff. The court granted the motion, and it was added, "If these papers had been found at the hearing we should have ordered the cause to stand over for the purpose of giving the plaintiff an opportunity of exhibiting an interrogatory." This, too, was the case of a written document.

In *Cox v. Allingham*, Jacob R., 337, permission was given at the hearing to exhibit an interrogatory as to the loss of a deed, omitted by mistake to be proved in the proper manner. Sir Thomas Plumer, in delivering his opinion on this occasion, stated his strong impression of the dangers that would arise if in every instance a party, whose case broke down at the hearing, were at liberty to go into farther evidence. At the same time he admitted that it was too late to argue that there could be no case of exception to the general rule, after it had been departed from in some instances and by great authorities. He also took notice of the circumstance that the evidence proposed to be given related only to the proof of a document.

In *Ord v. Noel*, 6 Madd. R., 127, an application was made to file a supplemental bill, in the nature of a bill of review, on account of the discovery of some deeds and facts connected therewith since the decree. The vice-chancellor refused the petition; and the only remarks, material to our present purpose, which he made on that occasion, are: that if the plaintiff had applied, after he had discovered the contents of these deeds, and before the cause was finally heard, to have the benefit of this discovery at the hearing, the court would have found the means to render him that justice; and that the new matter for a bill of the nature proposed must be such as, if unanswered, would clearly entitle the plaintiff to a decree, or would raise a question of so much nicety and difficulty as to be a fit subject of judgment in a cause. *Brigham v. Dawson*, Jacob R., 243, was a similar application and shared a similar fate.

Coley v. Coley, 2 Younge & Jerv. R., 44, was an application, after publication passed, and the cause set down for a hearing, for liberty to examine two further witnesses, one only having been examined, to prove the execution of a will in the pleadings mentioned. The court granted it, saying that if, upon the hearing of the cause, the plaintiff had been unable to prove the execution of the will, the case would have been allowed to stand over for the purpose of supplying that proof, upon payment of the costs of the day.

Then came *Wyld v. Ward*, 2 Younge & Jer. R., 381, where, upon a rehearing, a motion was made to exhibit an interrogatory to prove certain facts,

upon the ground that they were newly discovered since the original hearing. Upon this occasion there was an elaborate argument by counsel. But the court granted the motion, saying that it had a discretion to grant or refuse it, according to the circumstances of the particular case.

In *Williams v. Goodchild*, 2 Russ. R., 91, an application was made upon an appeal from a decree of the vice-chancellor to the lord chancellor, for permission to use, on the hearing of the appeal, some old documents and bailiffs' accounts, which had been discovered since the original hearing. On that occasion, Lord Eldon said: "I cannot lay it down that new evidence can in no case be received; nor will I decide that it is not to be introduced in this case, if the evidence here tendered shall be shown to be in its nature admissible, and a proper ground for its introduction shall be laid." The question was afterwards adjusted by an arrangement between the parties.

These are all the English authorities, bearing directly on the point now before the court, which the researches of counsel, as well as my own, have brought to my notice. What is very remarkable is, that not one of them presents the case of an application to introduce newly-discovered oral evidence, or newly-discovered witnesses; but they all relate to written documentary evidence. The courts upon deciding upon these applications, however, made no allusion to any distinction or practice excluding oral evidence; and the generality of the language sometimes used might incline one to believe that the evidence of new witnesses might, under some circumstances, be within the contemplation of the court.

§ 4560. *Practice as to new evidence on bills of review and supplemental bills. Review of English cases.*

Finding no direct English authority, either way, upon the point of the exclusion of oral evidence, unconnected with new written evidence, I have sought for information in cases of an analogous nature, such as bills of review, and supplementary bills in the nature of bills of review; for (I repeat it) if, in such cases, the evidence would be admissible, it ought now to be admitted. Unfortunately, there are not many cases of this sort to be found, and those which do exist do not afford any very satisfactory lights to settle the question now before the court. Indeed, bills of review are of very rare occurrence. Lord Chancellor Lyndhurst, in *Partridge v. Usborne*, 5 Russ. R., 249, 250, observed, that for the period of a century past very few instances had occurred of bills of review having been allowed to be filed. In that very case, he allowed matters, dependent upon oral as well as written evidence, which had been discovered since the decree, to be brought forward by a supplemental bill in the nature of a bill of review. But then they related to facts not previously in issue in the cause. He thus settled a doubt, which had long existed on this very subject; and in respect to which, there was a *dictum* of Lord Eldon the other way, in *Young v. Keighly*, 15 Ves., 557.

Lord Chief Baron Gilbert (Gilb. For. Rom., 186), in laying down the rules as to granting bills of review, puts one of the requisites in these words: "Thirdly, they can examine to nothing that was in issue in the original cause, unless it be any matter happening subsequent, which was not before in issue, or upon matter of record, or *writing, not known before*. For, if the court should give them leave to enter into proofs upon the same points that were in issue, that would be under the same mischief as the examination of witnesses after publication, and an inlet into manifest perjury." Now, if this is to be deemed a true exposition of the doctrine in courts of equity, it makes an end of the

present application. The difficulty is, whether the modern decisions affirm the practice in so limited a form.

Lord Hardwicke in *Norris v. Le Neve*, 3 Atk. R., 35, said that the rules of Lord Bacon upon bills of review had never been departed from. And, professing to give the substance of those rules, he added, "By the established practice of this court there are two sorts of bills of review: one founded on supposed error appearing in the decree itself; the other a new matter, which must arise after the decree; or upon new proof, which could not have been used at the time when the decree passed." The ordinance of Lord Bacon is substantially as here stated; his language on the last matter is: "Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded." Beames' Ord. in Ch., p. 2, and note (3). See, also, *Patterson v. Slaughter*, Ambl. R., 293. In the case of *Norris v. Le Neve*, the application for the bill of review was not confined to "new proof" of a mere documentary character, but it embraced other facts of an oral nature; and Lord Hardwicke took no notice of any distinction between oral and written evidence. But he did take notice that the new discoveries amounted to no more than corroboratives only of the former points in issue. In another case, *Gould v. Tancred*, 3 Atk. R., 354, before the same great judge, no notice was taken of any positive distinction between oral and written evidence, although certainly there may be good ground for such a distinction. In *Young v. Keighly*, 15 Ves., 557, which indeed was an application founded on the discovery of new documentary evidence, Lord Eldon said: "As far as I can ascertain, what the court permits with regard to bills of review upon facts newly discovered (he does not say documents), the decisions appear to have been upon new evidence, which, if produced in time, would have supported the original case." He added also in the same case: "The ground is even apparent on the face of the decree; a new evidence of a fact (not saying written evidence) materially pressing upon the decree, and discovered at least after publication in the cause." In *Partridge v. Usborne*, 5 Russ. R., 145, the new evidence (which went to points not before in issue) was certainly largely founded in mere oral proofs and testimony; yet it was admitted. The language of Lord Eldon in *Milner v. Lord Harwood*, 17 Ves. R., 148, already cited, appears to me to confirm the conclusion that, upon rehearings and bills of review upon newly-discovered evidence, parol evidence to facts is not necessarily prohibited by any general practice or rule of law.

I had occasion, in the case of *Dexter v. Arnold*, 5 Mason R., 303, 313, 314, to examine this subject with a good deal of care in reference to bills of review. I was not, at that time, able to satisfy my mind that the doctrine, as to the admissibility of newly-discovered evidence, was limited to written evidence of a documentary nature. The subsequent authorities have not helped the matter in this particular. Upon principle it may, perhaps, be found difficult in all cases practically so to limit it; although no person is more sensible than myself of the great inconvenience and danger of admitting new evidence of a parol nature, after the former evidence in the cause has been seen; and, *a fortiori*, after the original cause has been heard. The reasons are well stated in *Jones v. Purefoy*, 1 Vern. R., 47; and still more forcibly in the case of *Respass v. M'Clanahan*, Hardin R., 346, 347, to which I shall presently advert. In examining the decisions of Mr. Chancellor Kent, in which he has collected the leading English decisions on this point, not only after publication, but upon bills of review, it will be seen that he has exhibited a strong

disinclination to allow the introduction of any newly-discovered evidence, merely cumulative, or not of a documentary nature. This is manifested in an especial manner in *Hamersley v. Lambert*, 2 Johns. Ch. R., 432, in *Livingston v. Hubbs*, 3 Johns. Ch. R., 124, and *Troup v. Sherwood*, 3 Johns. Ch. R., 558. Yet he is compelled to admit that there may be exceptions to the general rule. I cannot find, however, that he has ever made a direct decision that the newly-discovered evidence of witnesses to the facts in issue is not admissible on a hearing, or rehearing, or bill of review. He has, indeed, on one occasion, said that the nature of the newly-discovered evidence must be different from that of the mere accumulation of witnesses to a litigated fact. *Livingston v. Hubbs*, 3 Johns. Ch. R., 127. But his decision did not turn particularly upon that point. The language in *Taylor v. Sharp*, 3 P. Will., 371, upon which he has placed some reliance for this qualification of the doctrine, does not seem to me to have looked to any supposed difference in regard to the nature of the new matter, that is, whether newly-discovered testimony, or newly-discovered documents; but singly to the fact that it was newly-discovered matter of some sort.

I have thus gone over the principal cases (with an exception, which will presently appear) which seem to me to be applicable to the more general question before the court. The result has been already incidentally suggested. But I will give it in a more direct and positive form. It is, that there is no universal and absolute rule, which prohibits the court from allowing the introduction of newly-discovered evidence of witnesses to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause.

§ 4561. *The court will not, in its discretion, let in merely cumulative testimony.*

I am driven, therefore, and I regret it, by this view of the matter, to the consideration of the special circumstances of the present case, and to decide whether the court ought, upon general principles, and in the exercise of its just discretion, to grant the present petition. The objections which forcibly present themselves against it are, (1) the great length of time since the publication of the evidence; (2) the nature of the evidence itself, being the asserted confessions of the defendant to many of the most material points in the case, a species of evidence, of which it has been truly remarked, that it is the most easy to fabricate and the most difficult to refute; and (3) the fact that it is merely cumulative or corroborative testimony to the very points in issue. In my judgment, each of these objections has great intrinsic weight. The last has been thought by Mr. Chancellor Kent as of itself decisive. I find, too, that the same view of the matter has been taken by several other of the American courts, upon very solemn occasions. In *Respass v. McClanahan*, Hardin R., 342, it was held by the court of appeals of Kentucky, at that time adorned by minds of uncommon ability, that the discovery of new witnesses to prove a matter of fact in issue in the original cause is not a ground for a bill of review. The reasoning of the court is so very full and clear on the point, that I would gladly transfer it to this opinion, if it would not occupy too large a space. Upon that occasion the court said that, after the most careful search, they could not find one case reported in which a bill of review had

been allowed on the discovery of new witnesses, to prove a fact which had before been in issue; although there were many, where bills of review have been sustained on the discovery of records and other writings relating to the title *generally* put in issue. The same doctrine has been since repeatedly affirmed by the same court; and particularly in *Bowles v. South*, Hardin R., 451, and *Head v. Head*, 3 Marsh. R., 121. It was also adopted and acted on by the court of appeals of Virginia in *Randolph's Ex'rs v. Randolph's Ex'rs*, 1 Hen. & Munf. R., 180.

§ 4562. *Quære: Should evidence connected with newly-discovered documents be allowed after publication.*

I am not able to satisfy myself that this objection to the evidence is not well founded. On the contrary, the more I reflect, the more I feel the difficulty of the admissibility of merely cumulative and corroborative testimony, though newly discovered, to the facts in issue. If I were to decide in favor of its admissibility, I should, as far as I know, be the first judge who ever acted upon so broad a doctrine. I am not bold enough to adventure upon such a course. On the contrary, if I were called upon to frame a rule, it would be to exclude all testimony of newly-discovered witnesses to any facts in issue, unless connected with some newly-discovered documents. There is no authority in favor of the petition. There is authority against it. No book of practice states anything which leads to the conclusion that evidence, like that now proposed, has ever been admitted at the original hearing, or upon a rehearing, or upon any bill in the nature of a bill of review. So far as the books of practice speak, they lead in the opposite direction. My judgment, therefore, is, under all the circumstances, that the motion ought not to be granted.

§ 4563. *In equity.*—The rules of evidence are the same in equity as at law, except that making an answer in chancery evidence. *Harmer v. Gwynne*, 5 McL., 313.

§ 4564. In a suit in equity, evidence may be taken before one of the standing examiners of the court, without his having been specially appointed examiner in the cause. Where the examination was made orally, without any agreement of the parties, but the other party had written notice and made no objection for ten months afterward, he was held to have waived his right to require written interrogatories to be filed. *Van Hook v. Pendleton*, 2 Blatch., 85.

§ 4565. Under equity rule 67, as modified at the December term, 1861, a witness examined in a foreign country by commission may be cross-examined orally, though the direct examination may be on written interrogatories, if desired. Where such testimony can be taken orally it will not be ordered taken otherwise, except for special reasons. *Bischoffsheim v. Baltzer*,* 10 Fed. R., 1.

§ 4566. Where the defendant to a suit in equity is a mere nominal party, and has not the means, and probably not the inclination, to give as full an answer as the case admits of, and the interests of the real party demand it, the court will, upon the application of the latter, issue a commission to take the defendant's answer. *Wilkins v. Jordan*, 3 Wash., 226.

§ 4567. Where it was attempted in an equity suit to impeach the testimony of a witness by showing that his original evidence given in the cause was contradicted by his subsequent testimony before the master, and the latter had been given without a special order of the court, it was held that it ought to be suppressed, and could not be used for the purpose of contradicting the witness. *Jenkins v. Eldredge*, 3 Story, 299.

§ 4568. It is the practice in chancery not to allow a witness whose deposition has been taken and closed to be re-examined without an order of court, and then only for good cause shown. *Phettiplace v. Sayles*, 4 Mason, 312.

§ 4569. Witnesses already examined in the cause cannot be examined again before the master without a special order of the court. And such order is limited to facts not then testified to by them, and not then in issue. *Jenkins v. Eldredge*, 3 Story, 299.

§ 4570. A witness whose deposition has been read at the hearing cannot be again examined before the master when the cause is referred to him under a decretal order, without a special order of the court. *Gass v. Stinson*, 2 Sumn., 605.

§ 4571. Where a cause is before a master under a decretal order, an application to the master

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to take the testimony of witnesses for the purpose of establishing the incompetency of a witness who has already been examined in the cause should be by petition in writing, verified by affidavit. If such an application is founded upon a suggestion which is found to be wholly incorrect in point of fact, and it is clear that the witness is competent, the other party is entitled to have the order for taking the depositions superseded. *Ibid.*

§ 4572. If either party would object to the competency or credibility of witnesses whose depositions are introduced on the other side, in a court of equity, he must make a special application by petition to the court for liberty to exhibit articles, stating the facts and objections to the witnesses, and praying leave to examine other witnesses to establish the truth of the allegations in the articles by suitable proofs. Where the objection is to competency, the court will not grant the application after publication of the testimony, if the incompetency of the witness was known before the commission to take his deposition was issued. But where the objection is to credibility, the articles will ordinarily be allowed to be filed by the court upon petition, without affidavit, after publication. In the latter case the interrogatories must be confined to matters affecting credit, or to such particular facts as are not material to what is already in issue in the cause. *Ibid.*

§ 4573. Under the established chancery practice, and the act of congress of March 3, 1803, new evidence cannot be introduced in the supreme court on the hearing of an appeal in chancery from the circuit court. *Russell v. Southard*, 12 How., 139.

§ 4574. The reversal of a decree with directions to proceed *de novo* does not affect an agreement of the parties as to the admission of evidence. *Vattier v. Hinde*, 7 Pet., 252.

§ 4575. When a suit is revived by a bill of revivor, all the testimony may be used which might have been used if no abatement had occurred. *Ibid.*

§ 4576. Where issues are framed in chancery and sent to law to be tried, depositions taken in chancery cannot be used in the trial at law, except such as are ordered to be used by the court from which the issues go. *Cahoon v. Ring*, 1 Cliff., 592.

§ 4577. Where a party signed a note as principal he cannot in equity contradict this by showing that in fact he signed as surety. *Sprigg v. Bank of Mt. Pleasant*, 1 McL., 384.

§ 4578. On motion for an injunction to restrain the infringement of a copyright, the defendants' affidavit is competent evidence against the oath of the plaintiffs to the bill. *Baker v. Taylor*, 2 Blatch., 82.

§ 4579. Where issues framed in chancery are sent to a law court to be tried, the chancery court will not, after the record upon the equity side is made up, and the case is in the law court, grant a request that testimony taken upon the equity side may be used in the trial of the issues at law. *Cahoon v. Ring*, 1 Cliff., 592.

§ 4580. On the trial of issues out of a court of chancery, the respondent cannot be asked any question contradicting the admissions in his answer. *Ibid.*

§ 4581. A court of equity will not sit and try causes by the examination of witnesses in open session, as if it were trying a case by a jury. It is not the purpose of the seventy-eighth equity rule to allow this to be done. That rule only reserved the power in the court to verify documents set out in the pleadings, or to establish some fact of formal character, which had been inadvertently omitted in the evidence, and which would not require an extended examination. The rule does not change the English practice on the subject. *North Carolina R. Co. v. Drew*, 3 Woods, 692.

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Myer, William G.

Federal Decisions Cases argued and determined in the supreme, circuit and district courts of the United States. Arranged by William G. Myer

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